

AT LAW'S BORDER:
UNSETTLING REFUGEE RESETTLEMENT

by

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ABSTRACT

This dissertation looks at the development and operation of the Canadian refugee resettlement program. It queries how law influences the non-legal act of resettlement and conversely how resettlement contorts the law of asylum. Refugee resettlement is a voluntary act by states in which they bring refugees to their territories who have fled elsewhere but who have not received adequate protection. The voluntary nature of resettlement is in contrast to the legal obligation of non-refoulement that states take on with the promise not to send back refugees who reach their territory and claim asylum.

Canada is one of the three leading resettlement countries in the world. It has a long-standing resettlement program and employs diverse and creative resettlement models. It is also a program in political and legal flux. Each Canadian resettlement model – government-assisted, private sponsorship, source country, and group processing – is the basis for an analysis of the intersection of rights, responsibility and obligation in the absence of a legal scheme for refugee resettlement. This analysis is supported by an examination of the historical development of the international refugee regime and the United Nations High Commissioner for Refugee's challenge in fulfilling a mandate tenuously connected to human rights and comprised of both legal obligations and voluntary burden-sharing. A comparative review of the programs in Australia and the United States, which lead in global resettlement alongside Canada, is undertaken to point out and contrast respective differences, weaknesses, and strengths. This analysis shows how differing models affect the law's place and influence.

With these frameworks, the dissertation offers a comprehensive picture and examination of resettlement in Canada, and contributes to a holistic understanding of international resettlement. Beyond this, the project explores the law's influence on refugees, from outside of the law, and what this does to their access to protection. Refugee law is approached not from the border or at the point of an asylum claim, but further afield in the operation of the non-legal act of resettlement. Thus the project moves past traditional conceptions of law to consider the multitude of legal influences in both refugee law and policy.

PREFACE

This work was pursued under the supervision of Dr. Catherine Dauvergne.

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LIST OF ACRONYMS

ATCR	Annual Tripartite Consultations on Resettlement
AWR	Women-at-Risk
CCCRR	Canadian Christian Council for the Resettlement of Refugees
CCR	Canadian Council for Refugees
CG	Constituent Group
CIC	Citizenship and Immigration Canada
CPA	Comprehensive Plan of Action
DIAC	Department of Immigration and Citizenship
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
ERF	European Refugee Fund
ECOSOC	United Nations Economic and Social Council
EU	European Union
EXCOM	Executive Committee (UNHCR)
GAR	Government Assisted Refugees
GNP	Gross National Product
H&C	Humanitarian and Compassionate Grounds
ICGs	Interest-Convergence Groups
IGCR	Intergovernmental Committee on Refugees
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Persons
IFHP	Interim Federal Health Program
ILO	International Labour Organization
INA	Immigration and Nationality Act
IRO	International Refugee Organization
IRPA	Immigration and Refugee Protection Act
ISSBC	Immigrant Services Society of British Columbia
JAS	Joint Assistance Sponsorship
JIAS	Jewish Immigrant Aid Services of Canada
LGBTQ	Lesbian, Gay, Bisexual, Transgender and Queer/Questioning
MFU	Multilateral Framework of Understandings on Resettlement
MIIC	Manitoba Interfaith Immigration Council
NGO	Non Governmental Organization
PSR	Private Sponsorship of Refugees
RCOA	Refugee Council of Australia
RMAF	Results-Based Management and Accountability Framework
RRF	Resettlement Registration Form
RSTP	Refugee Sponsorship Training Program
SAC	Special Assistance Category
SAH	Sponsorship Agreement Holder
SHP	Special Humanitarian Program
SIPA	School of International and Public Affairs (Columbia University)
UNHCR	United Nations High Commissioner for Refugees
UNRRA	United Nations Relief and Rehabilitation Agency
UPP	Urgent Protection Program

US
Volag

United States
Voluntary Agency

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At its beginning, this dissertation was simply a kernel of inspiration and a fair amount of passion. Developing the former and maintaining the latter was only achieved through the support of many people.

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DEDICATION

This work is dedicated to my grandparents. Great people who came or whose parents came to Canada from diverse parts of the world and made this home.

CHAPTER ONE

AT LAW'S BORDER

Introduction

Refugees flee. They fear persecution and they escape. Where they escape to depends on where they begin, the immediacy of their need for escape, their means, access and their own physical abilities. Some barely get across an international border. Some get across the world. The reality of the disproportionate distribution of refugees results in a dual system of protection. By international agreement, many countries have recognized that if refugees arrive on their territory they will not be sent back. This is the principle of *non-refoulement* set out in Article 33 of the 1951 *Convention relating to the Status of Refugees* (1951 Convention).¹ Other countries have not become a party to the 1951 Convention or simply have an overwhelming and unmanageable number of refugees entering their territories. As a result, some countries far from the refugee flows have agreed to voluntarily bring refugees to their territory who have fled elsewhere but who have not received adequate protection. This is the act of resettlement.

Resettlement is defined by the United Nations High Commissioner for Refugees (UNHCR) as “the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status.”² The decision to resettle a refugee is only made in the absence of other options – local integration or voluntary repatriation. This statement, however, belies the complexity of resettlement decisions that are explored in the substance of this dissertation. Resettlement is regarded by UNHCR as serving two further functions, working not only as

¹ *Convention relating to the Status of Refugees*, 1951, 189 UNTS 150 (entered into force 22 April 1954).

² UNHCR, *Resettlement Handbook* (November 2004) at 1/2.

a solution but also as a tool of protection and expression of international burden-sharing.³ Possibly as a result of its multiple purposes, and definitely as a result of its voluntary nature, resettlement's usage has been *ad hoc*, intermittent, and sometimes manipulative, all with incredibly low numbers.

This dissertation explores the intersection of rights, responsibility and obligation in the absence of a legal scheme for refugee resettlement. It asks how law influences the voluntary act of resettlement and conversely how resettlement contorts the law of asylum. The chapters show that the core concept of refugee protection is often compromised by resettlement, both by the resettlement selection process and the influence of resettlement practices on in-country asylum. Resettlement is nonetheless argued to provide a positive complementary addition to in-country asylum claims. The intent of the dissertation is to analytically assess the current models and state practices of resettlement against resettlement scholarship and theory, so as to promote a restructuring of resettlement designed in a way to not only encourage resettlement but to also maintain a commitment to the notion of refugee protection.

Beyond this, the dissertation is about the relationship between refugees and the law. It demonstrates that law plays an influential role even in the voluntary, non-legal act of resettlement. Within a sovereign nation-state, law is clear. It is based on a formal or written constitution that establishes general law making and law enforcement powers. In the international realm, law, by contrast, is consensus-based and lacks a centralized, hierarchical structure. The refugee travels from a home state to the international realm and

³ “Global Consultations on International Protection, Strengthening and Expanding Resettlement Today: Challenges and Opportunities” 4th Mtg., EC/GC/02/7 (25 April 2002) at para 5.

ideally, although not always ultimately, back to a state, be it return to the home state or acceptance in a new state. During this journey, law weaves in and out. Both individual states' domestic laws and the consensus-based international laws influence the refugee's journey.

The central law that applies to refugees is the international legal obligation of *non-refoulement*. *Non-refoulement* grants the refugee protection against return to the country where he fears persecution. It does so by preventing the state bound by the 1951 Convention from expelling a refugee from its territory. States that have become party to the 1951 Convention have thus taken on the responsibility for refugees who arrive on their territory. As of September 2012, 145 states are party to the 1951 Convention.⁴ The concept of *non-refoulement* can be found in other international and regional documents,⁵

⁴ UNHCR, "States Parties to the Convention and the Protocol"; online: <<http://www.unhcr.org/pages/49da0e466.html>>. Nauru most recently acceded to the Convention on 28 June 2011.

⁵ Asian-African Legal Consultative Organization, *Bangkok Principles on the Status and Treatment of Refugees* (31 December 1966) at Article III(3):

No-one seeking asylum in accordance with these Principles should, except for over-riding reasons of national security or safeguarding the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

Declaration on Territorial Asylum, (14 December 1967) A/RES/2312(XXII) at Article 3(1):

No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

Resolution on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe (29 June 1967), 2:

They should in the same spirit ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to or remain in a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.

Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969) 1001 UNTS 45 at Article III(3):

No person may be subjected by a member State to measures such as rejection at the frontier, return or expulsion, which should compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2.

Organization of American States, *American Convention on Human Rights*, "Pact of San Jose" Costa Rica, (22 November 1969) at Article 22(8):

and some assert that it has reached the status of customary international law binding even those states that are not party to the 1951 Convention.⁶ In non-Convention states or in states where refugee recognition processes are not in place, UNHCR is often permitted to grant mandate refugee status under the *Statute of the United Nations High Commissioner for Refugees* (UNHCR Statute).⁷

A refugee's fate is determined by where she claims protection. If the refugee reaches a state party to the 1951 Convention, *non-refoulement* triggers a domestic legal system that, in theory, will process the claim and accord the refugee a bundle of rights set out in the 1951 Convention but linked to the entitlement rights of citizens in the new state. If the refugee claims asylum in a state in which UNHCR is according "mandate status", she will be recognized as a refugee but still lack the solution of a state.⁸ Despite UNHCR's grant of

In no case may an alien be deported or returned to a country regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85 at Article 3(1):

No State Party shall expel, return ("refoule") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

⁶ See UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner)*, 23 August 1977, EC/SCP/2; online: <<http://www.unhcr.org/refworld/docid/3ae68ccd10.html>>; Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed., 2007) at 352-353. But see also James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 363-364 for response.

⁷ UN General Assembly, *Statute of the United Nations High Commissioner for Refugees*, UNGA A/RES/428(V) 14 December 1950. According to reporting from 2008, UNHCR conducted refugee status determinations in 75 countries, making decisions for 48,745 people. Over 90% of this work came from 15 operations: Algeria, Cameroon, China (Hong Kong), Egypt, India, Kenya, Libya, Malaysia, Morocco, Pakistan, Somalia, Syria, Thailand, Turkey, Yemen. UNHCR, "The Refugee Status Determination Project" (2008). Six of these 15 countries are not state parties to the 1951 Convention or the 1967 Protocol: India, Libya, Malaysia, Pakistan, Syria and Thailand. UNHCR "States Parties" *supra* note 4. In 2009 UNHCR received 114,000 asylum applications in over 50 countries, amounting to 12 percent of the total claims (900,000) worldwide. Erika Feller, Assistant High Commissioner-Protection "Rule of Law 60 Years On" Statement at Sixty-first Session of the Executive Committee of the High Commissioner's Programme Agenda item 5(a) (6 October 2010) at 4.

⁸ This is true even in some states like Kenya; which is a state party to the 1951 Convention but where most refugees are left in camps with only the lesser designation of *prima facie status* unless they are being processed for resettlement. See Jennifer Hyndman & Bo Viktor Nylund, "UNHCR and the Status of Prima Facie Refugees in Kenya" (1998) 10 *International Journal of Refugee Law* 21. *Prima facie status* is not

refugee status, the refugee will not necessarily be permitted to remain in the state. The consequence is a massive refugee population in limbo, having fled one state but not finding solution in another.

Refugees in states that have either not joined or are not living up to their obligations under the 1951 Convention encounter the conceptual failure of both universal human rights and refugee protection. In the realm between the persecuting and protecting states, refugees lack anywhere to assert rights or find protection. The global refugee population was 10.4 million at the end of 2011.⁹ At that time, an estimated 7.1 million refugees, almost three quarters of the global total, were in 26 host countries in long-standing states of protraction.¹⁰

Under UNHCR's framework there are two aspects to the refugee's journey: protection and solution. UNHCR's Statute begins:

The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.¹¹

While the "international protection" responsibilities of asylum are supported by a strong legal basis, "permanent solutions" depend on voluntary burden-sharing. The recognition of

defined by international law but is accorded by some states and UNHCR when asylum claimants arrive en masse and it is determined that those in the group can be deemed to be refugees on the basis of objective information related to the circumstances in the country of origin. *Prima facie status* can be used to facilitate the durable solutions of local integration and repatriation but not resettlement. See Matthew Albert, "Governance and Prima Facie Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx" (2010) 29 *Refugee Survey Quarterly* 61-91.

⁹ UNHCR, "A Year of Crisis: UNHCR Global Trends 2011" at 11; online:

<<http://www.unhcr.org/4fd6f87f9.html>>.

¹⁰ *Ibid.* at 2.

¹¹ *Statute of the Office of the United Nations High Commissioner for Refugees*, UNGA A/RES/428(V), 14 December 1950, s.1.

refugee status thus triggers protection but it does not necessarily offer a solution. Three solutions are possible: local integration, voluntary repatriation or third-country resettlement. Essentially the refugee may stay where she is, if so welcomed; go home, if it is safe; or go to another country, if that country is willing to take her. There are many “ifs” on the solution side. While the international community imposed the legal obligation of *non-refoulement* to ensure protection, solutions were left as voluntary decisions by individual states.¹²

The Legal Periphery

Refugee protection is about law; refugee solutions are not. And yet the law is there on the periphery of refugee solutions. Resting on the periphery, the law does interesting things to both solutions and protection. This juxtaposition of protection and solution is most acute with the solution of third country resettlement. Resettlement offers a solution but it is also conceived of as protection in and of itself and representative of international burden-sharing.

In the less globalized world of the early twentieth century, resettlement was in fact the dominant response to refugees. Travel was more difficult and states therefore appeared further apart. *Non-refoulement* was practically irrelevant in much of the global North where access to asylum was often difficult to reach. Faced mid-century following the second world war with increasing refugee flows significant enough to demand and achieve an international response, the consequent 1951 Convention left resettlement to continue on

¹² There are agreed upon criteria for UNHCR to determine its resettlement referrals endorsed by its Executive Committee in 1996 but states are in no way bound by these criteria: legal or physical security, survivors of torture and violence, medical needs, women and girls at risk, children and adolescents, elderly refugees, family reunification, voluntary repatriation or local integration not available or feasible in the foreseeable future. UNHCR Excom, *Resettlement: An Instrument of Protection and a Durable Solution* (EC/46/SC/CRP.32) Standing Committee, 28 May 1996.

a voluntary basis and legalized *non-refoulement* on an individuated case by case basis. That no law was imposed on resettlement by the international community was a purposeful absence. Burden-sharing was recognized and prominently placed in the Preamble to the 1951 Convention,¹³ but it was not made into a binding legal obligation.

From the state perspective, however, resettlement has tended to be fit into a legal framework. Resettlement resembles immigration in the application and selection of individuals from abroad for citizenship in the new state. To facilitate this process, a domestic legal framework is placed on the voluntary act of protection and international burden-sharing. The body of the dissertation will cover in detail the Canadian regulatory scheme for resettlement, and show the modes through which resettlement is permitted and effected. Resettlement requires a government to decide on its approach to the selection and integration of refugees and how to fund the program. In Canada, this entails that regulations frame the resettlement process.

The law is thus both present and absent in refugee resettlement. The underlying question of the dissertation is what to make of this legal positioning? What does the law do to resettlement? What does the absence of law entail? How does the legally framed but voluntary act of resettlement influence the non-voluntary legal arm of refugee protection? By answering these questions, law is brought into the story of resettlement. The dissertation therefore reveals resettlement in the previously unaddressed light of the law. Resettlement is not simply a voluntary act that states may do or not do at their leisure. It is an act of

¹³ Within the Preamble it is stated: “Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,” 1951 Convention, *supra* note 1.

international protection and burden-sharing that is influenced by law, and that through its voluntary nature, influences the international refugee law of *non-refoulement*.

Canada at the Forefront

Three states have traditionally been the leaders in resettlement: Canada, Australia and the United States of America. Combined they receive approximately 90% of UNHCR's resettlement referrals.¹⁴ They are western states far removed from refugee flows. In-country claims of asylum triggering *non-refoulement* occur but never in the numeric masses encountered by the refugee receiving countries that neighbour refugee producing countries generally in the global South. Large-scale resettlement programs recognize these geographic realities and contribute to international refugee burden-sharing. In total, now more than 20 states offer resettlement programs with yearly resettlement numbers ranging from the tens of thousands to single digits.¹⁵

¹⁴ UNHCR, "UNHCR Projected Global Resettlement Needs 2013" 18th Annual Tripartite Consultations on Resettlement, Geneva (9-11 July 2012) at 61; online: <<http://www.unhcr.org/5006aff49.html>>.

¹⁵ While *ad hoc* resettlement changes the number of states each year, UNHCR indicates 26 resettlement states worldwide in 2012: Argentina, Australia, Brazil, Bulgaria (implementation in 2012 onwards), Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Hungary (implementation in 2012 onwards), Iceland, Ireland, Japan (pilot programme), the Netherlands, New Zealand, Norway, Paraguay, Portugal, Romania, Spain, Sweden, the United Kingdom, Uruguay, the United States of America. UNHCR, "Frequently Asked Questions about Resettlement" online <<http://www.unhcr.org/4ac0873d6.html>> at 2. See Table 7: Top Ten UNHCR Resettlement Departures by Country of Resettlement 2010-2011.

Table 1: UNHCR Resettlement Data 2007-2011¹⁶

	2007	2008	2009	2010	2011
Submissions	98,999	121,214	128,558	108,042	91,843
Departures	49,869	65,859	84,657	72,914	61,649
Country of Asylum*	80	80	94	86	79
Countries of Origin*	65	68	77	71	77
Countries of Resettlement**	25	24	24	28	22

* Based on Submissions ** Based on Departures

The dissertation will focus on Canadian resettlement. The Canadian program offers diverse and creative resettlement models. It is also a program currently in a period of political and legal flux. As such, the Canadian program offers a wide range of resettlement insight that will be of comparative benefit and helpful to a holistic and international examination of resettlement. The American and Australian resettlement programs will be used to better understand the Canadian models and the alternative approaches that are possible.

The dissertation consists of seven chapters. Following this Introduction, Chapter 2 “*International Rights and Burdens*” will situate resettlement in its international context and provide a review of the literature addressing resettlement and connected to the concepts of human rights and burden-sharing. Chapters 3-5 will follow the Canadian resettlement models. Resettlement in Canada occurs through either a government program or citizen supported private sponsorship. Within these two main models the program permits group resettlement of a specific group of refugees sharing the same ethnicity, language and, or, culture, to one location thereby creating immediate social networks, and previously

¹⁶ Table based on table in UNHCR, “UNHCR Projected Global Resettlement Needs 2013” *supra* note 14 at 61.

permitted source country resettlement from specifically identified countries. Chapter 3 “*Canada’s Commitment*” will examine Canada’s government assisted resettlement program. It sets out the distinction between resettlement and refugee law and the juxtapositioning of the two in refugee protection. Chapter 4 “*Complementary or Consuming?*” will look at the introduction of a complementary scheme of private sponsorship in Canada and how the addition of private citizens into resettlement affects the approach to and selection of refugees for resettlement. Chapter 5 “*Beyond the Convention*” will probe the programs within these programs, group sponsorship and source-country sponsorship, and what these selection processes reveal about the shifting focus of Canadian resettlement. With this examination of the full context of the Canadian resettlement program, Chapter 6 “*Further Afield*” will examine Australia and the United States and each state’s use or non use of these same resettlement models.

With each resettlement model three issues are examined. The framing question and key issue is what role does the law play? Where is the law present? Where is it absent? What are the intentional and unintentional consequences of the law’s mingling with the voluntary act of resettlement? To understand and assess the law, two other issues must be explored. They are the conflicting or mutually complementary justifications of refugee protection: international burden-sharing and human rights.

Burden-sharing is non-binding and operates through political maneuvering in the shadow of the law. Resettlement tends to be motivated by the rhetoric of burden-sharing but is arguably often used to avoid greater refugee burdens in the resettlement states. The dissertation examines the consequences on burden-sharing through the use of resettlement.

Whereas burden-sharing highlights the voluntary basis of refugee protection, human rights assertions impose a secondary layer of legal obligations that may either help or hinder refugee protection. While the intent is for human rights arguments to broaden protection justifications, there is the adverse risk that they permit a shirking of responsibility. The dissertation queries how a rights discourse influences the voluntary perception of burden-sharing responsibility.

Ultimately, exploring the languages of law, burden-sharing, and human rights, the dissertation seeks to determine how resettlement is best used to promote both burden-sharing and the protection of human rights, how it can be positively promoted, where it is unintentionally misused, and where it risks corruption.

Bringing Law into Resettlement

*Though this be madness yet there is method in it.*¹⁷

As will be seen in the following chapter, resettlement's international status as most-favoured or least-favoured solution to the refugee 'problem' fluctuates over time. What remains constant is that it is a necessary, albeit modest, solution and component of refugee protection and burden-sharing. Arguably because of its given but limited role and use by only a select number of states, resettlement receives minimal consideration. As the dissertation will show, it is attached to burden-sharing proposals with little elaboration beyond its stated presence in the plan, and unproblematically presumed in human rights agendas. Alternative resettlement models such as group resettlement, in-country processing and private sponsorship receive limited and specific examination disconnected from a

¹⁷ William Shakespeare, *Hamlet*, Barbara A. Mowat & Paul Werstine (eds.) (New York: Washington Square-Pocket, 1992.) Act 2, Scene 2 (spoken by Polonius).

holistic approach to resettlement. The aim of the dissertation is to remedy this absence and provide a comprehensive understanding and analysis of refugee resettlement that is lacking in the existing refugee law discourse.

My research intention is to map and assemble existing resettlement scholarship and models into a singular and thorough analysis of what resettlement *is*. Establishing this picture of resettlement allows for the question of law to be introduced. A hitherto unrecognized linkage between law and resettlement is identified, analyzed and assessed. At law's border, resettlement is ultimately unsettled from the unquestioned cursory role it usually plays in refugee discourse.

The novelty of the question of law's role in resettlement combined with the scarcity of academic literature considering resettlement necessitates a multi-pronged research design and methodological approach to the dissertation. A variety of sources of information are required in each chapter to define, clarify and analyze the research question. That said, the methodology is grounded in the legal discipline. Statutory and judicial authority frame and define resettlement. International law, Canadian and other states' statutory law, regulations, court decisions, and policies are collected and interpreted. The 1951 Convention, and Canada's *Immigration and Refugee Protection Act (IRPA)* and *Regulations*,¹⁸ as well as predecessor legislation, are at the forefront of this analysis. Chapter 3 devotes particular attention to judicial review in the Canadian Federal Court of visa officer decision-making on resettlement cases. Legislative review and Standing Committee reports are examined in Chapters 3-5 to reveal the considerations underlying law's movement and particular

¹⁸ *Immigration and Refugee Protection Act*, S.C. 2001 c. 27. [IRPA]; *Immigration and Refugee Protection Regulations*, SOR/2002-227.

attention is paid to the nuanced shifts from the previous *Immigration Act*¹⁹ to *IRPA*. Two Access to Information Requests were also made to Citizenship and Immigration Canada to gain statistics on humanitarian and compassionate grounds applications made under *IRPA* and a breakdown of permanent resident visas issued under the vulnerable/urgent need exception in *IRPA*. How these layers of law, both domestic and international, interact and conflict with each other demonstrate law's relevance to resettlement.

Other primary texts including Canadian government documents and those produced by UNHCR are examined and critiqued. Library-based traditional legal research of secondary sources supports the interpretation of primary texts. There is also a necessary historical context to the analysis. To understand how states, and Canada in particular, engage with refugees requires a long-term view of the creation and development of laws and policies in the twentieth century. The historical component of the project was achieved through the review of primary and secondary sources. Chapter 4's discussion of the origins of private sponsorship in Canada pre-dating the Indochinese boatpeople relied on documents from the Jewish Immigrant Aid Society found in the Canadian Jewish Congress Charities Committee National Archives. Interviews were further conducted with representative players²⁰ from both the public and private sector involved in the creation of Canada's private sponsorship scheme.

Media coverage from Canada's national and provincial newspapers and government news releases were broadly surveyed through Factiva searches of relevant terms to provide

¹⁹ *Immigration Act*, R.S.C. 1985, c.I-2.

²⁰ Howard Adelman, telephone interview with author, 8 July 2010; Rivka Augenfeld, former JIAS employee, telephone interview with author, 9 July 2010 & interview with author, 23 August 2010; Mike Molloy, former Director of Refugee Policy Division interview with author, 24 March 2011.

insight into Government positioning and public perspectives on specific events and policies. Interviews in Canada were conducted with representatives from UNHCR, Citizenship and Immigration Canada, Immigrant Services Society of British Columbia, Immigrant Settlement and Integration Services Nova Scotia, Manitoba Interfaith Immigration Council and the City of Winnipeg Wellness and Diversity Coordinator. Discussions in Australia were conducted with refugee scholars as well as informal conversations with the Refugee Council of Australia, a solicitor with the Refugee and Immigration Legal Service and a resettlement worker. The interviews and conversations sought to address knowledge gaps, clarify and confirm policies and procedures, expose any outstanding issues, redundancies or contradictions in resettlement policies, test tentative conclusions, and explore options for reform.²¹

I also represented the Canadian Council for Refugees (CCR)²² as a delegate on a fact-finding mission to Colombia in November 2010. The objective of the delegation was to gather information on the human rights situation within the country in the face of declining acceptance rates of Colombian refugees at the Canadian Immigration and Refugee Board, as well as significantly reduced source country class resettlement from Colombia to

²¹ A complete list of individuals and organizations interviewed is provided in Appendix A.

²² The CCR began in 1978 as the Standing Conference of Canadian Organizations Concerned for Refugees. The organization changed its name to the Canadian Council for Refugees in 1986 and sought charitable status. Its Mission Statement, adopted in 1993, positions the CCR as “a non-profit umbrella organization committed to the rights and protection of refugees in Canada and around the world and to the settlement of refugees and immigrants in Canada.” With a focus on information exchange, networking, policy-analysis and advocacy for and among its member organizations involved in protection, sponsorship and settlement, the CCR does much to promote public and political awareness of refugee rights, interests and protection. With connections to NGOs, academics and government officials, the CCR is a leading Canadian voice on refugee issues and provider of information Canadian Council for Refugees, “Brief History of Canada's Response to Refugees” (2009); online: <<http://ccrweb.ca/canadarefugeeshistory5.htm>>; Canadian Council for Refugees, “Mission Statement”; online: <<http://ccrweb.ca/en/about-ccr>>.

Canada.²³ Interviews were conducted with twelve organizations in Bogota.²⁴ Through the assistance of the Jesuit Refugee Service, we visited an Internally Displaced Persons (IDP) Camp in Soacha, south of Bogota, and met with several IDPs.

The purpose of my participation was two-fold. First, participation on the delegation enabled first-person interviews and insight on the largest source country class resettlement program offered by Canada to inform Chapter 5's examination of this resettlement class. This involvement was crucial to my understanding of the program at a time of program flux. It preceded the Canadian government's announced repeal of the source country class by four months.²⁵ Second, my participation enabled a working relationship with the CCR which granted me access to a wide range of involved participants in refugee resettlement for informal interview purposes. These conversations shaped my insight and understanding of the program from a wide array of perspectives across Canada.

Chapter 6 is primarily a comparative law piece. Konrad Zweigert and Hein Kötz define comparative law as simply "the comparison of the different legal systems of the world."²⁶ They go on to clarify such comparison must be specific and not merely descriptive.²⁷ The chapter is an applied microcomparison²⁸ looking at the U.S. and Australia, and examining the specific use of resettlement in these states in comparison to Canada.

²³ Francisco Rico Martinez & Canadian Council for Refugees, "The Future of Colombian Refugees in Canada: Are We Being Equitable?" (Canadian Council for Refugees, 2011).

²⁴ See Appendix A for list of organizations visited.

²⁵ On 10 March 2011 the Canadian government gave notice to remove the source country class from *IRPA*'s regulations. Citizenship and Immigration Canada, "Regulations Amending the Immigration and Refugee Protection Regulations and Regulatory Impact Analysis Statement" 145:2 Canada Gazette (19 March 2011); online: <<http://www.gazette.gc.ca/rp-pr/p1/2011/2011-03-19/html/reg3-eng.html>>.

²⁶ Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 3rd ed., 1987) at 2.

²⁷ *Ibid.* at 6.

²⁸ *Ibid.* at 5, 12.

A key contribution of the dissertation is therefore the gathering together and mapping of existing resettlement scholarship, historical documents, primary policy and legislative material, government and United Nations reports, documents, posted data and statistical reports. While the information itself is not new, it has not previously been brought together into a singular examination; nor has there been an overlay of legal analysis onto the data as is achieved here. The project is thus not primarily empirical in the narrow meaning of analysis of a gathered data set, but is nonetheless based on observation and analysis. In arguing for a clearer recognition of, and statement of, methodology for empirical legal research, Lee Epstein and Gary King suggest:

What makes research empirical is that it is based on observations of the world – in other words, *data*, which is just a term for facts about the world. These facts may be historical or contemporary, or based on legislation or case law, the results of interviews or surveys, or the outcomes of secondary archival research or primary data collection. Data can be precise or vague, relatively certain or very uncertain, directly observed or indirect proxies, and they can be anthropological, interpretive, sociological, economic, legal, political, biological, physical, or natural. As long as the facts have something to do with the world, they are data, and as long as research involves data that is observed or desired, it is empirical.²⁹

As a voluntary endeavor taken on by willing states, resettlement is *ad hoc* with terms, conditions and approaches that vary between states and understandings of intentions that vary between individuals. A succinct and straightforward understanding of how resettlement operates is impossible. The gathered information will set out a picture of resettlement models in key resettlement states, state resettlement policies and intentions, state-UNHCR interaction, and to an extent, attitudes and approaches to resettlement in both resettlement states and among UHNCR officials. The creation of such a comprehensive picture establishes the schematic basis of the dissertation and enables comparative textual

²⁹ Lee Epstein & Gary King, “The Rules of Inference” (2002) 69 *The University of Chicago Law Review* 133 at 3.

analysis of scholarly and primary sources and an understanding of the intersection of the theoretical with the practical application of the models. Ultimately, as a dissertation in law, the point of the project is to make a persuasive argument.³⁰ The methodology is structured around gathering the factual evidence to evaluate this argument. The analytical work on the place of law within resettlement will permit the argument to be made that resettlement is more legally influenced and influential to the legal scheme than assumed, and deserves attentive restructuring to ensure refugee protection is forefront.

The greatest obstacle in data collection was achieving a clear picture of a scattered program with a variety of players and interests and fluctuating policy. In particular, government rhetoric can often cover or blur unstated intentions. Sifting through public announcements and assessing their timing and issue linkages was both fascinating and confounding. This was particularly the case during this project as the research period spanned significant legislative reform of Canadian refugee law,³¹ the consequences of which cannot yet be fully known or appreciated. Many in the Canadian resettlement community, particularly amongst private sponsorship groups and those in government, were resistant to the dissertation's premise that law and resettlement are linked. That resettlement is a voluntary scheme seemed to close off any openness to the possibility of law's relevance. The failure of key actors to appreciate the project's central assertion highlights the novel ambitions and importance of the dissertation.

³⁰ Of course, a doctoral project in law can be empirically based as well, see *ibid*. Nor in indicating the central argument of the dissertation do I mean to suggest that the discussion is one-sided or dismissive of alternative views.

³¹ *Balanced Refugee Reform Act*, S.C. 2010, c. 8 (assented to 29 June 2010) (formerly Bill C-11); *Protecting Canada's Immigration System Act*, S.C. 2012 c.17 (assented to 28 June 2012) (formerly Bill C-31).

The absence of a legal obligation to resettle further places resettlement in a vulnerable position. Critiquing a voluntary government program requires delicacy. Chapter 4's discussion of the expansion of private sponsorship into a tool for family reunification predicted a 2012 announcement by the Canadian government to place significant limits on the program to curtail this tendency toward family reunification. As will be examined in Chapter 5, concerns that Canada's source country class resettlement required reform led instead to the removal of the class. Refugee advocacy tends to focus on Canada's meeting of its international obligations to refugees. Resettlement is sidelined in an unstated but apparent "be grateful for what we have" mentality. I encountered significant hesitancy in interviews and casual conversations with those working in resettlement in Canada to express any criticisms of the program's operation beyond the desire for more freedom for more resettlement. By putting resettlement at the forefront of a critical academic examination, the dissertation seeks to provide an accurate assessment of the program free from concerns about the consequences of criticism. Nevertheless, the dissertation arises out of a sincere belief in the importance and continuance of the resettlement of refugees as a voluntary activity.

It is necessary to take a further moment to address the academic-advocacy divide, particularly given the dissertation's grounding in law. Many of the individuals interviewed for this project are actively involved in refugee advocacy. Publications by organizations such as the CCR are likewise oriented toward advocacy. The dissertation project is however quite distinct from these interests. In general terms, while their concern is with refugees, the focus of the dissertation is on law. Law clearly plays a role in advocacy for refugee protection. While advocacy may be a consequence of the dissertation, it is not an

intent. Nor is the aim to provide policy directions to governments; although some recommendations are offered in the Conclusion. Rather, the intent is to provide a research output that can serve as a reflection against which to evaluate state resettlement policies. The incorporation of my recommendations by resettlement states is a desirable consequence but not a direct ambition of the project.

Beyond Traditional Concepts of Law

*Cathedrals, too, have windows. Grand and ornately stained, one cannot look out of them. On the contrary, they are meant to let the light in but to cloister the soul. The orthodox are within, knees bent in prayer. The heretics are without, hammering their theses to the door and noses pressed to the glass. But what, I wonder, would be the view, across the glebe and into the fields beyond?*³²

This dissertation is located in the fields beyond. Before the substantive work can begin, the final necessary task of this introduction is to state my conception of a doctoral project in law. To do so I must address what it is that I mean by the term “law.” This introduction has already reviewed the fluidity of law from the tenuous grounding of international law to the firm foundation of domestic law and the peripheral presence of law even in the voluntary scheme of refugee resettlement. This is not a project on the examination of doctrinal law in either its domestic or international form. Rather, law is embraced in both forms and in all their nuances to explore its hidden influences and consequences. To situate my conception of law for this purpose, I take as my starting point Desmond Manderson’s notion of “apocryphal jurisprudence.”³³

³² Desmond Manderson, “Apocryphal Jurisprudence” (2001) 23 *Studies in Law, Politics and Society* 81; online: <<http://www.mcgill.ca/files/crc-law-discourse/manderson-apocryphal.pdf>> at 22 [citation pinpoints are to the online article].

³³ *Ibid.*

The idea of apocryphal jurisprudence is meant to challenge the theoretical underpinnings of traditional legal theory.³⁴ Manderson suggests that both legal positivism³⁵ and its antithesis of critical legal studies³⁶ exist within a shared tradition and discourse. This discourse, while divisive, remains within a particular framework of the parties.³⁷ Within this framework there is definitional acceptance in the ideal of justice as a system of rules. Debate is centered on whether this ideal has been met or is over-ridden with justice realized instead through politics.³⁸ William Lucy's text *Understanding and Explaining Adjudication*³⁹ in which Lucy presents the debate on the meaning of adjudication as a war between the orthodoxy and the heresy is the catalyst for Manderson's discussion. Manderson's appropriation of the apocrypha is meant to build upon this analogy and illustrate an alternative approach.

The apocrypha is situated as not opposed to but rather outside of this framework containing the legal canon and its critics.⁴⁰ Texts within the apocrypha reconceive the law. Apocryphal work "focuses on what is missing from a certain conception of law, about the resources that yet remain within it to speak of these absences and failures, and about

³⁴ See Andrei Marmor, "The Nature of Law" in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (2011) for a summary of the basic debates in traditional legal theory.

³⁵ The basic premise of positivism is that law is the command of a sovereign backed by force. See Jeremy Bentham, *Of Laws in General* (1782) H.L.A. Hart (ed.) (London: Athlone Press, 1970); H.L.A. Hart, *The Concept of Law*, 2nd ed., P. Bulloch & J. Raz (eds.) (Oxford: Clarendon Press, 1994); Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979); Hans Kelsen, *Pure Theory of Law*, M. Knight (trans.) (Berkeley: University of California Press, 1967).

³⁶ Critical legal studies challenges the notion of law's neutrality and argues law and politics are intertwined. See Roberto Unger, "The Critical Legal Studies Movement" (1983) 96:3 *Harvard Law Review* 561.

³⁷ "one senses a mutual complicity in this dialogue of the damned." Manderson, "Aprocryphal Jurisprudence" *supra* note 32, at 3.

³⁸ *Ibid.* at fn 15 and fn 32.

³⁹ William Lucy, *Understanding and Explaining Adjudication* (Oxford, U.K.; New York: Oxford University Press, 1999).

⁴⁰ Manderson "Aprocryphal Jurisprudence" *supra* note 32.

drawing our attention to how and where the law gives out.”⁴¹ In this way, one can move away from the specificity of legal rules and concern over the definition of law to broader explanations of law’s purpose, its interest, its power.⁴² It is the idea of law as a verb and not a noun, law’s ability to control, modify and structure reactions and responses.⁴³ For Manderson, this is the “genre of law” beyond the singular moment of determination in law.⁴⁴

Manderson presents apocryphal jurisprudence as “a new genre of legal theory”⁴⁵ but also less robustly as an “apocryphal temperament.”⁴⁶ I find this latter description more fitting as the apocrypha is decidedly outside of canonical work, possesses a “freedom to be singular” and represents “a collection of unusual documents that speak and only speak for themselves.”⁴⁷ The task of the apocrypha is to “look where the tradition is blind, to engage with different concerns entirely, and thus to develop a new language whose strength lies in its very incommensurability.”⁴⁸ Manderson notes that it was not the inauthenticity of the biblical namesake for his genre that led to its exclusion but the impossibility of domestication.⁴⁹ The move with apocryphal jurisprudence is to give legitimacy to emerging literature that is outside of the canon and distanced from doctrine and yet still actively contributing to the study of the law.

⁴¹ *Ibid.* at 21.

⁴² *Ibid.* at fn 39.

⁴³ Desmond Manderson, “Desert Island Disks: Ten Reveries on Inter-Disciplinary Pedagogy” (2008) 2 *Public Space: The Journal of Law and Social Justice*.

⁴⁴ Manderson, “Apocryphal Jurisprudence” *supra* note 32 at 38.

⁴⁵ *Ibid.* at 31. Manderson is careful to add “I do not say *the* genre or seek to over-estimate its importance.”

⁴⁶ *Ibid.* at 47, 59.

⁴⁷ *Ibid.* at 47.

⁴⁸ *Ibid.* at 29.

⁴⁹ *Ibid.* at 31.

Manderson is not strictly forward-looking in his presentation of a new genre but rather puts the name of apocryphal jurisprudence on an “avowedly eclectic” array of scholarship already taking new and diverse approaches to law.⁵⁰ In doing so he grants these approaches a collective legitimacy lacking in their individual orientations:

Through the analysis of legal and non-legal texts, jointly not severally, we are invited to learn more about the relationship of the discourse of law to the cultural framework in which it is embedded; about the society through which both law and non-law emerge; about the mutual constitution of values and concepts through the dialogue which these social structures sustain.⁵¹

I embrace the idea of the apocrypha to move me likewise outside of traditional approaches to and understandings of law.

The current of apocryphal jurisprudence therefore runs beneath this dissertation. The hope is that with such a temperament the project can move beyond the traditional conception of refugee law to see the multitude of legal influences in both refugee law and policy on a domestic and international sphere. Manderson’s invocation at the outset of this section to move away from the cathedral and across the glebe to the fields beyond is well suited to the aim of this project which seeks to explore refugee law not at the border or at the point of an asylum claim, but further afield in the operation of the non-legal act of resettlement. The

⁵⁰ See as only a few examples of the multiple references Manderson provides: William MacNeil, “The Monstrous Body of Law: Wollstonecraft v. Shelley” (1999) 12 *Australian Feminist Law Journal* 21; “John Austin or Jane Austen?” *The Province of Jurisprudence Determined in Pride and Prejudice* (1998) 4:2 *Law Text Culture* 1; Adam Gearey “Death and the Law Between James Joyce and Pierre Legendre” in *Courting Death: The Law of Mortality*, Desmond Manderson (ed.) (Pluto Press, 1999) 194; Brook Thomas, *Cross Examinations* (New York: Cambridge University Press, 1987), Costas Douzinas, *Justice Miscarried: Ethics, Aesthetics, and the Law* (Hemel Hempstead: Harvester Wheatsheaf, 1994); Costas Douzinas, Shaun McVeigh, and Ronnie Warrington, “The Alta(e)rs of Law” (1994) 9:4 *Theory Culture and Society* 193; Piyel Haldar, “In and Out of Court: Of Topographies of Law and the Architecture of Court Buildings” 7 *International Journal for the Semiotics of Law* 185; Costas Douzinas and Lynda Read, (eds.), *The Law of the Image* (Chicago: University of Chicago Press, 1999); Slavoj Žizek, *The Plague of Phantasies* (London: Verso, 1997); Peter Goodrich, *Oedipus Lex: Psychoanalysis, Law, History* (Berkeley: University of California Press, 1995) as well as Manderson’s own body of work.

⁵¹ Manderson, “Apocryphal Jurisprudence” *supra* note 32 at 39.

reluctance noted in the previous section by some to even contemplate the possibility of a dissertation *in law* on the legally lacking voluntary scheme of resettlement illustrates the apocryphal nature of the project that appears by definition incomprehensible. The project is interested in how refugees are influenced by the law, from outside of the law, and what this does to their access to protection, their rights. Manderson speaks of the apocryphal's interest in "the marginal, in voices excluded by normative law, and by the complex layers of that exclusion."⁵² Here, again, refugees waiting in a state of legal limbo at both actual and metaphoric borders are the clear manifestation of these marginal excluded voices.

Manderson suggests that practitioners of apocryphal jurisprudence are "interested in ideas of myth and reality, of the historical contingency of authority, and of the importance of narratives in the construction of our beliefs."⁵³ While the work he considers much more directly embraces the discourses of other genres, there is a conceptual congruence with the aspirations of this project. The chapters that follow delve deeply into the myths and narratives that both direct refugee policy and influence understandings of refugee identities and arrival routes. The historical context of the development of the 1951 Convention and Canada's refugee legislation is necessary to understand these laws and the myths that accompany them. And yet, as Manderson makes clear, the methodology does not claim outside disciplines to lend authority to law.⁵⁴ Law is the focus of this dissertation but it is law as much more than a medium of decision-making.⁵⁵

⁵² *Ibid.* at 58.

⁵³ *Ibid.* at 31.

⁵⁴ *Ibid.* at 39.

⁵⁵ Manderson explains: "Law is not about determination because that is law's medium but *not* its function." *Ibid.* at 40.

Law's influence outside of its application has been previously examined in other manners as well. In *Bargaining in the Shadow of the Law: The Case of Divorce*, Robert Mnookin and Lewis Kornhauser present an argument on how the legal system surrounding divorce affects the bargaining process between separating couples that occurs outside of this system.⁵⁶ This is a helpful and approachable analogy to the task at hand. They suggest the interactions between separating couples occurs "in the shadow of the law" by which they mean that bargaining is influenced by a knowledge of the legal outcomes if the legal process were to be invoked.⁵⁷ In essence, it is not the law but an awareness of the law that is relevant. Mnookin and Kornhauser conclude by noting that law's shadow is cast in many contexts, and stress the need for further research on this influence.⁵⁸ While my project does not address the individual bargaining between parties that these authors consider, it does pursue the basic premise that law affects outcomes outside of its direct application.

The rejection of traditional legal theory to ground this dissertation is further supported by Margaret Davies' apocryphal work *Asking the Law Question: The Dissolution of Legal Theory*.⁵⁹ While the substance of Davies' text examines the various theories and approaches to law that constitute the legal canon, it is her introduction that sets out her own understanding of law that is most relevant to my interests. Davies presents the basic understanding of law as a means of ordering society. The suggestion is that law is a "huge system of categorization."⁶⁰ This is evident in the refugee context where categorizations of legality and illegality dominate. But, just as Manderson urges us to turn to other sources to

⁵⁶ Robert Mnookin & Lewis Kornhauser, "Bargaining in the Shadow or the Law: The Case of Divorce" (1978-1979) 88 *Yale Law Journal* 950 at 951.

⁵⁷ *Ibid.* at 968. For Mnookin and Kornhauser, this suggests that the primary function of the legal system is to enable private ordering and dispute resolution.

⁵⁸ *Ibid.* at 997.

⁵⁹ Margaret Davies, *Asking the Law Question* (Sydney: Law Book Co., 2nd ed., 2002).

⁶⁰ *Ibid.* at 5.

understand law, for Davies, the reality is that law cannot be separated out: “we cannot dissociate our understanding of law from our conventional environments – our language, our social existence, and the institutions which structure our lives.”⁶¹ Seeking an answer to her own query of what the law *is*, she notes that “[l]imiting jurisprudence to the idea of law in a legal system is therefore only reinforcing the artificial distinction between law and non-law.”⁶² Again this is the fault in defining law against politics and morality and all that is not law because it is all “always there *in* law.”⁶³ Moreover, as Davies’ points out “*legal* definitions are never separated from popular ones.”⁶⁴ Law expands outward from its basic function. The legal/illegal categorizations break down in a realm where various laws interweave. These intersections are at the crux of the dissertation. Davies’ urges us to look at “the ways that the intersections of all sorts of laws define our society, our political agendas...”⁶⁵ Just as borders are inherently porous despite a state’s best efforts to seal, there is no closure to the law.⁶⁶ We are back in Manderson’s glebe stretching out into the fields beyond.

The further difficulty in situating this dissertation in anything other than apocryphal theory is the failure of traditional legal theory to envision such a fluidity of law. Legal theorists tend to think only in national units. Often this is linked to the objective of seeking

⁶¹ *Ibid.* at 93.

⁶² *Ibid.* at 7.

⁶³ *Ibid.* at 16.

⁶⁴ *Ibid.* at 6.

⁶⁵ *Ibid.* at 21.

⁶⁶ *Ibid.* at 84-85. Drawing on Hans Kelsen’s work on legal norms, Davies explains:

Thus the basic norm is in a paradoxical position. It is not itself law, but it is the basic definition of what is law. It would seem at once to be both inside and outside the legal system. This is hardly surprising, since it is the limit of law. A limit is neither inside or outside that which it defines...Basically what this paradox indicates to me is the impossibility of legal closure.

legitimacy for law's authority within a legal system.⁶⁷ Catherine Dauvergne refers to this as "law's traditional tie to the nation."⁶⁸ It reverberates throughout modern legal philosophy and serves almost as a precondition of any attempt to explain law.⁶⁹

Even the concept of international law, which is only a component of the discussion that follows, struggles to locate itself in a discipline of law based in domestic legal systems. Jutta Brunnée and Stephen Toope address this challenge of international law.⁷⁰ These authors grapple with the perception of international law by social scientists, as well as traditional legal theorists and lawyers, that is trapped in "the distorting optic of the domestic law analogy."⁷¹ While it is unnecessary to explore in depth their attempt to set international law in a theoretical framework understandable by both social scientists and legal scholars, their recognition of the need for a language of law that can stand up to interdisciplinary work is insightful as much for the challenges they set out, as for the solutions they put forward. They note: "In looking for such interdisciplinary insights,

⁶⁷ See John Rawls' "just society" in Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 2005); Ronald Dworkin's concept of integrity within but not among political communities in Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1986) at 185.

⁶⁸ Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008) at 175. Andreas Wimmer and Nina Glick-Schiller similarly suggest that a "container model of society...developed in the social sciences and became dominant after the Second World War." They challenge the "taken-for-granted assumption of methodological nationalism" that preclude migration research. Andreas Wimmer and Nina Glick-Schiller, "Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences" (2002) 2:4 *Global Networks* 301 at 309, 310.

⁶⁹ The exception to this is natural law which offers a universal embrace. Davies suggests that "[t]he attraction of natural law in the modern era is its ideal of providing a basic system of universal moral values according to which atrocities in war and other abuses of human rights can be objectively condemned." Davies, *Asking the Law Question*, *supra* note 59 at 72. While natural law is not limited to the state it nonetheless remains limited: "if we try to base our actions directly on the truths of natural law, we immediately confront the question, 'Whose natural law?'" Jeremy Webber, "National Sovereignty, Migration, and the Tenuous Hold of International Legality: the Resurfacing (and Resubmersion?) of Carl Schmitt" in *Of States, Rights, and Social Closure*, Oliver Schmidtke & Saime Ozcurumezeds (eds.) (New York: Palgrave Macmillan, 2008) at 75.

⁷⁰ Jutta Brunnée & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge; New York: Cambridge University Press, 2010). Brunnée and Toope build upon the work of legal theorist Lon Fuller and bring it into international law, an area he "barely touched" at 15.

⁷¹ *Ibid.* at 9.

scholars have often adopted reductionist definitions of the ‘other’ discipline because they have not been actively involved in the constitutive internal disciplinary debates and processes that lead to healthy uncertainty and nuance.”⁷² In the case of law, a basic appropriation of the positivist view of law as sovereign enforcement is easily grasped by outsiders: “law can be found, defined, and labeled.”⁷³ Again, this is the basic idea of categorization of law and non-law set out by Davies. The difficulty for Brunnée and Toope is that international law fails to fit within this theoretical framework. They therefore present an interactional theory that considers international law as not just between states but made through the interactions of a variety of actors (elites, media, non-governmental organizations (NGOs), citizens).⁷⁴ Their aim is to explain the creation and arguments for upholding international law.

In another vein, new legal realism seeks more broadly to bridge dialogues between law and social science. My reliance on apocryphal jurisprudence over new legal realism results from new legal realism’s desire to achieve interdisciplinarity and translation between the law and social sciences as well as its predictive predisposition. This dissertation remains devotedly legal in discipline while embracing interpretive assistance from other disciplines. It is not outcome oriented as is the focus of legal realism. Nor is the project primarily empirical in design whereas new legal realism’s aim is to bring legal theory and empirical research together. However, like Manderson’s apocryphal jurisprudence, new legal realism is concerned that “disciplinary orthodoxies do not wind up setting limits on their

⁷² *Ibid.* at 9.

⁷³ *Ibid.* at 10.

⁷⁴ *Ibid.* at 5.

investigations.”⁷⁵ There is thus an openness to new ways of approaching law: “Traditional legal material is necessary but not sufficient...law is a social institution that does not operate in a vacuum.”⁷⁶

Three aspects of new legal realism prove particularly helpful to the construction of this project. First is the recognition of the need for “bottom up” as well as traditional “top down” research. The idea of bottom up, ground level, research to examine the “impact of law” and the understanding that “the less powerful people in society are often more invisible and silenced”⁷⁷ is what takes this project beyond the top down examination of the domestic and international laws that govern the refugee regime. Second, new legal realism recognizes the global dimensions of the law.⁷⁸ This is distinct from Brunnée and Toope’s discussion of the creation of international law. Instead, it is an acknowledgement of the global influences on domestic law and conversely the influences of domestic laws on other states. Third, new legal realism directly engages with policy issues.⁷⁹ The combination of policy, legal theory and empirical research is presented as the “core ‘trilectic’ at the heart of this new paradigm.”⁸⁰ In an effort to understand resettlement, the dissertation likewise embraces this joining of policy, theory and empirical research.

The task of this dissertation is to search for where law is absent and to look differently at the law that is present. It is to give law a greater presence but also a warning to be wary of its greater influence. Law as an academic pursuit remains relatively young. In 1887 the

⁷⁵ Howard Erlanger, et al., “New Legal Realism Symposium: Is It Time For A New Legal Realism?: Foreword: Is It Time For A New Legal Realism?” (2005) *Wisconsin Law Review* at 356.

⁷⁶ *Ibid.* at 360.

⁷⁷ *Ibid.* at 339, 341.

⁷⁸ *Ibid.* at 343.

⁷⁹ *Ibid.* at 344.

⁸⁰ *Ibid.* at 345.

first law journal, the *Harvard Law Review*, commenced as an effort to legitimize the law school's place in a university setting. Examining the historical development of the now ubiquitous law review, Bernard Hibbitts notes "As the patron of a 'learned' journal...[a law school] could at last make common academic cause with other progressive departments and professional schools on its campus...[and] more fundamentally, ...demonstrate that the law was amenable to 'scientific' study."⁸¹ And yet, over a century later, law remains an outsider in academia markedly distinct from the social sciences and humanities and not so easily amenable to scientific study.⁸² Law's outsider status is a consequence of its inherent presence *inside*. It cannot be extracted for analysis. And so, while this dissertation is about law, and an effort to extract and analyze the unique instances of law that arise in resettlement, the dissertation is also, inevitably, about much more.

Conclusion

This dissertation follows from my 2007 Master of Laws thesis titled *The Invisibles: An Examination of Refugee Resettlement*.⁸³ That project argued that refugees who fail to make it to the frontiers of safe states are simply not seen, with attention focused on asylum claimants. It is interesting to reflect back on that work's focus on invisibility as the dissertation will show how the intervening years have brought resettlement refugees to the forefront of visibility with the assertion that they are, in fact, the only "real" refugees. With new initiatives in Canada to reduce human smuggling, promote resettlement, and reduce

⁸¹ Bernard Hibbitts, "Last Writes? Reassessing the Law Review in the Age of Cyberspace" Version 1.2 created 10 March 1997 (Version 1.0 created February 5, 1996 printed in (1996) 71 *New York University Law Review* 615); online: <<http://faculty.law.pitt.edu/hibbitts/lastrev.htm>> at 1.3.

⁸² See Epstein & King, "The Rules of Inference" *supra* note 29; Erlanger, et al. "New Legal Realism" *supra* note 75; Paddy Hillyard, "Law's Empire: Socio-legal Empirical Research in the Twenty-first Century" (2007) 34 *Journal of Law & Society* 266; Brunnée & Toope, *Legitimacy and Legality*, *supra* note 70 for discussions of law's interaction with the social sciences.

⁸³ Shauna Labman, "The Invisibles: An Examination of Refugee Resettlement" LL.M. Thesis, UBC Faculty of Law (Vancouver: University of British Columbia, 2007).

refugee processing in Canada, the dissertation reveals how refugees waiting in camps are now much more commonly noted in government news releases, opinion pieces, and arguably public consciousness, than they were five years ago. Yet there is a danger in getting what you wish for. With this new assertion that resettlement is the right way to achieve refugee protection, those refugees waiting in camps with practically no chance of resettlement remain as invisible as before. At the same time, refugees validly claiming asylum are losing visibility in the juxtapositioning of resettlement and asylum. This research seeks to remedy this imbalance. By looking at law's role in resettlement and the influence of resettlement on the law of asylum, the dissertation argues for the complementarity between the two programs.

CHAPTER TWO

INTERNATIONAL RIGHTS AND BURDENS

Introduction

The dissertation queries how law influences the non-legal act of resettlement and conversely how resettlement compromises the law of asylum in both intentional and unintentional ways. This chapter begins with an overview of the historical development of the contemporary refugee regime and UNHCR's challenge in fulfilling a mandate tenuously connected to human rights and comprised of both legal obligations and voluntary burden-sharing. In doing so, it also provides the necessary review of literature to frame the dissertation.

There was a time when the refugee “problem” was thought to be solvable. While the movement of people has always occurred, and the Old Testament speaks of welcoming the stranger,¹ the twentieth century marked the first modern attempts by the international community to act together to address refugee flows. These first attempts were all reactive to individual events and offered specified solutions for particular refugees. Even the scope of the 1951 Convention was originally limited to persons who became refugees as a result of events occurring in Europe before 1 January 1951.² The 1967 *Protocol relating to the Status of Refugees* (1967 Protocol) confronted the reality that refugee crises are chronic and

¹ Leviticus 19:34 “But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt: I am the LORD your God.” Numbers 35:6 “And among the cities which ye shall give unto the Levites there shall be six cities for refuge, which ye shall appoint for the manslayer, that he may flee thither: and to them ye shall add forty and two cities.” Deuteronomy 23:15-16 “Thou shalt not deliver unto his master the servant which is escaped from his master unto thee: He shall dwell with thee, even among you, in that place which he shall choose in one of thy gates, where it liketh him best: thou shalt not oppress him.” (The Holy Bible, King James Version).

² *Convention relating to the Status of Refugees*, 1951, 189 UNTS 150 (entered into force 22 April 1954).

worldwide, and expanded the 1951 Convention's temporal and geographic coverage,³ but did not acknowledge the permanence of the problem. In fact, the continuation of the *Office of the United Nations High Commissioner for Refugees* (the Office) was originally only for three years.⁴ The Office was renewed by the General Assembly every 5 years thereafter. This temporal limitation on UNHCR's continuation repeated until December 2003.⁵ At that time, the General Assembly removed the limitation and created a permanent framework for refugee protection. While stating that the Office would now continue "until the refugee problem is solved"⁶ the removal of the temporal limitation speaks to a recognition of the increasing unlikelihood of such resolution.

A refugee, by international definition, is an individual who has been forced to flee his or her homeland for fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.⁷ While the refugee definition applies equally to all who are found to meet it, the protection attached to refugee status can differ greatly. Protection ranges from new citizenship to crowded camps. The determining factor is where refugee status is claimed. The 1951 Convention obliges state parties to not send back ("refoule") refugees who have arrived within the state's territory.⁸ While state parties

³ *Protocol relating to the Status of Refugees*, 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁴ UN General Assembly, *Statute of the United Nations High Commissioner for Refugees*, UNGA A/RES/428(V) 14 December 1950, at 5:

The General Assembly shall review not later than at its eighth regular session, the arrangements for the Office of the High Commissioner with a view to determining whether the Office should be continued beyond 31 December 1953.

⁵ UNGA Res 57/186 C.3 104. The final five year continuation of the Office of the High Commissioner for Refugees was made on 18 December 2002.

⁶ Implementing actions proposed by the United Nations High Commissioner for Refugees to strengthen the capacity of his Office to carry out its mandate, UNGA A/RES/58/153, 22 December 2003.

⁷ 1951 Convention, *supra* note 2 at Article 1A).

⁸ Article 33(1) of the 1951 Convention, *ibid.*, provides:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

are expected to grant refugee status and sometimes a route to citizenship to the refugees who reach their shores, other states, often overwhelmed by refugees and determined to discourage further flows, have not become party to the 1951 Convention or do not live up to their Convention obligations.

The conundrum is that protection requires reaching a state party to the 1951 Convention and the states closest to refugee flows, as a result of their proximity, have often not become parties.⁹ The dilemma is heightened with the twenty-first century focus on state security where the fear of terror translates into a fear of foreigners and borders become barriers. Legally mandated protection is simply too often inaccessible. The majority of refugees find themselves inadequately protected, often in camps grudgingly set up in the neighbouring countries from which they have fled.

In non-party states and states without their own refugee protection structure, UNHCR may grant mandate refugee status to identify asylum seekers meeting the criteria for refugee protection. A recognized mandate refugee receives protection from UNHCR despite being in a country not party to the 1951 Convention or regardless of whether the host country recognizes her as a refugee. UNHCR then seeks “durable solutions” for these refugees. Durable solutions comprise local integration in the receiving country, voluntary repatriation

⁹ For example, Malaysia, Nepal, Thailand, Jordan, and Lebanon are all within the top ten countries of asylum from which UNHCR made resettlement submissions in 2011 and none are state parties to either the 1951 Convention or the 1967 Protocol. UNHCR, “UNHCR Projected Global Resettlement Needs 2013” 18th Annual Tripartite Consultations on Resettlement, Geneva (9-11 July 2012) at 62; online: <<http://www.unhcr.org/5006aff49.html>>. Nor have other large refugee hosting states including Pakistan, India or Ecuador become state parties to either the 1951 Convention or the 1967 Protocol. Pakistan hosts one of the largest refugee populations in the world with approximately 1.7 million refugees, India hosts one of the largest urban refugee populations, and Ecuador hosts the largest refugee population in South America. UNHCR, “2012 UNHCR country operations profile – Pakistan”; online: <<http://www.unhcr.org/pages/49e487016.html>>; UNHCR, “2012 Regional Operations Profile - Asia and the Pacific”; online: <<http://www.unhcr.org/pages/4a02d8ec6.html>>; UNHCR, “2012 UNHCR country operations profile – Ecuador”; online: <http://www.unhcr.org/pages/49e492b66.html>>.

to the country of origin where the situation has changed so as to make this a possibility, or resettlement to a third country.¹⁰ While voluntary repatriation and local integration require negotiation with origin and host states, individual states concerned with refugee protection and the problems of protraction can independently and voluntarily decide to take on resettlement at any numeric level they determine to be appropriate. Resettlement is thus the solution controlled by the states seeking solutions. If willing, these states could solve the refugee problem through the resettlement of all refugees in cases where local integration or repatriation prove impossible.

Resettlement in 2009 offered a solution for 112,400 refugees worldwide. UNHCR boasted the highest resettlement submission numbers in 16 years and a six percent increase from 2008.¹¹ This represented the resettlement of just over 1 percent of the global refugee population. Much of the remainder of the global population waits in limbo in increasingly protracted situations.¹² Protraction was previously defined by UNHCR as 25,000 or more refugees of the same nationality having resided in a host country for five years or longer.¹³

¹⁰ UNHCR, *Resettlement Handbook* (November 2004) at 1/2.

¹¹ UNHCR, “2009 Global Trends” (Division of Programme Support and Management, 2009) at 30-31. UNHCR submitted more than 128,000 individuals for resettlement in 2009 and 84,000 departed with UNHCR assistance. The remainder of 2009 resettlement places, 28,400, were resettled by states through their broader humanitarian programs and not directly through UNHCR. By 2011, numbers had decreased somewhat with UNHCR submitting 92,000 refugees to states for resettlement, close to 62,000 departing with UNHCR assistance and state statistics indicating a total of 79,000 refugees resettled to 22 states. UNHCR, “A Year of Crisis: UNHCR Global Trends 2011” at 3; online: <<http://www.unhcr.org/4fd6f87f9.html>>.

¹² See Howard Adelman & Elazar Barkman, *No Return, No Refuge: Rites and Rights in Minority Repatriation* (Columbia University Press, 2011); Alexander Betts, *The Politics, Human Rights and Security Implications of Protracted Refugee Situations* (Conference Report) 19-20 September 2006, St. Antony’s College, University of Oxford (Oxford: OUP, 2006); Jeff Crisp, *No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa* (Geneva: UNHCR, 2003); Gil Loescher, *Protracted Refugee Situations: Political, Human Rights and Security Implications* (Tokyo: United Nations University Press, 2008); Gil Loescher & James Milner, *Protracted Refugee Situations: Domestic and International Security Implications* (Abingdon; New York: Routledge for the International Institute of Strategic Studies, 2005); James Milner, “Refugees and the Regional Dynamics of Peacebuilding” (2009) 28 *Refugee Survey Quarterly* 13; UNHCR Executive Committee, “Conclusion on Protracted Refugee Situations” ExCom Conclusion No. 109 (LXI) (8 December 2009).

¹³ UNHCR, “2009 Global Trends” *supra* note 11 at 6.

By this definition, in 2009 an estimated 5.5 million refugees, over half of the global total, were in 25 protracted situations across 21 host countries.¹⁴ Even so, this definition is static and inadequate. It fails to encompass the chronic, irresolvable and recurring character of protracted refugee situations or articulate the long-term political consequences of protraction.¹⁵ A 2009 Conclusion by UNHCR's governing Executive Committee removed the numeric minimum of 25,000 and strongly called on states and other relevant actors to commit themselves to address the roots causes of protraction.¹⁶ Protracted situations represent the failure of local integration, voluntary repatriation and resettlement. Protraction is the antithesis to solution.¹⁷

But the reality remains that resettlement will never be the "solution" to the refugee problem. It is, in fact, the smallest piece of the puzzle. This is as it should be. The relocation of people from their homes, their families, their regions, their languages or their cultures is by no means ideal. Nor would it be fair to assume that individuals, even those who have suffered tremendously in their countries of origin, do not ultimately desire to return home. There are many who argue that resettlement is a costly solution that acts as a "pull factor" inducing migration and creating greater problems in host countries, permits countries of origin to rid themselves of unwanted ethnic minorities, and hampers peace and stabilization possibilities through the permanent departure of citizens.¹⁸ The argument has been made that attention and resources should focus proactively on "preventative

¹⁴ *Ibid.* at 6.

¹⁵ Loescher & Milner, *Protracted Refugee Situations*, *supra* note 12 at 14.

¹⁶ UNHCR, "Conclusion on Protracted Refugee Situations" *supra* note 12.

¹⁷ Gervase Coles, "The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Inquiry" in A. Nash (ed.), *Human Rights and the Protection of Refugees Under International Law* (Halifax: Institute for Research on Public Policy, 1988) 195-222 at 206.

¹⁸ See Michael Casasola, "Current Trends and New Challenges for Canada's Resettlement Program" (2001) 19 *Refugee* 76 at 77; Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (New York; Oxford: Oxford University Press, 1993) at 16, 22, 59 for discussions of pull-factor arguments.

protection”¹⁹ to diminish the causes of displacement and reactively on peace-building. Yet, even unproblematically taking these programs at their best they are not enough. Refugee flows should never simply be assumed to occur and therefore abandon efforts to curtail flows, but neither can the remaining reality of these flows be ignored. Nor can they necessarily be resolved in the regions. The reality of protracted refugee situations with refugees lacking any solution betrays the idealism of the above arguments.

The Refugee Regime and Resettlement’s History²⁰

*Prior to this century...The practice of sheltering those compelled to flight was not perceived as a burden, but rather as a necessary incident of power, and indeed as a source of communal enrichment.*²¹

Resettlement is but one component of a refugee protection regime that has struggled with its identity, place and purpose since its creation more than 50 years ago. To appreciate resettlement’s place in the narrative of protection requires an understanding of the refugee regime’s shifting priorities and perspectives. The regime’s story is told in different ways as one that moves from exile to containment, from protection to assistance, conversely from charity to rights, and, in many ways, from enthusiasm to exhaustion. Resettlement’s role

¹⁹ UNHCR, “Report of the UNHCR Working Group on International Protection” (Geneva: UNHCR, 1992); Jennifer Hyndman argues that preventative protection

...is at least as much about states’ interests as it is about assisting displaced persons in need...[it] is an expression of the more powerful states’ desire to avoid the legal obligations of refugees and to save nonrefugee taxpayers’ money in their home territories. It speaks to a desire for a multilateral, or UN, solution to displacement in order to avoid incurring the perceived expense of refugees, both economically and politically...

She later notes: “To assist displaced people at home by employing the language of preventative protection and the safe spaces it designates is to maintain a safe and less costly distance between ‘us’ and ‘them’” Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis; London: University of Minnesota Press, 2000) at 27-28, 181; see also Bill Frelick, “Preventive Protection, and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia” (1992) 4 *International Journal of Refugee Law* 439.

²⁰ Components of this section come from Shauna Labman, “Looking Back, Moving Forward: The History and Future of Refugee Protection” (2010) *Chicago-Kent Journal of International and Comparative Law*; online: <<http://www.kentlaw.edu/jicl/spring2010.html>>.

²¹ James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 1.

within this story has been one of fluctuating favour as it swings between least and most preferred solution.

Pre-1950 Refugee Regimes

Refugee resettlement has a checkered past that pre-dates the 1951 Convention and lies at the foundations of modern day refugee protection. Founded in 1919 pursuant to the *Treaty of Versailles*, the League of Nations was the first international organization to address refugee issues.²² In response to an appeal from the International Committee of the Red Cross (ICRC) the League appointed a High Commissioner for Refugees in 1921. The first High Commissioner for Refugees, Fridtjof Nansen, was tasked to resolve the specific problem of the Russian refugees created by civil war and famine in the Soviet Union.²³ His solution for the Russian and subsequent Armenian, Assyrian and other Christian refugees following the fall of Ottoman Empire was a travel document. The “Nansen Passport” gave refugees a legal identity and enabled them to travel internationally. Refugees were perceived through a redistributive lens. Rather than a promise not to turn refugees away, the passport assisted in the *movement* of refugees – their ‘egress’ and ‘ingress’ – in an ‘equitable’ manner to willing states.²⁴ Nansen’s 1922 High Commissioner’s report refers to

²² *Peace Treaty of Versailles*, Covenant of the League of Nations, Articles 1-30.

²³ The League of Nations stated:

The Conference considered the difficulties which existed with reference to *passports* for Russian refugees. These called for special arrangements which could only be made by the High Commissioner with the various interested Governments. In particular such arrangements should make possible *the egress* of Russian refugees from countries where they were presently congregated and for *their ingress* to the States which were willing to receive them. (League of Nations, Fourteenth Council Session, Annexes 245 and 245a, emphasis added)

²⁴ *Ibid.* The League’s resolutions did mention *non-refoulement* but only briefly and in connection with repatriation:

Finally, the Conference considered that no Russian refugee should be compelled to return to Russia (*non-refoulement*) but that it would be expedient to collect without delay particulars of the number of refugees desiring to be repatriated (*voluntary repatriation*).

Quoted in Ivor C. Jackson, “Dr. Fridtjof Nansen a Pioneer in the International Protection of Refugees” (2003) 22 *Refugee Survey Quarterly* 7 at 9.

the passport in international burden-sharing language as “a great step towards a more equitable distribution of Russian refugees.”²⁵

In 1924 the League of Nations entered into an arrangement with the International Labour Organization (ILO) in which the ILO matched refugees with countries and employers in need of workers. Once the Refugee Commissioner identified refugees, the ILO coordinated the refugees’ job-placements and emigration.²⁶ Between 1925 and 1929 the ILO coordinated employment placements for approximately 50,000 refugees.²⁷ The ILO model highlights the challenge of resettlement in the merger of refugee protection and immigration incentives. The upcoming chapters will elaborate this tension.

Following Nansen’s death in 1930, the League of Nations opted to create the Nansen International Office charged with the protection of refugees under the League’s mandate.²⁸ The Nazi rise to power in 1933 triggered an outpouring of new refugees, mostly Jews from Germany, and the League of Nations was forced to address the issue. By the 1930s, the *refoulement* of refugees was commonplace²⁹ but the inclusion in the 1933 League of Nations’ Refugee Convention that state parties were obliged not to expel authorized refugees from their territories and to avoid “non-admittance [of refugees] at the frontier”³⁰ received little support.³¹ The League also appointed an independent High Commissioner

²⁵ Fridtjof Nansen, “Russin Refugees: Report to the Council of July 20th, 1922 by Dr. Nansen” Official Journal (August 1922).

²⁶ Claudena Skran, “Profiles of the First Two High Commissioners” (1988) 1 *Journal of Refugee Studies* 277 at 284.

²⁷ *Ibid.*

²⁸ *Ibid.* at 289.

²⁹ Claudena Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995) at 131.

³⁰ *Convention relating to the International Status of Refugees*, 28 October 1933, 3663 LNTS.

³¹ Eight states ratified the Convention: Belgium, Bulgaria, Czechoslovakia, Denmark, France, Great Britain, Italy and Norway. It was signed but not ratified by Egypt. See Robert J. Beck, “Britian and the 1933

for Refugees coming from Germany.³² James G. McDonald, the American professor who first held the post from 1933-1935, resettled approximately two thirds of the 80,000 refugees who left Germany during his tenure.³³ The concept of *refoulement* is not even mentioned in either the 1936 Provisional Arrangement³⁴ or the consequent 1938 Refugee Convention.³⁵ The 1938 Convention did however specifically address resettlement.³⁶

The year 1938 also saw the merging of the League of Nations' Nansen International Office, which was scheduled to terminate, with the High Commissioner for Refugees coming from Germany. The resulting High Commissioner was assigned the responsibility to oversee the application of the 1933 and 1938 conventions, assist governments and "...to coordinate in general humanitarian assistance along with resettlement and other solutions..."³⁷ A separate organization, the Intergovernmental Committee on Refugees (IGCR) was also created at the League of Nations conference in Evian, France, convened in July 1938 to address the growing refugee crisis.³⁸ The two organizations were essentially amalgamated in February 1939 when the High Commissioner Sir Herbert Emerson concurrently became Director of the IGCR.³⁹

Refugee Convention: National or State Sovereignty?" (1999) 11 *International Journal of Refugee Law* 697 at 600 and 603.

³² Skran, "Profiles" *supra* note 26 at 289.

³³ John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000) at 138.

³⁴ *Provisional Arrangement concerning the Status of Refugees coming from Germany*, 4 July 1936, 3952 LNTS 77.

³⁵ *Convention concerning the Status of Refugees coming from Germany*, 10 February 1938, 4461 LNTS 61.

³⁶ Article 15, *ibid*, stated:

With a view to facilitating the emigration of refugees to overseas countries, every facility shall be granted to the refugees and to the organizations which deal with them for the establishment of schools for professional re-adaptation and technical training.

³⁷ Alessandra Roversi, "The Evolution of the Refugee Regime and Institutional Responses: Legacies from the Nansen Period" (2003) 22 *Refugee Survey Quarterly* 21 at 28.

³⁸ Torpey, *The Invention of the Passport*, *supra* note 33 at 135.

³⁹ Roversi, "The Evolution of the Refugee Regime" *supra* note 37 at 29.

The United Nations Relief and Rehabilitation Agency (UNRRA) was created by the allied powers in 1943 in preparation for the liberation of Europe. UNRRA was not a refugee agency but focused on the repatriation of displaced persons. It was during this period that the reality shifted from an individual's *inability* to return home to his or her *unwillingness* to return home. Tensions arose between Eastern and Western states on the freedom to refuse return.⁴⁰

The League of Nations' inability to prevent the Second World War signaled its downfall and it dissolved as the war drew to a close. At the conclusion of the war, the world's leaders sought to form a new international forum for world opinion. The United Nations was established on 24 October 1945. The League's dissolution caused the High Commissioner's office to close on 31 December 1946.⁴¹ That same year, the International Refugee Organization (IRO) was established by a resolution of the United Nations General Assembly.⁴² The IRO was designed to assist those persons who could not be repatriated or who "in complete freedom and after receiving full knowledge of the facts...expressed valid objections to returning to [their countries of origin.]"⁴³ The IRO was strongly supported by the United States and its resettlement mandate was intentionally counter to UNRRA's repatriation focus supported by the Soviet bloc.⁴⁴

⁴⁰ Loescher, *Beyond Charity*, *supra* note 18 at 48-49.

⁴¹ Atle Grahl-Madsen, *The Status of Refugees in International Law* (Leyden: A.W. Sijthoff, 1966) at 17.

⁴² *Question of Refugees*, UNGA Res. (8/1), 12 February 1946.

⁴³ *Constitution of the International Refugee Organization* (15 December 1946) at Part I(C)(1).

⁴⁴ Loescher, *Beyond Charity*, *supra* note 18 at 50. The United States had been the primary funder of UNRRA and refused to support it beyond 1947, moving their support to the IRO. Loescher, *Beyond Charity*, *supra* note 18 at 49.

By mid-1947, the IRO had assumed the responsibilities of UNRRA, the IGCR and, indirectly the League of Nations' High Commissioner for Refugees.⁴⁵ The IRO oversaw the resettlement of displaced Europeans to countries such as the U.S., Canada, and Australia. Between 1947 and 1951 the IRO resettled close to 1 million refugees, including 329,000 in the U.S., 182,000 in Australia, 132,000 in Israel, 123,000 in Canada and 170,000 in various European states.⁴⁶ During this same period a mere 54,000 people were repatriated to Eastern and Central Europe.⁴⁷ The IRO was a specialized agency of limited duration to close in 1951. With the Second World War creating a continued flow of refugees, the United Nations was thus forced to again revisit the refugee issue leading to the creation of UNHCR and the 1951 Convention.

The United Nations High Commissioner for Refugees

By resolution on 3 December 1949 the United Nations General Assembly decided to establish a High Commissioner's Office for Refugees.⁴⁸ The *Statute of the Office of the United Nations High Commissioner for Refugees* was adopted by the United Nations General Assembly on 14 December 1950.⁴⁹ UNHCR began its work on 1 January 1951 with 33 staff and a budget of \$30,000.⁵⁰ The *Convention relating to the Status of Refugees*

⁴⁵ James Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950" (1984) 33 *International and Comparative Law Quarterly* 348 at 376.

⁴⁶ Dennis Gallagher, "The Evolution of the International Refugee System" (1989) 23 *The International Migration Review* 579 at 579.

⁴⁷ Loescher, *Beyond Charity*, *supra* note 18 at 51.

⁴⁸ *Refugees and Stateless Persons*, UNGA Res. 319(IV), 3 December 1949.

⁴⁹ UNHCR Statute, *supra* note 4.

⁵⁰ Erika Feller, "The Evolution of the International Refugee Protection Regime" (2001) 5 *Washington University Journal of Law and Policy* 129 at 131. The organization now operates in 125 countries. UNHCR, *Where We Work*; online: <<http://www.unhcr.org/pages/49c3646c206.html>>; see also *Biennial Program Budget 2012-2012 of the Office of the United Nations High Commissioner for Refugees*, Report by the High Commissioner, Executive Committee of the High Commissioner's Programme, Sixty-second sessions, Geneva 3-7 October 2011 (A/AC.96/1100) for a detailed review of UNHCR's current operation and budget.

was adopted on 28 July 1951 and came into force on 22 April 1954.⁵¹ On December 4, 1952, Denmark became the first state to ratify the 1951 Convention.

Given the early twentieth century tendency to resolve refugee crises through the movement and transfer of refugees overseas, it is not surprising that UNHCR commenced as a reactionary organization with an “exilic” orientation.⁵² Unlike its predecessors however, the 1951 Convention successfully garnered state support to address asylum through the concept of *non-refoulement*. One explanation for this reorientation is that with the IRO’s mandate ending, a core of refugee rights was necessary to maintain the willingness of states to offer resettlement as a viable alternative.⁵³ Resettlement would therefore continue as a protection mechanism when refugee rights could not be attained. While resettlement is indeed part of some countries’ current refugee schemes, the difference between these programs and the earlier agendas of the IGCR and the IRO is that resettlement is now state-centered rather than flowing from the international refugee agency.⁵⁴ The 1951 Convention thus established the dichotomous protection relationship between resettlement and *non-refoulement* that will be traced throughout this dissertation.

The South Asian boat people crisis of the 1970s and early 1980s, which will be examined in Chapter 4, brought a resurgence in resettlement enthusiasm with 1.2 million Indochinese resettled by UNHCR between 1976 and 1989. By the late 1970s UNHCR was involved in

⁵¹ 1951 Convention, *supra* note 2.

⁵² Gil Loescher, “Protection and Humanitarian Action in the Post-Cold War Era” in Aristide R. Zolberg & Peter Benda (eds.), *Global Migrants, Global Refugees: Problems and Solutions* (New York, Oxford: Berghahn Books, 2001) at 172.

⁵³ James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 92-93. Of course, the atrocities of World War II also loomed large on the states supporting the 1951 Convention. Peter Showler suggests that the promise not to send people back to persecution is commonly viewed as the response of “nations still bruised by post- Holocaust guilt, conscious of having denied entry to pre-Holocaust Jews.” Peter Showler, *Refugee Sandwich: Stories of Exile and Asylum* (McGill-Queen’s University Press, 2006) at 212.

⁵⁴ Hathaway, *The Rights of Refugees*, *ibid.* at 964.

the resettlement of 200,000 persons per year, and at one point in 1979 a UNHCR representative reports that “resettlement was viewed as the only viable solution for 1 in 20 of the global refugee population under the responsibility of UNHCR.”⁵⁵ Beginning in the late 1980s however, with still increasing refugee flows from Indochina and diminishing state resettlement quotas, resettlement came to be viewed by UNHCR as the least preferred durable solution.⁵⁶ By 1991 UNHCR’s Executive Committee issued a conclusion emphasizing that resettlement be pursued “only as a last resort, when neither voluntary repatriation nor local integration is possible.”⁵⁷ Concerns that large-scale resettlement was leading to the abandonment of asylum in first countries and serving as a pull factor for individuals to leave home for social and economic reasons, combined with an increased emphasis on voluntary repatriation,⁵⁸ limited enthusiasm for resettlement.⁵⁹ At the same time there was a numeric explosion of refugees from third world countries as the revolution of transportation opened access to the West and the end of the Cold War removed

⁵⁵ Gary Troeller, “UNHCR Resettlement: Evolution and Future Direction” (2002) 14 *International Journal of Refugee Law* 85 at 87.

⁵⁶ The approach to the resettlement of Indochinese boatpeople changed drastically between 1979 and 1989. In July 1979, sixty-five governments met in Geneva for the first international conference on refugees from Indochina and pledged to resettle Indochinese who arrived in the region in return for the countries of first asylum permitting these boats to land. This “blanket” resettlement was replaced by the Comprehensive Plan of Action (CPA) for Indochinese Refugees adopted in June 1989 as a multilateral agreement between countries of first asylum, countries of origin and resettlement countries with the objective of finding durable solutions for recognized refugees but also to stop the clandestine departures from Vietnam considered to be increasingly economically driven. The CPA still permitted landings but now all arrivals would be screened for refugee status and those found not to meet the narrow refugee definition would have to return to Vietnam. UN General Assembly, *Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General* (22 September 1989) A/44/523; UNHCR, *Resettlement Handbook*, *supra* note 10 at 9-10; Adelman & Barkman, *No Return, No Refuge*, *supra* note 12 at 98.

⁵⁷ UNHCR Executive Committee, “Resettlement as an Instrument of Protection” ExCom Conclusion No. 67 (1991) at para (g); online:<<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c4368>>

⁵⁸ See Coles, “The Human Rights Approach” *supra* note 17.

⁵⁹ Troeller, “UNHCR Resettlement” *supra* note 55 at 88.

ideological protection incentives.⁶⁰ The realities of resettlement fatigue, the fear of enticing mixed migration flows and ostensibly offering an immigration program through resettlement had therefore hit by the early 1990s. By 1996 UNHCR resettled only 1 in every 400 of the global refugee population under its care.⁶¹ The new century has seen a revival of resettlement yet again. However, before examining resettlement in the twenty-first century it is necessary to probe the underlying justifications for resettlement's pendulum-like position in the regime.

Reorienting Protection

Both the mechanism of resettlement and the principle of *non-refoulement* contemplate a solution outside of return to the home state. This has been negatively labeled as the “exilic bias”⁶² of both the 1951 Convention and UNHCR's Statute. Gervase Coles suggests the “thrust was directed almost exclusively to separation and alienation.”⁶³ The further fact is that as the regime developed in the Cold War era, an exile-orientation was perceived to be within states' interests. It expressed a “Eurocentric humanitarianism” that reflected the earlier tension between UNRRA and the IRO and idealized settlement in the civilized West, and garnered “ideological points” for taking in refugees from the East.⁶⁴

The critique of the exilic focus centers on the concern over the accepted detachment from home country. It has been challenged as a violation of human rights⁶⁵ and more recently,

⁶⁰ See B.S. Chimni, *The Geopolitics of Refugee Studies and the Practice of International Institutions: A View from the South* (Oxford: Refugee Studies Programme, 1998); Stephen Castles, “The Factors That Make and Unmake Migration Policies” (2004) 38 *International Migration Review* 852.

⁶¹ Troeller, “UNHCR Resettlement” *supra* note 55 at 85 and 89.

⁶² Coles, “The Human Rights Approach” *supra* note 17 at 211.

⁶³ *Ibid.*

⁶⁴ Alexander Aleinikoff, “State-centered Refugee Law: From Resettlement to Containment” in E.V. Daniel & J.R. Knudsen (eds.), *Mistrusting Refugees* (Berkeley: University of California Press, 1995) at 260.

⁶⁵ Coles, “The Human Rights Approach” *supra* note 17 at 199.

facilitating the interests of those driving the refugees out and counter to the interests of peace-building.⁶⁶ By the 1990s, there is general consensus that a paradigm shift had occurred in the refugee regime that was tied to an ostensible concern with human rights and humanitarianism.⁶⁷ Turning to the foundational conceptualizations of refugee issues in human rights terms⁶⁸ the reorientation offered a focused concern for refugees as human beings rather than a state-based focus on borders.⁶⁹

The shift thus signaled a new focus on countries of origin, repatriation, and human rights monitoring.⁷⁰ The move was couched in the language of a “repatriation turn”⁷¹ and “preventative protection.”⁷² The focus was on preventing and resolving the causes of refugee flows. A major project was jointly undertaken by the ILO and UNHCR in 1992 to investigate the capacity of foreign aid to minimize unwanted migration.⁷³ With respect to refugees, it was argued that the two “Rs” of *relief* and *resettlement* needed to expand to four “Rs” through the inclusion of *repatriation* and the reduction of *root causes*.⁷⁴ The early 1990s also saw UNHCR undergo a comprehensive management review resulting in a “care and maintenance” sector prioritizing assistance over protection.⁷⁵ The suggestion was

⁶⁶ See Loescher & Milner, *Protracted Refugee Situations*, *supra* note 12.

⁶⁷ See Coles, “The Human Rights Approach” *supra* note 17; Hyndman, *Managing Displacement*, *supra* note 19.

⁶⁸ James Hathaway, “Reconceiving Refugee Law as Human Rights Protection” (1991) 4 *Journal of Refugee Studies* 113.

⁶⁹ Aleinikoff, “State-centered Refugee Law” *supra* note 64 at 264.

⁷⁰ *Ibid.* at 258.

⁷¹ Chimni, *The Geopolitics of Refugee Studies*, *supra* note 60 at 364.

⁷² Hyndman, *Managing Displacement*, *supra* note 19 at 181.

⁷³ W.R. Böhning & M.L. Schloeter-Paredes, (eds.) *Aid in Place of Migration?: Selected Contributions to an ILO-UNHCR Meeting, A WEP Study* (Geneva: International Labour Office, 1994).

⁷⁴ P.L. Martin, “Reducing Emigration Pressure: What Role Can Foreign Aid Play?” 241 in Böhning & Schloeter-Paredes *ibid.* at 242, 244.

⁷⁵ Guglielmo Verdirame & Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (Oxford; New York: Berghahn Books, 2005) at 289.

that a ‘full-belly’ theory – “the idea that rights and legal protection were pointless for ‘starving’ refugees” guided this move.⁷⁶

While ideologically legitimate, for many this geopolitical shift was critiqued as merely a turn in terminology but not underlying interests. Accusations point to “engineered regionalism”⁷⁷ and the “demise of protection”⁷⁸ with a move clearly toward containment⁷⁹ and encampment.⁸⁰ Humanitarianism was merely the “ideological guise.”⁸¹ The actual shift would then be seen to be about shifting state interests from the “exilic bias” to a “source control bias.” Alexander Aleinikoff concisely presented the dilemma:

Rather than a paradigm shift, then, we may well be witnessing the troubling use of humanitarian discourse to mask a reaffirmation of state-centeredness...If this analysis is correct, then the story of change is not about the melding of refugee law into human rights law; rather, it is the exchange of an exilic basis for policies of containment – detention of asylum seekers, visa requirements, closing opportunities for resettlement, pushbacks and return.⁸²

Interestingly, the second half of the 1990s also marked a period of budget shortfalls for UNHCR and the reduction of humanitarian and development assistance.⁸³ Western states were able to deter refugee flows and avoid their legal obligations to refugees while maintaining a rhetoric of concern. Refugees meanwhile often lacked either protection or a “full-belly.”

⁷⁶ *Ibid.* at 289.

⁷⁷ Matthew Gibney, “Forced Migration, Engineered Regionalism and Justice between States” in Susan Kneebone & Felicity Rawlings-Sanei (eds.), *New Regionalism and Asylum Seekers* (Oxford: Berghahn Books, 2007) 57 at 57-77.

⁷⁸ Verdirame & Harrell-Bond, *Rights in Exile*, *supra* note 75 at 289.

⁷⁹ Chimni, *The Geopolitics of Refugee Studies*, *supra* note 60; Aleinikoff, “State-centered Refugee Law” *supra* note 64; Gibney, “Forced Migration, Engineered Regionalism” *supra* note 77.

⁸⁰ Loescher & Milner, *Protracted Refugee Situations*, *supra* note 11 at 21.

⁸¹ Verdirame & Harrell-Bond, *Rights in Exile*, *supra* note 75 at 289.

⁸² Aleinikoff, “State-centered Refugee Law” *supra* note 64 at 265.

⁸³ Loescher & Milner, *Protracted Refugee Situations*, *supra* note 12 at 21.

Another layer of analysis contends that the shifting of state interest was tied to a change in the composition of the refugee flow. B.S. Chimni argues that the paradigm shift was achieved through the creation of the “myth of difference”:

the nature and character of refugee flows in the Third World were represented as being radically different from refugee flows in Europe since the end of the First World War. Thereby, an image of a ‘normal’ refugee was constructed—white, male and anti communist—which clashed sharply with individuals fleeing the Third World.⁸⁴

Founded on a myth that demonstrated dissimilarities in volume, nature and cause between European and Third World refugees, Chimni shows how this approach “articulated a set of policy proposals which justified restrictive measures. The proposals included the rejection of the exilic bias of international refugee law; a nearly sole reliance on the solution of voluntary repatriation; and an emphasis on the responsibility of the state of physical origin.”⁸⁵ Whereas Western states wished to embrace the ideological Cold War exile, with the “new” third-world refugees there was the potential to resolve the flight-causing political conflicts and return home. Exile no longer made sense. Chimni therefore suggests that the “repatriation turn” in refugee policy was “the outcome of a marriage between convenient theory, untested assumptions and the interests of states.”⁸⁶

The validity of these arguments is difficult to deny in the face of a regime that ostensibly turned to human rights but has created a reality that has fallen deeper into protraction where rights are glaringly lacking. A socio-legal analysis of compliance with international human rights law and refugee law in Kenya and Uganda deplored that “as a matter of fact *no*

⁸⁴ Chimni, *The Geopolitics of Refugee Studies*, *supra* note 60 at 351. The current rhetorical twist of presuming asylum seekers, particularly those arriving by boat, to be terrorist threats rather than refugees can be seen as the newest construction of the myth of difference. This issue will be covered in detail in Chapter 3.

⁸⁵ *Ibid.* at 369.

⁸⁶ *Ibid.* at 364-365.

refugee enjoyed his or her rights when confined to a camp/settlement.”⁸⁷ In Jennifer Hyndman’s study of camps along the Somali-Kenyan border, she observes: “Legal arguments of protection and assistance are navigated, and in some cases avoided, through the introduction of a more politicized and exigent set of humanitarian practices.”⁸⁸ In Hyndman’s analysis: “Humanitarian assistance at the end of the millennium is synonymous with neither protection, in the legal sense, nor solutions to displacement,”⁸⁹ a fact tied to the realities of refugee camps that “remove evidence of human displacement from view and contain ‘the problem’ without resolution, as noncommunities of the excluded.”⁹⁰ Matthew Gibney similarly concludes: “Western states seemed, by the end of the 1990s, to have foiled the globalization of asylum, at least temporarily.”⁹¹ Refugees remained contained far from the western world.

Lessons Learned

*While UNHCR and other humanitarian organizations are able to deliver large quantities of humanitarian supplies under extremely difficult conditions, they are much less successful in protecting civilians from human rights abuses...*⁹²

For many refugee scholars, the events of the 1990s served to teach an important lesson in advocacy. They recognized their potential complicity in state evasion of protection through the promotion of humanitarian assistance and repatriation. Aleinikoff wearily warned of the risk of becoming “unwitting allies in reinforcing the state-centered paradigm they seek

⁸⁷ Verdirame & Harrell-Bond, *Rights in Exile*, *supra* note 75 at xiv.

⁸⁸ Hyndman, *Managing Displacement*, *supra* note 19 at 18.

⁸⁹ *Ibid.* at 4.

⁹⁰ *Ibid.* at 190.

⁹¹ Gibney, “Forced Migration, Engineered Regionalism” *supra* note 77 at 63.

⁹² Gil Loescher, “UNHCR at Fifty: Refugee Protection and World Politics” in Niklaus Steiner, et al. (eds.), *Problems of Protection: The UNHCR, Refugees and Human Rights* (New York, London: Routledge, 2003) 3 at 13.

to overthrow.”⁹³ He suggested: “refugee scholars and advocates would do well to stay off the repatriation bandwagon until there are far stronger reasons to believe that the international regime stands ready and able to keep its human rights commitments to returnees or other victims of persecution.”⁹⁴ James Hathaway likewise recognized the potential subversion of the idealized theory: “There is, however, a very real risk that governments will seize on the Coles framework [critiquing the exilic bias] in order to divert attention from their failure to provide meaningful protection to refugees.”⁹⁵

Bandwagons, the rhetoric of “least preferred” and critiques of varying solutions as misdirected, risk corruption of a regime designed to be holistic and multi-pronged. Protection and solution sit as the central components of the refugee regime.⁹⁶ Their achievement requires support for each aspect, protection as well as all three manners of solution. Sacrificing any one for the promotion of the other strengthens neither protection nor solution but rather creates more cracks for refugees to slip through into protraction.

The onset of the twenty-first century has returned resettlement to the foreground of protection attention. Resettlement has been at the forefront of UNHCR initiatives such as Convention Plus in 2002 articulating the strategic use of resettlement,⁹⁷ rewriting the

⁹³ Aleinikoff, “State-centered Refugee Law” *supra* note 64 at 266.

⁹⁴ *Ibid.* Howard Adelman and Elazar Barkan have more recently reviewed cases of minority repatriations spanning Asia, Europe, the Middle East and Africa. The “minority” reference is to the refugees’ minority status in their country or region to which repatriation is sought. Adelman and Barkan outline a policy preference for the solution of repatriation over the last two decades and demonstrate how a focus on repatriation has ultimately led to the protraction of refugees in camps: “They cannot resettle because they are supposed to be repatriated; they cannot repatriate because they are a minority.” Adelman & Barkman *No Return, No Refuge*, *supra* note 12 at x.

⁹⁵ Hathaway, “Reconceiving Refugee Law” *supra* note 68 at 117.

⁹⁶ UNHCR Statute, *supra* note 4 at 1.

⁹⁷ See Alexander Betts & Jean-François Durieux, *Convention Plus as a Norm-Setting Exercise* (Oxford: OUP, 2007); Jean-François Durieux, “The Role of International Law: Convention Plus” (2005) 24 *Refugee Survey Quarterly* 89; Marjoleine Zieck, “Doomed to Fail from the Outset? UNHCR’s Convention Plus Initiative

Resettlement Handbook in 2011⁹⁸ and a general promotion of resettlement in non-traditional resettlement countries.⁹⁹ This has aligned with a renewed interest in resettlement by states.¹⁰⁰ Hyndman notes: “Public opinion and government planning cycles are more likely to favour refugee resettlement in which eligible, screened refugees in need of protection can be brought to Canada in controlled numbers for settlement.”¹⁰¹ Moreover, the securitized paradigm shift triggered by the 2001 terrorist attacks¹⁰² can arguably have contributed to a renewed interest in resettlement.¹⁰³ As the body of the dissertation will reveal, the control and order inherent in resettlement offers states a protection measure counter to the unpredictable nature and, by necessity, often illegal, entrance of asylum seekers.

Both the academic and advocacy sides identified an opportunity for renewed conversation on resettlement.¹⁰⁴ John Fredriksson argued that “[i]n the aftermath of the tragic events of

Revisited” (2009) 21 *International Journal of Refugee Law* 387; Debra Pressé & Jessie Thomson, “The Resettlement Challenge: Integration of Refugees from Protracted Refugee Situations” (2007) 24 *Refuge* 48.

⁹⁸ UNHCR, *Resettlement Handbook* (July 2011).

⁹⁹ UNHCR, “Frequently Asked Questions About Resettlement”; online: <<http://www.unhcr.org/4ac0873d6.html>>.

¹⁰⁰ Chapter 3 will review in detail the Canadian government’s approach to resettlement.

¹⁰¹ Jennifer Hyndman, “Second-Class Immigrants or First Class Protection” in Pieter Bevelander, et al. (eds.), *Resettled and Included? The Employment Integration of Resettled Refugees in Sweden* (Malmö University, MIM, Malmö: Holmbergs, 2009) 247 at 255.

¹⁰² In the introduction to UNHCR’s *Global Consultations* the editors note that:

it has been noticeable that the post-September 11 context has been used to broaden the scope of provisions of the 1951 Convention allowing refugees to be excluded from refugee status and/or to be expelled. The degree of collaboration between immigration and asylum authorities and the intelligence and criminal law enforcement branches has also been stepped up. Erika Feller, et al., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) at 5.

Catherine Dauvergne has noted: “[t]he worldwide fear of terror has overlapped and intertwined with the fear of illegal migration.” Catherine Dauvergne, “Sovereignty, Migration and the Rule of Law in Global Times” (2004) 67 *The Modern Law Review* at 588.

¹⁰³ John Fredriksson, “Reinvigorating Resettlement: Changing Realities Demand Changed Approaches” (2002) 13 *Forced Migration Review* 28 at 30; Gregor Noll & Joanne van Selms, “Rediscovering Resettlement: A Transatlantic Comparison of Refugee Protection” (2003) 3 *MPI Insight* at 2.

¹⁰⁴ See Casasola, “Current Trends” *supra* note 18; Troeller, “UNHCR Resettlement” *supra* note 55; Fredriksson, “Reinvigorating Resettlement” *ibid.*; Noll & van Selms, “Rediscovering Resettlement” *ibid.*;

11 September, [resettlement] may prove to be one of the most useful tools in the protection kit.”¹⁰⁵ Joanne van Selm similarly suggested the post-11 September security measures “could in fact benefit some of those people seeking asylum and refuge by ensuring other, safer, means of arrival, including the expansion of resettlement.”¹⁰⁶ Hathaway noted a “recent renaissance of interest by some governments” in resettlement schemes.¹⁰⁷ And indeed, resettlement has proven quite attractive to states, albeit in an altered form. In 2003, the international community defined the “strategic use of resettlement” as “the planned use of resettlement in a manner that maximizes..., directly or indirectly, benefits other than those received by the refugee being resettled.”¹⁰⁸ The focus is therefore on using resettlement as a tool to achieve durable solutions other than resettlement.

Resettlement’s most recent resurgence must be understood in the context of shifting protection paradigms that may be mere restatements of state interest. While the promotion of increases in resettlement numbers is urged in this dissertation, the willingness of states to comply with this call must be cautiously approached. The reasons behind the willingness are crucial to an assessment of whether resettlement actions are an embrace or an evasion of states of their protection obligation.

To understand resettlement in the context of the refugee regime in the twenty-first century requires the insertion of the two justifications that encapsulate discussions: human rights and burden-sharing. Neither approach is new. Indeed it was the international cognizance

David Steinbock, “The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement” (2003) 36 *University of Michigan Journal of Law Reform* 951 for examples of renewed discussion.

¹⁰⁵ Fredriksson, “Reinvigorating Resettlement” *supra* note 103 at 28.

¹⁰⁶ Joanne van Selm, “Refugee Protection in Europe and the U.S. after 9/11” in Steiner, *Problems of Protection*, *supra* note 92, 237 at 239.

¹⁰⁷ Hathaway, *The Rights of Refugees*, *supra* note 53 at 964.

¹⁰⁸ UNHCR, “The Strategic Use of Resettlement” Discussion Paper by the Working Group on Resettlement, WGR/03/04.Rev4 (2003); online: <<http://www.unhcr.org/protect/PROTECTION/3ee6dc6f4.pdf>>.

of human rights following the Second World War and the recognized need for international burden-sharing that frames the creation of the 1951 Convention and the United Nations. However, the 1951 Convention is not recognized by the United Nations as a human rights document,¹⁰⁹ and UNHCR has traditionally sought to maintain a distance between itself and the promotion and protection of human rights.¹¹⁰ Burden-sharing experiences a more Sisyphean cycle of debate and its most recent recurrence in the form of the “strategic use” of resettlement will be examined for its repetitive tendencies and the consequences of its incentives to persuade states.

An Uncomfortable Union: Human Rights and Refugees

*The refugee problem is, very centrally, an issue of rights - of rights which have been violated and of rights, as set out in international law, which are to be respected...The challenges faced when refugees seek sanctuary are, in legal terms, challenges to the realization of human rights, which at the same time pose significant social and humanitarian dilemmas.*¹¹¹

*Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination.*¹¹²

While there is legitimate contention with the humanitarian justifications for the protection approach of the 1990s, there remains a sincere desire to attach a human rights approach to

¹⁰⁹ On its webpage “International Law Instruments Relating to Human Rights” the 1951 Refugee Convention is not listed as one of the nine “core international human rights treaties” but is noted as one of “many other universal instruments relating to human rights”; online: <<http://www2.ohchr.org/english/law/>>.

¹¹⁰ UNHCR, *UNHCR and Human Rights*, a policy paper resulting from deliberations in the Policy Committee on the basis of a paper prepared by the Division of International Protection (1997). The paper commences with the statement:

Extreme caution traditionally marked UNHCR’s approach to any suggestion that it should cooperate and collaborate with established mechanisms for the promotion and protection of general human rights principles. While being prepared to acknowledge its human rights origins, as well as the complementarity of refugee protection and human rights promotion, UNHCR nevertheless kept a deliberate distance from the proliferating and increasingly forceful UN mechanisms for monitoring and ensuring compliance with international human rights norms. Motivating this approach was the fear that greater activism would lead to politicisation of UNHCR activities which would compromise our capacity to work with our government counterparts.

¹¹¹ Erika Feller, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come” (2006) 18 *International Journal of Refugee Law* 509 at 518.

¹¹² *Canada v. Ward*, [1993] 2 S.C.R. 689 at 733.

refugee advocacy. The overt union of refugee protection and human rights is a relatively recent, and seemingly growing, trend. UNHCR began to recognize collaborative potential with human rights bodies in the 1990s.¹¹³ It has become increasingly commonplace for academics to situate their interpretation of the 1951 Convention and the refugee regime in a human rights framework.¹¹⁴ The benefit of a rights-based stance is that it adds a concrete assertion of legal obligation and accountability to refugee protection. It further adds dignity to the demand. There is an entitlement to rights. There is equality between the parties. Stuart Scheingold defines this as “the call of the law.”¹¹⁵ He suggests that the assertion of a right implies a legitimate and dignified reciprocal relationship that is societal and not personal.¹¹⁶ The current, alternative calls in refugee protection are for compassion, humanitarianism and morality.¹¹⁷ Such claims lack reciprocity and are founded on personal need. As Catherine Dauvergne explains: “A claim for compassion does not effectively function as a right because rights are grounded in equality but compassion is grounded in generosity and inequality.”¹¹⁸ So long as refugees seek only compassion they remain dependent, often invisible, outsiders in the realm between the persecuting and protecting countries.

¹¹³ UNHCR, *UNHCR and Human Rights*, *supra* note 110.

¹¹⁴ Hathaway, *The Rights of Refugees*, *supra* note 53; Feller, “Asylum, Migration and Refugee Protection” *supra* note 111; Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge; New York: Cambridge University Press, 2007); Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008); Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford: Oxford University Press, 2007).

¹¹⁵ Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (Ann Arbor: University of Michigan Press, 2004) at 39.

¹¹⁶ *Ibid.* at 58.

¹¹⁷ See Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004); Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005).

¹¹⁸ Dauvergne, *Humanitarianism, Identity, and Nation*, *ibid.* at 174

The human rights approach further renders the citizen/non-citizen assertion irrelevant.¹¹⁹ A universalism is attached to the human rights as opposed to the specified refugee rights argument. While the invocation of these rights for refugees makes absolute sense, it seems to simultaneously deteriorate the demarcating line of refugee status. On what basis could refugees claim such specialized status within a *human* rights regime? Emma Haddad points to the irreconcilability of the regimes: “whereas the human rights regime aspires to a solidarist world beyond the nation-state, the refugee regime rethinks the state as the ‘solution’ to the ‘problem.’”¹²⁰ Asylum through *non-refoulement* and each durable solution presents the embrace of a state, be it home or host, as the resolution of refugeehood. The universalism of the human rights approach thus leads to challenges of the refugee definition and the out of country requirement.¹²¹ This can be seen in UNHCR’s gradual and uncomfortable embrace within its mandate of internally displaced people (IDPs) who have not crossed an international border and are not refugees.

As will be examined in detail in Chapter 3, Canada’s protection scheme exemplifies just such an expansion. With its *Immigration and Refugee Protection Act (IRPA)* Canada’s protected persons class now includes those beyond the refugee definition and specifically references the *Convention Against Torture*.¹²² In the U.S., and previously in Canada, there is the potential to designate source country states for in-country processing of claims.¹²³

¹¹⁹ Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed., 2007) at 448.

¹²⁰ Haddad, *The Refugee in International Society*, supra note 114 at 88.

¹²¹ Aleinikoff, “State-Centered Refugee Law” supra note 64 at 264.

¹²² *Immigration and Refugee Protection Act*, S.C. 2001 c. 27. [IRPA] at s.97.

¹²³ Judith Kumin, “In-Country ‘Refugee’ Processing Arrangements: A Humanitarian Alternative?” in Michael Jandl (ed.), *Innovative Concepts for Alternative Migration Policies* (Amsterdam: Amsterdam University Press, 2007) 79.

The traditional refugee definition, however, still stands alongside these broader interpretations in both countries.

At the time when human rights were beginning to gain momentum in discussions of refugee protection, there was speculation that refugee law would be lost in the merger.¹²⁴ Indeed Hathaway advocated such a melding in his first proposal to reconceive refugee law as human rights protection:

Fear of persecution by reason of one's civil or political status (i.e. the enumerated grounds in the Refugee Convention...) is simply not an adequate definitional standard to embrace all those who require protection because they have been coerced to migrate. If the new systemic human rights focus of refugee law is to strive for solutions to the causes of all forms of coercive migration, it follows that all those forced to migrate should similarly be entitled to interim protection.¹²⁵

Hathaway perceived that bringing human rights law into refugee law benefited not only the refugee regime but would also address an “inadequacy” of human rights law. While broader in coverage, the inadequacy of human rights lies in the practical challenge of attainment. Both refugee law and human rights law possess something the other desires. Refugee advocates desire the broader expanse of a human rights interpretation of applicability. Human rights advocates desire the definitive status attached to those who meet the refugee definition.

Jane McAdam suggests status is the “‘primary’ feature of the Convention.”¹²⁶ Beginning with the establishment of refugee law as part of international human rights law, she examines the duties states owe to people under other human rights law instruments which complement the duties under the 1951 Convention. The distinguishing factor in the 1951

¹²⁴ Aleinikoff, “State-Centered Refugee Law” *supra* note 64 at 264.

¹²⁵ Hathaway, “Reconceiving Refugee Law” *supra* note 68 at 120.

¹²⁶ McAdam, *Complementary Protection*, *supra* note 114 at 15.

Convention obligation of *non-refoulement*, she argues, is the attaching refugee status.¹²⁷ Given that the basis of the protection need, *non-refoulement*, is the same, McAdam suggests that the 1951 Convention should be read as “specialist law” and its provision of legal status be read to extend to all those in need of international protection. The difficulty is that her focus on the “status” the Convention creates for refugees fails to recognize the constraints that prevent refugees from obtaining this status. The reality is that status is consequently meaningless for many of those to whom it currently applies. Expansion may thus risk more than it offers. Broader application of lesser and non-treaty rights offers increased protection to neither refugees nor other victims of human rights abuse.

While advocating for a complete reorientation of the regime,¹²⁸ Hathaway also provides a detailed interpretation of the rights currently set out in the 1951 Convention.¹²⁹ In his analysis of refugee rights, he interprets the rights set out in the 1951 Convention through (near) universally applicable international human rights as established in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* (as opposed to other regional and specialized norms).¹³⁰ In so doing, he counters reliance on generic human rights law and “affirm[s] the importance of refugee-specific rights.”¹³¹ The desire is to maintain the core of the 1951 Convention for the fear that stretching of the Convention will eventually cause it to snap.

The existing applications of human rights both point to and help assess the shifts in resettlement models that embrace a human rights oriented definition of those included in

¹²⁷ *Ibid.* at 267.

¹²⁸ Hathaway, “Reconceiving Refugee Law” *supra* note 68.

¹²⁹ Hathaway, *The Rights of Refugees*, *supra* note 53.

¹³⁰ *Ibid.* at 8.

¹³¹ *Ibid.* at 13.

their schemes. Both group resettlement and source-country processing shift away from the refugee definition in their protection offerings. David Martin has warned:

...by opening up a prospect of extensive new legal obligations, such claims risk undermining the political support – already threatened in a time when Western nations are receiving unprecedented numbers in direct asylum applications – that is essential if even Treaty commitments are to retain vitality. Moreover, to assert that an expanded UNHCR mandate entails an expansion in the direct legal obligations of states is to create incentives for shrinking the mandate.¹³²

One question to be explored in the dissertation is thus whether these resettlement models expand or shrink the protection mandate.

Bearing and Sharing the Burden

*The bottom line is that international law does not require any state to resettle anyone.*¹³³

*We are extremely unlikely in this new century to find the United States or any other country willing to make an open-ended commitment to resettlement of virtually all who escape a designated nation.*¹³⁴

At this point in the analysis, certain realities come into focus. Resolution of refugee status occurs through the two arms of UNHCR's mandate: protection and solution. Protection is considered to occur through the provision of asylum and the monitoring of state compliance with the legal obligations of the 1951 Convention. Solutions encompass the negotiation of local integration, voluntary repatriation and third-country resettlement. UNHCR's movement from protection to durable solutions therefore requires a shift from one arm to the other. The impossibility of this task is evident in the numerical reality of protraction. While theoretically the two arms of protection and solution embrace the refugee "problem," the reality is that the majority of the world's refugees slip through the fingers of this

¹³² David Martin, "Refugees and Migrants" in Christopher C. Joyner (ed.), *The United Nations and International Law* (Cambridge: Cambridge University Press, 1997) 155 at 176.

¹³³ Noll & van Selm, "Rediscovering Resettlement" *supra* note 102 at 13.

¹³⁴ David A. Martin, *The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement* (Washington, DC: Migration Policy Institute, 2005) at 8.

embrace and wait in limbo for resolution. Interestingly, the visual capturing of UNHCR's challenge can be seen in the agency's logo, which has two hands cupping over a person in a house-like shape. While the image is meant to convey protection, one can also easily picture the refugee either trapped or falling through the space between the hands.¹³⁵

Figure 1: UNHCR Logo



While the protection responsibilities of asylum are supported by an obligatory legal basis, durable solutions depend on voluntary burden-sharing among states to establish the refugee in a new state or resolution of the fear of persecution and return to the home state. Protection simply does not automatically lead to solution. Alexander Betts and Jean-François Durieux suggest the gap between the structure of asylum and that of burden-sharing indicates the “half-complete” reality of the refugee regime.¹³⁶ Increased state participation through “burden” or “responsibility”¹³⁷ sharing is commonly invoked as necessary for UNHCR to meet its solution responsibilities.

¹³⁵ In 2010, UNHCR submitted a request for proposals for its brand development. UNHCR, “Request for Proposal for UNHCR’s Brand Development” RFP/2010/384 (28 May 2010).

¹³⁶ Betts & Durieux, *Convention Plus as a Norm-Setting Exercise*, *supra* note 97 at 510.

¹³⁷ The choice of terminology tends to be interchangeable although each term is indeed loaded. There are those who suggest the term “burden” should be discarded and replaced with “responsibility” so as to combat the negative meaning of the word “burden.” Others distinguish between the terms to clarify whether physical or financial sharing is discussed or use both terms to cover all aspects. Hathaway and Neve made this

In its broadest sense, burden-sharing refers to the shared responsibility the international community bears for refugees. Gregor Noll divides burden-sharing into three schemes:

1. Sharing the burden of preventing and resolving refugee crises.
2. Sharing the burden of preventing and deflecting arrivals.
3. Sharing the burden of reception.¹³⁸

The first burden encompasses preventative protection¹³⁹ and peace-keeping initiatives. Preventing arrivals reflects policies of containment and involves visa requirements, interception of unauthorized arrivals and carrier sanctions, all of which may involve unilateral state action¹⁴⁰ or inter-state coordination. States may also cooperate to control flows through safe third country agreements.¹⁴¹ Noll subdivides the burden of reception into three further categories:

- a) Harmonizing refugee and asylum legislation (sharing norms).
- b) Reallocating funds (sharing money).
- c) Distributing protection seekers (sharing people).¹⁴²

Noll suggests that the sharing of people through reception is appealing to states: “From a state perspective, the attraction of people sharing lies in the redistribution of the perceived

distinction between these terms: “to provide safe and humane protection to the refugees (responsibility sharing) and how to apportion the fiscal costs of meeting protection needs (burden-sharing)” James C. Hathaway & Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection” (1997) 10 *Harvard Human Rights Journal* 115 at 45. Despite the negative connotation of describing refugees as a burden, this term will be primarily used in the dissertation as it more accurately reflects the view states take of their refugee responsibilities.

¹³⁸ Gregor Noll, “Protection in a Spirit of Solidarity” in Rosemary Byrne, et al. (eds.), *New Asylum Countries?: Migration Control and Refugee Protection in an Enlarged European Union* (The Hague; London: Kluwer Law International, 2002), 305 at 308.

¹³⁹ See UNHCR, “Report of the UNHCR Working Group on International Protection” (Geneva: 1992).

¹⁴⁰ See Savitri Taylor on whether states violate their *non-refoulement* obligations when they intercept individuals without valid entry authorization in overseas airports. Savitri Taylor, “Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?” in Jane McAdam (ed.), *Forced Migration, Human Rights and Security* (Oxford; Portland: Hart, 2008).

¹⁴¹ For example, see *Canada-U.S. Safe Third Country Agreement*, 5 December 2002, online: <<http://www.cic.gc.ca/english/policy/safe-third.html>>.

¹⁴² Noll, “Protection in a Spirit of Solidarity” *supra* note 138 at 308.

source of all conceivable costs linked to reception, be they fiscal, social or political.”¹⁴³

The long-term implications, however, are much greater for the state to receive refugees and offer them citizenship in comparison to the containment consequence of sharing the burden of preventing and resolving the refugee crises and sharing the burden of preventing and deflecting arrivals.

Noll’s analysis does however point to the attractiveness of resettlement when the primary prevention techniques of burden-sharing fail and sharing of people is required. The predictability and planning of reception is particularly true of resettlement where reception is completely within the control of the state. Not only the costs, but the refugee herself and the method of her arrival is known. As will be seen in Chapter 3, the Canadian government has demonstrated a clear preference for controlled resettlement over the unknown arrival of asylum seekers in the country.

The alternative to sharing of people is the sharing of costs – transferring funds to another state to bear the burden of hosting the refugees. Japan, for instance, makes financial compensations as a top donor state in acknowledgement of its low intake.¹⁴⁴ The European Refugee Fund (ERF) provides financial assistance to member states on the basis of the number of persons receiving international protection. In September 2009, the European Commission proposed the establishment of a Joint EU Resettlement Programme. Member States who resettle according to the common EU annual priorities would receive additional

¹⁴³ *Ibid.* at 314.

¹⁴⁴ The government of Japan also established a resettlement pilot project in December 2008, the first of its kind in Asia. UNHCR, “Japan to Start a Pilot Resettlement Programme” Briefing Notes (19 December 2008); online: <<http://www.unhcr.org/494b7e3011.html>>.

financial assistance of 4.000 Euros per resettled person from the European Refugee Fund.¹⁴⁵

The EU proposal reflects a willingness of states to engage in regional burden-sharing. Regional burden-sharing is seen as more realistically attractive to states as it is more contained, controllable and likely to achieve consensus.¹⁴⁶ Earlier regional agreements such as the 1969 Organization of African Unity Convention and the 1984 Cartagena Declaration have been hailed for harmonizing standards and providing a targeted regional response. While regional models may be more realistic, they may not be more desirable. The counter to the argument for regional burden-sharing agreements is tied to the reality of the location of refugee flows and the disproportionate burdens that arise in such a scheme. Stephen Castles argues that the focus in regional agreements is exclusion.¹⁴⁷ Gibney makes the accusation of Western states' "engineered regionalism" to achieve containment.¹⁴⁸ By this, he means the current regionalization of asylum is "engineered" by Western states through deterrent and preventative asylum measures.

The critique here moves beyond a rejection of regionalism to argue for the necessity of global burden-sharing. The difficulty is that refugee flows are geographically located and globally unbalanced. Returning to the gap between protection and solution, dependence on asylum does not achieve equal distribution. Gibney advocates for the need for a global

¹⁴⁵ European Refugee Fund, Decision No 573/2007/EC of the European Parliament and of the Council (23 May 2007) and COM(2009) final amending Decision No 573/2007/EC 2009/0127(COD); online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0456:FIN:EN:PDF>>.

¹⁴⁶ Noll, "Protection in a Spirit of Solidarity" *supra* note 138 at 308.

¹⁴⁷ Stephen Castles, "The Migration-Asylum Nexus and Regional Approaches" in Susan Kneebone & Felicity Rawlings-Sanei (eds.), *New Regionalism and Asylum Seekers* (Oxford: Berghahn Books, 2007) 25 at 40

¹⁴⁸ Matthew J. Gibney, "Forced Migration, Engineered Regionalism" *supra* note 77 at 58, 63. See also Gibney, *The Ethics and Politics of Asylum*, *supra* note 117 on "tyranny of geography" which refers to unregulated regionalism.

regime: “The *non-refoulement* principle distributes state responsibility for refugees almost entirely on the basis of proximity....inequity seems virtually guaranteed by it.”¹⁴⁹

Because voluntary resettlement has traditionally drawn the interest of only a handful of countries, more specific proposals to share burdens have gained both currency and criticism. Hathaway originally proposed a burden-sharing scheme in 1991 as a supplement to the human rights based repatriation re-orientation of the refugee regime. His reform was founded on the need to remedy the lack of obligation in international protection. He proposed the realization of inter-state obligation through “a binding regime of international burden-sharing.”¹⁵⁰ State inducements toward this more expansive model would be created through “a consensual dynamic” in which “no state would be compelled to enter into any arrangement not reconcilable to its own sense of self-interest.”¹⁵¹ This consensual dynamic would be achieved through the creation of an “international supervisory organization,” a system of sharing based on each state’s resources and absorptive capacity and the ability to “assume part of another state’s asylum quota in return for cash or development assistance on such terms as might be mutually agreeable, subject to approval by the supervisory agency.”¹⁵²

Hathaway’s proposal broadened into a research project with Alexander Neve that spanned six years and brought together international refugee law scholars and created North-South teams of experts to generate empirical evidence. The resulting reports led to further international consultations with resulting support for global reform through “solution-

¹⁴⁹ Gibney, “Forced Migration, Engineered Regionalism” *supra* note 77 at 67.

¹⁵⁰ Hathaway, “Reconceiving Refugee Law” *supra* note 68 at 120.

¹⁵¹ *Ibid.* at 127.

¹⁵² *Ibid.* at 127.

oriented temporary protection.”¹⁵³ The breakdown of refugee law was attributed to two shortcomings: “the absence of a meaningful solution orientation and the problem of individuated state responsibility.”¹⁵⁴ The authors envision “interest-convergence groups” (ICGs) involving “systematic and ongoing sharing within associations of states.”¹⁵⁵ They propose a balance between granting physical asylum and providing financial support through “common but differentiated responsibility.”¹⁵⁶ The ICGs would operate like insurance schemes with advance agreement on contributions through temporary protection, resettlement where temporary protection is insufficient, financial support, or a combination of these contributions. Essentially states of the South are convinced to host refugees by the provision of financial support and the assurance the protection is temporary.

Peter Schuck came out with a proposal that parallels the Hathaway and Neve model in its combined approach of temporary protection and permanent resettlement. His model differs in its greater focus on allocation and lesser concern with durable solutions. While Schuck recognizes four means of addressing refugee flow: root causes, repatriation, temporary protection and resettlement, he suggests the latter two are strategies of last, but too often, only resort.¹⁵⁷ Schuck proposes an international agency that would “calculate a worldwide total of refugees who need temporary protection and a total of those who need permanent resettlement, and then allocate those totals among participating states by assigning a quota to each.”¹⁵⁸ The allocation would create a system within groups of states (regional and

¹⁵³ Hathaway & Neve, “Making International Refugee Law Relevant Again” *supra* note 137 at 115.

¹⁵⁴ *Ibid.* at 137.

¹⁵⁵ *Ibid.* at 143.

¹⁵⁶ *Ibid.* at 143.

¹⁵⁷ Peter H. Schuck, “Refugee Burden-Sharing: A Modest Proposal” in Peter H. Schuck (ed.), *Citizens, Strangers, and in-between: Essays on Immigration and Citizenship* (Colorado: Westview Press, 1998), 281 at 293.

¹⁵⁸ *Ibid.* at 308.

similar to ICGs) in which quotas could be traded and physical asylum obligations bought and sold.

Noll has noted that burden-sharing “hinges on the establishment of a distributive key.”¹⁵⁹ Schuck’s proposal suggests that allocation be based on a market-based process. Hathaway and Neve review other allocation proposals that include looking at both gross national product (GNP) and population but with greater weight attached to GNP than population; and a land mass equation proposed by Chimni in which all states that are 20,000 square kilometers or more agree to take the same number of refugees with an adjustment for total land mass and population density and with a numerical ceiling.¹⁶⁰ Hathaway and Neve argue these models are misplaced and present a four-part approach that considers 1) physical security, 2) functional compatibility between refugees and host communities, 3) cultural harmony, and 4) geographical proximity to country of origin.¹⁶¹ The authors’ acknowledged consequence of this distribution is that refugees will remain in their regions of origin. They suggest that other states “would more often contribute by a combination of fiscal transfers and residual resettlement opportunities.”¹⁶² The suggestion is that the proposal would appeal to the South as it adds equity and Northern participation in the protection, and would appeal to the North due to linked issue incentives tied to manageability, security and economic interests.

There is an appeal to the burden-sharing regimes proposed by these authors. In a failing regime where protection is not being effected, the authors offer specific proposals to create

¹⁵⁹ Noll, “Protection in a Spirit of Solidarity” *supra* note 138 at 314.

¹⁶⁰ Hathaway & Neve, “Making International Refugee Law Relevant Again” *supra* note 137 at 203-204.

¹⁶¹ *Ibid.* at 204.

¹⁶² *Ibid.* at 205. The model is an example of the tendency to tack on resettlement with little examination or analysis.

increased obligations and reach solutions. In a direct reply to both the Hathaway and Neve proposal and the Schuck proposal, Deborah Anker, Joan Fitzpatrick and Andrew Shacknove critique the proposals on the basis of three major failings: 1) failure to identify the crucial defects in the current system; 2) no realistic chance of implementation; and 3) de-emphasis on existing protection responsibilities which risks aggravating protection failures.¹⁶³ The authors argue that the “context in which refugee crises of various origins unfold is too complex and unpredictable for one over-arching structural cure,”¹⁶⁴ and not a result of individualized determinations as Hathaway and Neve argue. They challenge the presumption in the proposals of the extent of state dominance in asylum issues and query how, with even a lesser degree of state influence, the state-based solutions are plausible: “Neither proposal appears to us to offer sufficient incentives to over-come states’ resistance to meaningful and binding burden-sharing obligations, particularly those that are forward-looking.”¹⁶⁵ The idea of temporary protection is further challenged by the reality that situations are increasingly protracted and Anker, Fitzpatrick and Shacknove suspect that resettlement numbers would likely be much higher than the proposals acknowledge.¹⁶⁶ They take issue with both proposals’ “commodification” and see the models as moving the issue from the realm of law to the realm of political bargaining.¹⁶⁷ Their “alternatives” reinforce the law and are centered on “rigorous respect for *non-refoulement*,”¹⁶⁸ the continual pressing of states to honour their 1951 Convention and human rights commitments, closer coordination between the refugee regime and human rights

¹⁶³ Deborah Anker, et al., “Crisis and Cure: A Reply to Hathaway/Neve and Schuck” (1998) 11 *Harvard Human Rights Journal* 295 at 296; see also Daniel Warner & James Hathaway, “Refugee Law and Human Rights: Warner and Hathaway in Debate” (1992) 5 *Journal of Refugee Studies* 162.

¹⁶⁴ Anker, et al., “Crisis and Cure” *ibid.* at 297

¹⁶⁵ Anker, et al., “Crisis and Cure” *ibid.* at 300.

¹⁶⁶ Anker, et al., “Crisis and Cure” *ibid.* at 302.

¹⁶⁷ Anker, et al., “Crisis and Cure” *ibid.* at 305-306.

¹⁶⁸ Anker, et al., “Crisis and Cure” *ibid.* at 308.

organizations, enhanced independence, professionalism and institutional capacity of UNHCR as well as a more secure and independent financial basis for the agency.¹⁶⁹ Essentially it is a call for solidarity and internationalism.¹⁷⁰

While somewhat specific, the alternatives lack any practical incentives for the reform they propose and serve only to highlight the realities that led Hathaway, Neve and Schuck along their radical paths. Schuck's "Response to the Critics" accurately, I would argue, suggests their list of alternatives "is simply a repetition of the familiar pieties and exhortations for states to be better than they are and for scholars to remind them *ad nauseam* of their obligations."¹⁷¹ Schuck is frustrated by the critique that his proposal is not viable alongside state sovereignty. He argues: "The whole point of my article – and the value of my approach – is to see how improved refugee protection might be achieved within this enormous but inescapable constraint."¹⁷² He considers the internationalist approach "woefully unrealistic"¹⁷³ and retorts that "Simply wishing sovereignty away, as Anker *et al.* do, is a familiar theme today but it adds nothing to the difficult quest for practical solutions."¹⁷⁴ The force of law, both international law pushing for obligations and state sovereignty pushing against obligations move the discourse away from legal arguments to practical political bargaining.

Gibney throws himself into this reform debate in an attempt to navigate to a practical yet ethical resolution. He identifies an "ethical stalemate":

¹⁶⁹ Anker, et al., "Crisis and Cure" *ibid.* at 309.

¹⁷⁰ Chimni, *The Geopolitics of Refugee Studies*, *supra* note 60 at 369.

¹⁷¹ Peter H. Schuck, "A Response to the Critics" (1999) 12 *Harvard Human Rights Journal* 385 at 387.

¹⁷² *Ibid.* at 385.

¹⁷³ *Ibid.* at 385.

¹⁷⁴ *Ibid.* at 386.

Most people accept that engineered regionalism leads to an unjust distribution of the refugee burden between states. But it appears that measures to relieve this state of affairs create new forms of injustice. This suggests that there is a conflict here between the requirements of justice to refugees and justice amongst states.¹⁷⁵

Gibney breaks down the proposals into three central objections: a) burden-sharing arrangements corrupt asylum by putting a price on something that is priceless; b) burden-sharing arrangements deny refugee agency by not respecting a refugee's choice of where to seek asylum; and c) burden-sharing arrangements demean refugees by treating refugees as if they possess negative value.¹⁷⁶ The first objection is rejected on the basis that allocation only offers a determination of "where" asylum is to be provided and does not put a price on the idea of asylum itself. The second objection is dismissed based on its underlying assumption that refugees have the right to choose their country of asylum but this does not seem "an inextricable part of the idea of refugee protection."¹⁷⁷ With the third model, a rough sketch of Schuck's proposal, Gibney is unable to offer a counter to the objection. He views the model as illustrating "a genuine conflict between the demands of justice amongst states and justice to refugees."¹⁷⁸

Gibney distinguishes the concern with demeaning the refugee from the compensation critique because in compensation schemes, money is being exchanged but not refugees and the payment does not reflect a subjective view of refugees as bad or a cost but simply an objective recognition of the costs associated with accepting refugees. As neither state is attempting to rid itself of refugees, the "powerful sense of rejection is thus absent."¹⁷⁹

¹⁷⁵ Gibney, "Forced Migration, Engineered Regionalism" *supra* note 77 at 69.

¹⁷⁶ *Ibid.* at 69-70.

¹⁷⁷ *Ibid.* at 71.

¹⁷⁸ *Ibid.* at 73.

¹⁷⁹ *Ibid.* at 74.

Gibney's objection to trading schemes goes beyond the individual detriment to the refugee and expands to a concern for the asylum regime:

Market systems for determining where a refugee will find protection exist...because of an axiom that the existence of asylum is of value. But demeaning refugees – treating them like toxic waste – reinforces a view of refugees as unworthy of respect. In the long-term the dehumanization of the refugee seems likely to result in the erosion of support for this axiom. The benefits in terms of more efficient provision of asylum offered by a market based response are thus likely to be short-term.¹⁸⁰

The warning is that ultimately a market solution to promote burden-sharing will remove the underlying recognition that refugees are an international responsibility and burden to be borne.

This risk of erosion points again to the risk of losing support for refugee protection implicit in the human rights arguments. And yet, this argument sits opposite to the rights argument. By placing refugees into a human rights regime, the rights are embedded into the refugee. The refugee becomes a universalized human. Commodification achieves the reverse and the refugee is dehumanized. With the burden-sharing regime the refugee is reduced from a rights bearing body to a numeric quota. Whereas the risk with rights enhancement was stretching the application to a snapping point, here the risk is the reduction of the refugee into a meaningless entity. Obligation risks erasure by either expansion or contraction.

Gibney's justice model does permit burden-sharing by physical and financial means and does not challenge the goal behind the Hathaway/Neve and Schuck proposals of establishing incentives to states. The incentives model is at the basis of recent attempts to remedy the failings of the refugee regime that leaves too many refugees in protracted states of limbo. Former UNHCR High Commissioner Ruud Lubbers did directly acknowledge

¹⁸⁰ Gibney, *The Ethics and Politics of Asylum*, *supra* note 117 at 73.

that while the “1951 Refugee Convention remains the cornerstone of the international refugee protection regime,...it alone does not suffice.”¹⁸¹ And to an extent, under his leadership, an addition to the 1951 Convention was envisioned in the concept of “Convention Plus.” The *Agenda for Protection*, arising out of the Global Consultations on the 1951 Convention’s 50th anniversary in 2001 and addressing the increasing challenges to the Convention’s relevance, introduced the notion of Convention Plus in 2002. Two key inter-related components of the “plus” are improved burden-sharing and increased resettlement. The initiative was premised on a reorientation of the refugee regime to create a normative framework for global burden-sharing. A Convention Plus unit was based at UNHCR’s headquarters in Geneva and operated until December 2005 when it was mainstreamed into the headquarters’ structure.

In many ways, this most recent, and seemingly strategic turn was toward linking refugee issues¹⁸² with other concerns, and a particular focus on security. While recognizing the failure of Convention Plus to achieve the type of soft law agreements envisaged at the outset, Betts and Durieux extract procedural and conceptual ideas concerning UNHCR’s role in norm-creation from the initiative. They present two conceptual models or “ideal types” of norm creation employed by UNHCR during Convention Plus: a top-down institutional bargaining model and a bottom up good practices model. The institutional bargaining model involves three functions that lead to norm creation: 1) direct appeals to state interests, 2) issue-linkages to channel interests into commitments, and 3) agreement formulation on the basis of interest convergences. The focus in Convention Plus on state-

¹⁸¹ UNHCR, *Agenda for Protection*, A/AC. 96/965/Add. 1, General Assembly, Executive Committee of the High Commissioner’s Programme (26 June 2002) 3rd ed., (October 2003) at 6.

¹⁸² Betts & Durieux, *Convention Plus as a Norm-Setting Exercise*, *supra* note 97.

specific concerns is seen by Betts and Durieux as marking UNHCR's "conceptual reorientation away from appeals to ethical or humanitarian imperatives."¹⁸³ The idea instead is to draw linkages between the protection of refugees and state interests and thereby create incentives for states to participate in protection. Convention Plus, they illustrate, drew linkages in migration, security and development. As such, Convention Plus points to another turn in the history of the refugee regime - the abandonment of humanitarian rhetoric and a focus on state enticements. Gil Loescher and James Milner argue the reorientation is a practical necessity: "actions by humanitarian agencies, such as UNHCR, without the support of peace and security actors, such as the UN Security Council, will not lead to truly comprehensive solutions. So long as discussions on protracted refugee situations remain exclusively within the humanitarian community, and do not engage the broader security and development communities, their impact will be limited."¹⁸⁴ Their proposed comprehensive solution incorporates increased development assistance; self-reliance; support for local integration; the strategic use of resettlement; and repatriation with the additional focus on security. As such, it eerily resembles the 1990s shift to maintenance and repatriation.

Erica Feller, UNHCR's Assistant High Commissioner of Protection, has recently offered her own version of issue-linkages. She notes: "refugee issues have to be repositioned more positively in the evolving thinking and migration programmes of States."¹⁸⁵ And indeed, she sees scope for creative negotiation and repositioning. In a statement that appears

¹⁸³ *Ibid.* at 522.

¹⁸⁴ Loescher & Milner, *Protracted Refugee Situations*, *supra* note 12 at 77.

¹⁸⁵ Feller, "Asylum, Migration and Refugee Protection" *supra* note 111 at 518.

reminiscent of earlier agreements negotiated by the first High Commissioner Nansen with the International Labour Organization in the 1920s, Feller suggests:

Host States need to be encouraged to appreciate more directly the potential of refugees as a positive factor able to contribute to their development, not only as a recipient of aid and a long term liability. As a labour and social affairs orientation to migration comes into better balance with interior ministry concerns in developed countries, there is clearly scope to bring them to see refugee issues also from that optic. There may, for example, be the possibility of additional avenues for resettlement for refugees who possess the sought after migration profile. Refugees who also possess the sought after migration profile could potentially find themselves able to use alternative labour migration possibilities.¹⁸⁶

It seems that rather than moving away from state-centered approaches, this latest turn embraces them most openly.

Engaging in a discussion on the challenges of the refugee regime and burden-sharing reform options, and in particular reviewing the evolution of this discussion, one is left feeling like a post-modern Sisyphus. Reform proposals are painstakingly pushed up the hill only to roll back down upon rejection until they are reformulated into the rhetoric of a different boulder and pushed back up. States appear to change in their approaches to refugees, but arguably it is the refugee realities that change and states merely alter their approaches so as to remain consistently focused on their own interests.

The reality is that little appears to actually change and refugee numbers continue to grow. The consequences of Convention Plus have been minimal. Out of the three issues considered under the initiative, targeting development assistance, irregular secondary movements, and the strategic use of resettlement, the resettlement strand, led by Canada, produced the only output that even approached the envisioned special agreements. The

¹⁸⁶ *Ibid.* at 517.

resulting *Multilateral Framework of Understandings on Resettlement* (MFU)¹⁸⁷ is the closest the international community has come to generalized agreement on resettlement and arguably on burden-sharing. Yet, the MFU explicitly notes in its second paragraph that the understandings are “not legally binding.”¹⁸⁸ Further, in adopting the terms of reference, it was made clear that participation in the core group is not taken to mean a willingness to participate in situation-specific agreements.¹⁸⁹ For the most part, concepts of burden-sharing float ethereally in states’ consciousnesses but fail to materialize. State responses remain *ad hoc* and discretionary. They are not legally binding.

Global Leadership

*The overwhelming majority of long-term refugees could be eligible for resettlement, but a lack of resettlement opportunities, of resettlement staff to prepare submissions, and inefficiencies in the process of preparing and submitting resettlement cases have resulted in the under-utilisation of this durable solution.*¹⁹⁰

While globalized burden-sharing remains in the realm of the ideal, some have pointed to the need for greater global coordination on the issue. Most suggestions involve an increased facilitating role for UNHCR. There are calls for a “coherent global system”, “transparent programme” and consistently applied criteria.¹⁹¹

Many point to the institutional and bureaucratic restraints that have hindered UNHCR resettlement in the past. Because of its narrow application, resettlement has lacked the

¹⁸⁷ High Commissioner’s Forum, “Multilateral Framework of Understandings on Resettlement” FORUM/2004/6, 16 September 2004; online: <<http://www.unhcr.org/doclist/protect/408d17494.html>>.

¹⁸⁸ *Ibid.* at para. 2.

¹⁸⁹ Informal Record, “Meeting of the Convention Plus Core Group on the Strategic Use of Resettlement” Geneva, FORUM/CG/RES/05, 24 November 2003, at para. 4; online: <<http://www.unhcr.org/doclist/protect/408d17494.html>>.

¹⁹⁰ Loescher & Milner, *Protracted Refugee Situations*, *supra* note 12 at 74-75.

¹⁹¹ Fredriksson, “Reinvigorating Resettlement” *supra* note 103 at 30; Noll & van Selm, “Rediscovering Resettlement” *supra* note 103; Refugee Council of Australia, “Australia’s Refugee and Humanitarian Program: Community Views on Current Challenges and Future Directions” 2009 Intake Submission (2009).

support, resources and staff to effectively process referrals.¹⁹² Responsibility does not rest on UNHCR alone. The process requires state coordination and cooperation with states often demanding more from UNHCR than it was capable of and a combination of hubris, blindness and dependency preventing UNHCR from admitting its lack of capacity.¹⁹³ There tends to be an imbalance between expectations and ability in resettlement arrangements between UNHCR and states. Reform requires recognition and action by both sides.

One means of achieving greater balance is to increase efficiencies in the referral and selection process through UNHCR led coordination. Roundtable discussions in the US and EU identified the need for an evolving dialogue among states on joint protection criterion, a unified referral system, the creation of either a shared priority system or conscious specialization by individual countries, and delegation of lead states.¹⁹⁴ The Refugee Council of Australia (RCOA) similarly notes: “The Australian Government has advocated successfully for a stronger Resettlement Service within UNHCR as part of a strategy to give resettlement a higher priority. Greater international support is now required for resettlement both in terms of places made available and the improved coordination of international efforts.”¹⁹⁵ Michael Casasola, a Canadian-based UNHCR resettlement officer has also suggested “Contact groups” to increase efficiency, common medical exams and shared processing among the three largest resettlement programs to prevent dual processing

¹⁹² Troeller, “UNHCR Resettlement” *supra* note 55 at 89; Loescher & Milner, *Protracted Refugee Situations*, *supra* note 12 at 74-75.

¹⁹³ Verdirame & Harrell-Bond, *Rights in Exile*, *supra* note 75 at 295; Troeller, “UNHCR Resettlement” *supra* note 55 at 94.

¹⁹⁴ Noll & van Selm, “Rediscovering Resettlement” *supra* note 103 at 17.

¹⁹⁵ Refugee Council of Australia, “Australia’s Refugee and Humanitarian Program” *supra* note 191 at 4.

and ensure appropriate prioritization of referrals.¹⁹⁶ The desire for a coherent global system, at least in terms of a “minimum common denominator of global relevance”¹⁹⁷ is thus being expressed in the three largest resettlement states as well as Europe where openness to resettlement is slowly growing with the EU proposal.

UNHCR has also devoted significant focus to its resettlement process in the past few years. In 2006, UNHCR’s Resettlement Section was upgraded into a “Service” with “key functions” that include the provision of “policy and procedural guidance, monitoring field operations and Regional Resettlement Hubs, analyzing trends to inform strategic directions, managing global resettlement delivery, and representing both the external face and internal dimension of UNHCR resettlement.”¹⁹⁸ The results are quantifiable. Contrary to past criticisms that UNHCR referrals were inadequate to meet state quotas, UNHCR’s year 2007 outcomes reveal an 83% increase in resettlement referrals from the year prior and the first time in two decades that UNHCR’s referrals exceeded the global capacity of resettlement countries (about 70,000 persons).¹⁹⁹ As already noted, the 2009 resettlement numbers hit a 16 year high.²⁰⁰ In 2010, revision of the Resettlement Handbook, which sets out resettlement policy and practice, was commenced through a Canadian consultant²⁰¹ and was completed in 2011.²⁰² While these initiatives reflect a much needed reform of UNHCR’s resettlement program, and a conquering of past “institutional reticence towards

¹⁹⁶ Casasola, “Current Trends and New Challenges” *supra* note 18 at 82.

¹⁹⁷ Noll & van Selm, “Rediscovering Resettlement” *supra* note 103 at 17.

¹⁹⁸ UNHCR, “Refugee Resettlement: Performance Outcomes 2007 and Global Projections 2009” (30 June 2008) at 7.

¹⁹⁹ *Ibid.* at 8.

²⁰⁰ UNHCR, “2009 Global Trends” *supra* note 11 at 12.

²⁰¹ UNHCR, “UNHCR Projected Global Resettlement Needs 2011” in Division of International Protection Resettlement Service (Geneva, 2010) at 13.

²⁰² UNHCR, “Resettlement Handbook” *supra* note 98.

resettlement”²⁰³ they are internally oriented. As such they will undoubtedly improve UNHCR’s resettlement delivery but it is less clear whether they will promote state co-operation, increased efficiencies on a more integrated program or overall increases in resettlement numbers. As Erika Feller stated in her 2010 address to the Executive Committee of the High Commissioner’s Programme: “We can capacitate, but we are never an effective substitute for the exercise by States of their own, and primary responsibilities to decide to whom and how they owe protection.”²⁰⁴

UNHCR’s yearly *Global Projections* report is its primary planning tool to assist resettlement states to determine their programmes.²⁰⁵ It is based on each office’s Country Operations Planning report and Annual Protection Report and includes both regional projection needs and processing capacities. Much of the document, however, is simply media reports on different refugee groups. As a tool it provides information but not guidance. Nor does the report itself encourage inter-state dialogue although it is shared at the Annual Tripartite Consultations on Resettlement (ATCR) which serves as a forum for UNHCR, resettlement states, NGOs and the International Organization for Migration to exchange information. UNHCR suggests that it promotes “global partnerships and cooperation on resettlement” through the ATCR as well as Indications Meetings, the Working Group on Resettlement and the encouragement of bilateral meetings between states.²⁰⁶ The ATCRs have occurred annually since 1995 and were formalized in 2001. At the 2010 ATCR the “10 of 100” Project was launched to highlight the gap between

²⁰³ Noll & van Selm, “Rediscovering Resettlement” *supra* note 102 at 18; see also Martin, *The United States Refugee Admissions Program*, *supra* note 134 at 8; Verdirame & Harrell-Bond, *Rights in Exile*, *supra* note 75 at 288.

²⁰⁴ Erika Feller, “Rule of Law 60 Years On” Statement, Sixty-first Session of the Executive Committee of the High Commissioner’s Programme, Agenda item 5(a) (6 October 2010) at 4.

²⁰⁵ UNHCR, “Performance Outcomes 2007 and Global Projections 2009” *supra* note 198 at 5.

²⁰⁶ *Ibid.* at 7.

resettlement numbers and resettlement need²⁰⁷ with the aim to increase resettlement numbers by 10 percent.²⁰⁸ Still though, the ATCRs do not appear to have significantly shifted resettlement from an individualized state process to a global structure. Nor do they equate to the type of UNHCR-led, global resettlement program advocated for above.

The MFU that arose out of Convention Plus has been hailed as a success in achieving global dialogue and consensus:

the strand involved a cross-section of resettlement and host states with divergent interests. Yet, those who represented the broad concerns of each group were able to reach compromise by working closely together, such that even a state such as Thailand, which following the Indo-Chinese CPA has been highly suspicious of resettlement, was left satisfied by the process.²⁰⁹

Satisfaction may be an over-statement as the same authors acknowledge the resulting MFU was “a modest and uncontroversial statement.”²¹⁰ The MFU considers none of the coordination issues identified by concerned states. Cooperation and consultation is set out in generalized terms²¹¹ and only general reference is made to maximizing efficiency by “pooling resources and expertise”²¹² and endeavoring to “avoid duplication of efforts by sharing information and resources.”²¹³ There is a need to push beyond these generalized statements of cooperation to actual cooperative measures. While taking the lead on such measures increases UNHCR’s responsibility, increased efficiency mechanisms would reduce time and resource demands, both financial and staff, and, in fact, lessen the demands

²⁰⁷ In 2010 less than 80,000 refugees were resettled globally while UNHCR estimated global resettlement need at over 800,000 including populations requiring resettlement over a period of years. UNHCR, “UNHCR Projected Global Resettlement Needs 2011” *supra* note 201 at 1.

²⁰⁸ Feller, “Rule of Law 60 Years On” *supra* note 204 at 2.

²⁰⁹ Betts & Durieux, *Convention Plus as a Norm-Setting Exercise*, *supra* note 97 at 519-520.

²¹⁰ *Ibid.* at 514.

²¹¹ High Commissioner’s Forum, “Multilateral Framework of Understanding on Resettlement” *supra* note 187 at para 11.

²¹² *Ibid.* at Part G.

²¹³ *Ibid.* at para 35.

the resettlement program puts on the agency. The success of the Resettlement Service already points in this direction. At the same time, coordination and efficiency that reduces the costs of resettlement would make the program more enticing to new resettlement states and potentially lead to the resettlement of increased numbers of refugees by those states already operating programs. While the dissertation will speak to state based programs, the resulting principles could guide the development of a more comprehensive global model for resettlement.

Where the Law Is

For several of the refugees, the refugee claim is experienced not as a legal process that gives them rights defined in international laws or humanitarian protection, but as ‘a refuge’, understood as a place where they can be protected.²¹⁴

The international legal basis for refugee protection derives from the 1951 Convention, the 1967 Protocol and UNHCR’s Statute. These international documents establish the legal definition of a refugee and accord the resulting refugee status. As the chapter has shown, however, there is a distinction between acquiring the international legal status as a Convention refugee and acquiring refuge. The distinction between status and achieving protection is what propels the desire to infuse the status with human rights and requires a broader voluntary scheme of burden-sharing in the search for durable solutions.

Resettlement, as a voluntary burden-sharing mechanism, is a response to the inability of law to accomplish absolute protection. While the Chapter has shown that resettlement historically preceded asylum as a protection mechanism, the legalization of asylum through the obligation of *non-refoulement* did not render resettlement unnecessary. Rather the two

²¹⁴ Pilar Riaño Alcalá, et al., *Forced Migration of Colombians: Colombia, Ecuador, Canada* (Colombia, Vancouver: Corporación Región (Spanish) School of Social Work, University of British Columbia (English), 2008) at 76.

are considered to play complementary roles in achieving protection through legal and voluntary means. Interestingly, pre-1951, durable solutions, and resettlement in particular, held a much stronger international legal position. The Nansen Passport gave refugees a legal identity and the 1938 Convention specifically addressed resettlement whereas *non-refoulement* was left unmentioned. Unlike the modern state-based structure, resettlement at the time existed within an international legal framework.

The shift that occurred in 1951 placing *non-refoulement* as the cornerstone of refugee protection, infused a much stronger legal obligation into international refugee protection. Arguably done in order to maintain state willingness to continue a voluntary resettlement program alongside *non-refoulement*, the shift fundamentally altered the orientation of resettlement. UNHCR, the new international refugee agency focused on asylum and resettlement became state centered. A dichotomy was thus created between *non-refoulement* and resettlement.

With the obligatory legal basis of *non-refoulement* holding states to international legal commitments in the second half of the twentieth century, an additional layer of legal rights, human rights, offered both support for and an escape from these obligations. The draw of the human rights argument is the perceived strengthening of legality and obligation tied to refugee status. Advocates are empowered with a stronger stick with which to coerce states to meet their obligations to refugees. At the same time, the juxtaposition of refugee rights and human rights brings out the failings in both. Human rights possess a broader blanket of protection than refugee rights but lack the provision of legal status that refugees possess. Nor does the right to status entail that status is attainable. For too many refugees waiting in camps with little hope of resettlement or repatriation, their refugee status is meaningless.

So the law fails, be it refugee law or human rights law, to guarantee adequate and permanent protection. It is limited by a lack of enforceability.²¹⁵ Given this lack of enforceability, rather than equipping advocates with a stronger arsenal of rights assertions, human rights arguments may in fact pose a risk to refugee protection. At a time when states appear to be looking to limit their 1951 Convention obligations, is it wise to suggest to them that these obligations carry a greater breadth than previously believed? Achievement of any level of enforceability of the 1951 Convention is dependent on already tenuous political support. Fusing these obligations with human rights risks compromising the mandate.

Human rights arguments further challenge the conception of refugee status as the universalism of the human rights assumptions contradicts the state-as-solution orientation of the refugee regime. The expansion of refugee law into human rights law loses sight of the refugee definition. This is where the risks to refugee law influence the voluntary side of refugee resettlement. While not a legal obligation, resettlement relies on the legal definition of a refugee to premise selection choices. As a state based mechanism, resettlement is of course not restricted to this definition and many countries' resettlement programs have indeed expanded their selection criteria to include broader human rights coverage. The challenges to resettlement are thus the same as the challenges to asylum: as coverage broadens does political support for protection weaken? Conversely though, if not weakened, it may be re-oriented.

²¹⁵ See Hathaway & Neve, "Making International Refugee Law Relevant Again" *supra* note 137 at 116 where Hathaway and Neve argue the goal of refugee law and all international law is not enforceability but rather "a mechanism by which governments agree to compromise their sovereign right to independent action in order to manage complexity, contain conflict, promote decency, or avoid catastrophe."

With *non-refoulement*, many states opt to expand their recognition beyond the refugee definition to include human rights abuses but they remain obligated internationally to continue to recognize refugees. On the contrary, resettlement decisions are completely within a state's discretion and there is no requirement that they maintain the refugee definition or a focus on refugees in their resettlement programs. As asylum becomes increasingly difficult to access and resettlement interest increases, there is a real risk that the refugee definition will be lost. The chapters that follow demonstrate this risk in Canada's various resettlement models and argue for the need to maintain the core of refugee rights and vitality of the 1951 Convention despite the broader pull of human rights.

Law is being evermore abandoned in the arguments for resettlement. From a practical perspective, advocating for increased law in resettlement does not necessarily make sense. States currently often turn to resettlement as a mechanism to avoid their legal obligations to refugees. In this way, resettlement works with *non-refoulement* in an almost complementary manner despite what the dissertation will show as disturbingly opposing rhetoric. In the absence of law, and increasingly in the face of the evasion of the law, incentives are sought to promote burden-sharing. The rationale for an incentive based approach is supported by the failure of arguments for the creation of a binding burden-sharing obligation on states.²¹⁶ The MFU on Resettlement represents the highest level of agreement the international community is presently willing to reach on burden-sharing and yet it is explicit that the understandings are not legally binding. The need remains to address this lack of obligation to those refugees who fall through the cracks between

²¹⁶ See *ibid.*; Anker, et al., "Crisis and Cure" *supra* note 163; Schuck, "Refugee Burden-Sharing" *supra* note 157.

protection and solution and become trapped in a state of protraction that seems far from resolvable at this time.

While discovering a discourse that will convince states to increase their protection activities is obviously desirable, there is a danger in abandoning the humanitarian rhetoric. Burden-sharing agreements risk demeaning the value of the refugee; which will erode overall support for asylum. The call for issue-linkages may suffer the fate of short-term appeal. As issues change, linkages, and interest, may be lost. Lost with them would be any remaining justification for refugee protection. Gibney has asserted that any policy response to refugees must possess *both* “ethical force (be informed by a convincing value or furnish a credible moral ideal) and practical relevance (take account of the character and capabilities of the agents at whom it is directed, and of the probable consequences of their actions).”²¹⁷ The practical cannot simply replace the ethical. Otherwise, in the long-run, when the issues change or the linkages appear untenable, it may be too difficult to revive a forgotten humanitarian appeal.

Cognizance of the lessons learned from previous shifts in the orientation of the refugee regime is necessary. The past concern was that humanitarian discourse disguised a state-centric approach. Now, with proposals for unapologetic state focused calls, the risk to any lingering humanitarianism is that much greater. The reasoning behind a state’s willingness to resettle must be taken into account in evaluating their resettlement decision-making. The past has shown that actions may be based more on an evasion of protection than an embrace.

²¹⁷ Gibney, *The Ethics and Politics of Asylum*, *supra* note 117 at 15.

An alternative to incentive based negotiations is increased global leadership in the promotion of state cooperation to increase efficiencies. While current practices such as the strategic use of resettlement do encourage state cooperation, as will be seen in Chapter 5 in the discussion on group resettlement, this remains a state centered approach. More global leadership, without mandating binding obligations, could offer UNHCR a means of regaining the reins of resettlement in a manner reflective of agreements from the first half of the twentieth century. Doing so would preserve the place of the 1951 Convention and refugee focused protection at the core of resettlement. In such a system the law's positioning would shift from state-based to international with the resettlement framework coming from UNHCR. This relinquishment of the regulatory framework of resettlement is, of course, why such a model fails. States are resistant to surrender control or compromise their sovereignty, even in a non-binding manner.

Conclusion

Resettlement, while part of the voluntary aspect of protection, has seen a resurgence at the outset of the twenty-first century because of the inherent control and order of the process that permits it to be regulated by the state and put within a legal framework. There is predictability and planning involved in resettlement that permits a legal framing of the non-legal. This is countered by the reality that access to asylum, triggering *non-refoulement*, often requires illegal entrance into the asylum state. The idea of the illegality of asylum entrants will be pursued in greater detail in the next chapter.

Ultimately what this chapter demonstrates is the inability of international law to successfully achieve refugee protection, and the need for complementarity. The difficulty is that the two means of encouraging broader protection – burden-sharing and the addition of

human rights – both present as double-edged swords. The refugee is universalized in the human rights regime and dehumanized by the commodification inherent in burden-sharing proposals. By either expansion or contraction the sense of obligation to protect refugees risks erosion. From this point on, the chapters will move from the international refugee regime to the application and interpretation of that regime in Canada along with perspectives from other state programs. The state's use of legal layering and the contrasting positioning of overseas resettlement and in-country asylum framed by burden-sharing and humanitarian rhetoric will be at the core of these chapters.

CHAPTER THREE

CANADA'S COMMITMENT

Introduction

The previous chapter situated resettlement in the international context of the refugee regime. It explored the development of the regime, the shifting parameters of protection and the tensions between state interests and idealized theories of protection. The positioning and problems with arguments premised on human rights and burden-sharing justifications were examined through this international lens. The term resettlement, however, implies movement. Beyond the refugee's initial flight from home to host state, resettlement adds a secondary, constructed movement to a third state. To understand this movement from international protection to national recognition requires an examination of both schemes.

While, to an extent, UNHCR provides top-down direction to resettlement states through its *Global Projections* and the Annual Tripartite Consultations on Resettlement discussed in the previous chapter, resettlement remains an individualized state process. As resettlement is a discretionary state-based action, each resettlement state applies its own policies and procedures to its resettlement operations. The dissertation focuses on Canada's resettlement program. Canada is a leading resettlement country and its resettlement approach is diverse and nuanced. Canadian resettlement will therefore ground the body of the dissertation with other state perspectives considered where they are able to offer additional insight.

The most unique aspect of Canada's resettlement program is the division between government assisted and privately sponsored refugees. Canada also previously resettled certain individuals in refugee like situations directly from their home countries and has

recently begun group resettlement. To grasp the diversity of the Canadian program it is necessary to start with the history of refugee policy in Canada and the government program that best reflects similar approaches in the other leading resettlement countries. From there, subsequent chapters will explore private, source and group resettlement.

Canada's Humanitarian Commitment¹

The day before Citizenship and Immigration Canada (CIC) introduced the legislative package to reform Canadian refugee law in 2010, the Ministry announced an expansion of Canada's resettlement program to bring over more needy refugees from camps and urban slums. According to CIC, the expansion amounted to a potential increase of 2,500 resettlement places per year.² That this announcement preceded the introduction of Bill C-11, *Balanced Refugee Reform Act*³ by one day demonstrates two important points. First, refugee resettlement is distinct from refugee law. Second, resettlement sits in juxtaposition to in-country asylum.

The announced increase in resettlement numbers was not a legislative change. In fact, all the announcement amounted to was a willingness by the government to increase the number of resettled refugees it voluntarily accepts each year.⁴ The announcement for increased resettlement was seen as a positive move by refugee advocates. Refugees

¹ Components of this section come from Shauna Labman, "Queue the Rhetoric: Refugees, Resettlement and Reform" (2011) 62 *University of New Brunswick Law Journal* 55.

² Citizenship and Immigration Canada, "Expanding Canada's Refugee Resettlement Programs" *News Release* (29 March 2010).

³ Bill C-11, *Balanced Refugee Reform Act*, 3d. Sess., 40th Parl., 2010 (assented to 29 June 2010, S.C. 2010, c.8)

⁴ CIC does intend to increase the Resettlement Assistance Program budget by \$9 million a year; Citizenship and Immigration Canada, "Backgrounder - Bill C-11: The Balanced Refugee Reform Act" (14 October 2010); online: <<http://www.cic.gc.ca/english/departement/media/backgrounders/2010/2010-06-29.asp>>. Many would argue this increase has been overdue since *IRPA* shifted government assisted resettlement to more vulnerable refugees.

themselves cheered.⁵ The CCR likewise welcomed the government's commitment to increased resettlement.⁶ In contrast, the legislated reform received much criticism from refugee advocates. While professing to reduce delays and abuse, it was seen as a tightening of borders and significantly reducing access to asylum.⁷ The announced increase in resettlement in advance of the legislative change had the effect of countering allegations that government reform signaled a move away from refugee protection. As the resettlement announcement concluded: "Providing increased support for resettled refugees clearly demonstrates Canada's ongoing humanitarian commitment and affirms our long-standing tradition as a leader in international refugee protection."⁸ This chapter looks at Canada's tradition of refugee protection and clarifies the relationship between asylum and resettlement and the interwoven rhetoric of legal obligation and voluntary action that dictate refugee policy in Canada.

In the late 1990s Canada was reconsidering its immigration and refugee laws and policies. The authors of the legislative review began with the recognition that: "Many prevailing assumptions about immigration eventually reach the level of myth, which is an opinion, a belief, or an ideal that has no basis in truth or fact. Unfortunately, it requires much more effort (and recognition) to refute a myth than to create one."⁹ The thread that links Canadian refugee policy from its inception to the present is acknowledgement of Canada's

⁵ Minister Jason Kenney made the announcement at an Ottawa immigration centre where it was reported over 100 refugees gathered to hear the speech and cheered at the increases. Norma Greenaway, "Tories tackle refugee backlog while opening door to those in camps overseas" *Canwest News Service* (29 March 2010).

⁶ Canadian Council for Refugees, "CCR Welcomes Opening of Door to More Privately Sponsored Refugees" *Media Release* (21 July 2010).

⁷ Canadian Bar Association, National Citizenship and Immigration Law Section, "Bill C-11, *Balanced Refugee Reform Act*" (May 2010).

⁸ Citizenship and Immigration Canada, "Expanding Canada's Refugee Resettlement Programs" *supra* note 2.

⁹ Susan Davis, et al., "Not Just Numbers: A Canadian Framework for Future Immigration" (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 9.

“humanitarian tradition.” The Overseas Processing Manual that guides Canadian visa officers in resettlement admission determinations begins with the statement:

The objective of Canada’s Refugee and Humanitarian Resettlement Program is to uphold Canada’s humanitarian tradition in the resettlement of refugees and persons in “refugee-like” situations. It is a discretionary program that complements Canada’s in-Canada refugee determination system, which fulfils Canada’s obligations under the *1951 Convention Relating to the Status of Refugees* (the Refugee Convention) to provide asylum and protection to Convention refugees who arrive on Canadian soil.¹⁰

The positioning of the resettlement scheme as “humanitarian” and “discretionary” sits in contrast to the obligatory basis of in-Canada asylum.¹¹ Through a review of Canada’s resettlement scheme – its origins, statutory framework, policies and jurisprudence – this chapter “refute[s] the myth” of the current humanitarian rhetoric that envelops the scheme. Rather than a humanitarian complement to Canada’s international legal obligations, resettlement now enables the government to reduce these obligations under a discourse of concern.

Background & Beginnings

*It is true, policies on refugees tended to be unplanned and in a sense represented reactions to political emergencies or in response to humanitarian considerations.*¹²

Humanitarianism and Half-Open Doors

From the time of Confederation, Canadian officials have sought to populate Canada. At the time of the 1901 Census, Canada’s population was just over 5 million.¹³ There was a

¹⁰ Citizenship and Immigration Canada, “OP5: Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-Protected Persons Abroad Classes” Manual (2006) at 8; online: <<http://www.cic.gc.ca/manuals-guides/english/op/index.html>>.

¹¹ For a more detailed analysis of the discretionary nature of Canadian refugee law see Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005) at 218.

¹² Joseph Kage, “Stepping Stones Towards the New Canadian Immigration Act” in Jewish Immigrant Aid Society Information Bulletin No. 347 (20 November 1973) at 12 (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

demand for people to inhabit the country. As a consequence of this need for farmers and settlers, immigration was relatively open. Gerald Dirks reports that “[f]or most of Canada’s immigration history, neither politicians nor officials made any distinction between immigrants and refugees. The reasons for people’s departures from their homelands seldom interested officials responsible for processing those who wanted to settle in Canada.”¹⁴ And yet, many who settled in Canada during the first half of the twentieth century were indeed refugees fleeing persecution according to the international refugee definition – former American slaves, persecuted Hutterites, Mennonites and Doukhobors, and eastern European Jews.¹⁵ Canada’s first Immigration Acts, 1869, 1906 and 1910, contained no recognition of refugees as an immigrant class.¹⁶ Even by mid-century, when the international recognition and protection of refugees was well underway, Canada’s new *Immigration Act, 1952* made no reference to refugees.¹⁷

Despite the absence of legislative recognition, Canada was a proactive partner in the international resettlement of refugees. Active involvement in a refugee scheme did not,

¹³ K.G. Basavarajappa & Bali Ram, “Historical Statistics of Canada” *Population* (Series A1-247); online: <<http://www.statcan.gc.ca/pub/11-516-x/sectiona/4147436-eng.htm#1>>. According to the 2006 Census, Canada’s population now stands at 31,612,897; Statistics Canada, 2006 Census, *Portrait of the Canadian Population in 2006*. Statistics Canada Catalogue no. 97-550-XWE200600113, Analysis Series, 2006 Census, Ottawa (13 March 2006); online: <<http://www12.statcan.ca/english/census06/analysis/popdwell/NatlPortrait1.cfm>>.

¹⁴ Gerald E. Dirks, *Controversy and Complexity: Canadian Immigration Policy During the 1980s* (Montreal and Kingston: McGill-Queen’s University Press, 1995) at 61. Yet, in the early part of the 20th century Canada overtly applied racial criteria in its immigration laws and limited other unwanted immigrants. For example, the intent of the *Immigration Act*, S.C.1906, c.19 was described by the responsible Minister, Frank Oliver, Minister of the Interior as “to enable the Department of Immigration to deal with undesirable migrants.” The *Chinese Immigration Act* 1923, 13-14 George V., c. 38, commonly referred to as the Chinese Exclusion Act banned most forms of Chinese Immigration to Canada. For an overview of the extent of Canada’s exclusionary policies see Janet Dench, *A Hundred Years of Immigration to Canada 1900-1999: A Chronology Focusing on Refugees and Discrimination*, (2000) Canadian Council for Refugees; online: <<http://ccrweb.ca/en/hundred-years-immigration-canada-1900-1999>>; David Matas, “Racism in Canadian Immigration Policy” (1985) 5:2 *Refuge* 8.

¹⁵ Dirks, *Controversy and Complexity*, *ibid*.

¹⁶ *An Act Respecting Immigration and Immigrants*, S.C. 1896-1869, c.10; *Immigration Act*, S.C.1906, c.19; *Immigration Act*, S.C.1909-1910, c.27.

¹⁷ *Immigration Act*, S.C. 1952 c.42.

however, signify a true distinction between refugees and immigrants in the minds of the Canadian officials coordinating the resettlement program. Writing in 1957, David Corbett provided a telling critique of Canada's resettlement selections during this period:

The degree of generosity which Canada has shown in her international relations is reflected in the admission of refugees. In 1949, the peak year of overseas resettlement by the International Refugee Organization, the United States accepted almost five times as many refugees as Canada; Australia more than three times as many; and Israel twice as many. In 1950, Canada took even fewer refugees than the previous year; however, in 1951 our total increased significantly to thirty thousand, one-third of the American total. ... From 1952 to the middle of 1954, Canada's reception of refugees was second only to the United States and amounted to eleven thousand, nearly half the American total. All told, we have accepted about one hundred thousand refugees. *However, they have been carefully selected, and most of them would have satisfied our standards if they had been applying as immigrants.* The I.R.O. did not keep a record of the numbers of the so-called "difficult cases" which the receiving countries accepted. The "difficult cases" were people who for various reasons including ill-health and age would not normally be acceptable by immigration countries. On the other hand, *records were kept of the number of refugees requiring permanent care in institutions whom the receiving countries accepted. Of the nearly ten thousand such cases resettled, Canada accepted so few that she was not even listed among the countries which received two hundred cases or more,* in a report issued by the Office of the United Nations High Commissioner for Refugees.¹⁸

Resettlement to Canada continued, absent legislated refugee recognition, throughout the 1950s, 1960s and 1970s. Admissions were based on *ad hoc* decisions and cabinet orders-in-council.¹⁹ Decisions tended to be ideological and strategic. As Soviet "escapees", approximately 37,000 refugees were admitted to Canada from Hungary in 1956 and 1957, and 11,000 from Czechoslovakia in 1968.²⁰ Sharryn Aiken contrasts the admission of "7,000 highly skilled and educated Asian refugees" following their expulsion from Uganda

¹⁸ David Corbett, *Canada's Immigration Policy: A Critique* (Toronto: University of Toronto Press, 1957) at 198-199 (emphasis added).

¹⁹ Gerald E. Dirks, "A Policy within a Policy: The Identification and Admission of Refugees to Canada" (1984) 17 *Canadian Journal of Political Science* 279 at 280. For a greater discussion on the early use of orders-in-council to direct Canadian immigration policy see Alan G. Green and David Green, "The Goals of Canada's Immigration Policy: A Historical Perspective" (2004) 13:1 *Canadian Journal of Urban Research* 102.

²⁰ Sharryn J. Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy" (2001) 14 *Revue Québécoise de Droit International* 1 at 9.

by Idi Amin in 1972 to the “closed door” that met the less desirous Tibetan agriculturalists when China annexed Tibet in 1959, and the “Canadian government’s lethargic response to Chilean refugees, many of whom were suspected Marxists, fleeing Pinochet’s coup in 1973.”²¹ Mike Molloy, working as a Canadian immigration officer at the Embassy in Beirut in 1972 when Idi Amin issued his expulsion order recalls that while Ugandan Asians “were formally selected under the ‘point system,’ by the end of September every communication and visitor from Manpower and Immigration Headquarters carried the same message: humanitarian considerations were to be paramount in the selection process.”²² Through a resettlement program, the Canadian government maintained complete and selective control over those it chose to admit and protect.

Although supporting UNHCR financially from its inception and serving as a member of its governing Executive Committee since 1957,²³ Canada did not ratify the 1951 Convention or its 1967 Protocol until 4 June 1969.²⁴ While the 1951 Convention permits states the possibility of limiting their obligations under the Convention to persons who had become refugees as a result of events occurring in Europe, the 1967 Protocol removes both the dateline and possible geographic limitations of the 1951 Convention making it more relevant to western states such as Canada.

²¹ *Ibid.* at 9.

²² Mike Molloy quoted in Laura Madokoro, “Remembering Uganda” ActiveHistory.ca; online: <<http://activehistory.ca/2012/03/remembering-uganda/>>.

²³ In 1957 Canada became a member of the United Nations Refugee Fund Executive Committee. The Executive Committee of the High Commissioner’s Programme was established in 1958 by Economic and Social Council (ECOSOC) Resolution E/RES/672 (XXV) (30 April 1958) and Canada continued on as a member UNHCR, “Excom Membership by Date of Admission of Members” (30 June 2009).

²⁴ UNHCR, “States Parties to the Convention and the Protocol”; online: <<http://www.unhcr.org/pages/49da0e466.html>>.

Ratification of the 1951 Convention and adoption of the obligation of *non-refoulement* in Article 33 required Canada to relinquish absolute control of its borders – the ability to turn away any foreigner for any reason and make individual evaluations on admission. Reportedly, at the time of the 1951 Convention’s drafting, and the concluding conference of interested governments that took place in Geneva in July 1951, the head of the Canadian delegation was directed not to sign the Convention as the Canadian government “had certain reservations because some sections of the convention appeared to prohibit states from deporting ‘bona fide’ refugees, even on grounds of national security.”²⁵ In terms of Canada’s “humanitarian tradition” this 18 year period between the drafting of the 1951 Convention and Canada’s ratification of the instrument, could be considered a period of humanitarian hesitation.

While Canada was hesitating, 53 countries became State Parties to the 1951 Convention.²⁶ North America represented a major absence in the Convention’s coverage. The U.S., while never signing the 1951 Convention did ratify the 1967 Protocol in November 1968, almost a year before Canada’s ratification of both the Convention and Protocol in June 1969.²⁷ Australia, however, the third of the major resettlement countries, was an early party to the 1951 Convention in 1954.²⁸

²⁵ Gerald E. Dirks, *Canada’s Refugee Policy: Indifference or Opportunism* (Montreal and London: McGill-Queen’s University Press, 1977) at 180. For a discussion of why the 1951 Convention’s obligations do not challenge a nation’s sovereignty see Catherine Dauvergne, “Sovereignty, Migration and the Rule of Law in Global Times” (2004) 67 *The Modern Law Review* 588 at 597.

²⁶ UNHCR, “States Parties” *supra* note 24. See Table 2: 1951 Convention State Parties 1951-1968.

²⁷ *Ibid.*; See Dirks, *Canada’s Refugee Policy*, *supra* note 25 at 180-182 for a detailed account of the efforts within the Canadian government during this period to promote accession.

²⁸ UNHCR, “States Parties” *supra* note 24.

Table 2: 1951 Convention State Parties 1951-1968²⁹

Year	State Parties
1952	Denmark
1953	Belgium, Germany, Luxembourg, Norway
1954	Australia, Austria, France, Israel, Italy, Monaco, Sweden, Northern Ireland
1955	Ecuador, Iceland, Switzerland
1956	Holy See, Ireland, Morocco, Netherlands
1957	Liechtenstein, Tunisia
1958/1959	No states
1960	Brazil, Greece, New Zealand, Portugal
1961	Argentina, Cameroon, Colombia, Côte d'Ivoire, Niger
1962	Benin, Central African Republic, Congo, Togo, Turkey
1963	Algeria, Burundi, Cyprus, Ghana, Senegal
1964	Gabon, Jamaica, Liberia, Peru, United Republic of Tanzania
1965	Democratic Republic of Congo, Guinea
1966	Gambia, Kenya
1967	Madagascar, Nigeria
1968	Finland

With the eventual decision to ratify the 1951 Convention, Canada was signaling to the world its commitment to refugee protection. Without any reference to the delay, the Canadian government announced in 1969: “Although Canada’s treatment of refugees has been, as a matter of policy, in accordance with the letter and spirit of the international instruments for the protection of refugees, the act of acceding will denote official acceptance of the international standards for the protection of refugees and the approved international and universal definition of the term refugee.”³⁰ The 1951 Convention was not immediately enforceable. Canada operates under a dualist model, in which a treaty that has been ratified by the executive still requires implementation through domestic law to be

²⁹ *Ibid.*

³⁰ Department of Manpower and Immigration, “Annual Report - Department of Manpower and Immigration Canada” (Ottawa: Department of Manpower and Immigration, 1969) at 11.

enforceable at the national level. Legislation was required to reflect Canada's acceptance of the Convention obligations.

On 17 September 1973, Robert Andras, the Minister of Manpower and Immigration announced actions to design a new immigration policy.³¹ The initial stage of legislative review was the appointment of a task force to study policy options and organize the review process followed by the preparation of a Green Paper to guide further consultations. Interestingly, the Minister's four and half page statement in 1973 announcing the new immigration policy plans contains only a single line reference to refugees and makes no mention of Canada's signing of the 1951 Convention whatsoever.³² The eventual Green Paper recommended that the new Immigration Act contain specific provisions for the selection and processing of refugees.³³ While not part of the international legal obligation Canada had assumed, resettlement was an unquestioned aspect of Canada's refugee protection. Alan Gotlieb, Deputy Minister of Manpower and Immigration at the time of the legislative reform, commented that "Canadian Immigration law has even less to say about admission for first asylum than about resettlement."³⁴ While Gotlieb spoke of the future potential for Canada to become a country of first asylum,³⁵ such a reality had not yet hit when he was writing in 1975. Resettlement was the norm because access to asylum at a port of entry was difficult in Canada. Canada is bookended by oceans on its east and west

³¹ Office of the Minister of Manpower and Immigration, "Statement by the Honourable Robert Andras, Minister of Manpower and Immigration" *Release* (17 September 1973).

³² The sentence read "We want also to take into account our well-established tradition of receiving political refugees." *Ibid.* at 4.

³³ Department of Manpower and Immigration, "A Report of the Canadian Immigration and Population Study" (Ottawa: Information Canada, 1974).

³⁴ Alan Gotlieb, "Canada and the Refugee Question in International Law" (1975) 13 *Canadian Yearbook of International Law* 3 at 15.

³⁵ *Ibid.* at 22.

coasts, with the Arctic Ocean to the north and the United States to the south. Even in the present era of international travel, Canada is far removed from refugee producing countries.

Following extensive consultations, the *Immigration Act, 1976*³⁶ was the first Canadian legislation to place government refugee policy in statutory form by recognizing refugees as an immigrant class,³⁷ and setting out a process for refugee admissions. Canada had evolved from refugee policy to refugee law. The non-legal aspect of Canada's refugee protection scheme continued nonetheless. Resettlement, as essentially a continuation of the status quo, was recognized but with lesser hype and commitment than in-Canada refugee status determinations. Reviewing the legislation in 1984, Dirks wrote:

The advisory committee [tasked with assessing the validity of in-Canada refugee claims] had no role to play for individuals outside of Canada claiming to be bona fide refugees seeking to gain entry to this country. Verifying these claims to refugee status was a responsibility left to the immigration officers in the overseas posts. The exclusion of overseas claimants from the advisory committee process has not been a particularly contentious issue either at the time the 1976 legislation was being debated or since.³⁸

Nonetheless, of the two approaches to refugee status in Canada, “bona fide refugees being selected by overseas Canadian visa officials from pools of individuals already in states of first asylum” was the approach “expected by the Act’s drafters to be the *normal* entry route.”³⁹ While an addition to its international obligation, the inclusion of resettlement can

³⁶ *Immigration Act, 1976*, S.C. 1976-77, c.52. The Immigration Act, 1976 passed in 1976 and came into effect in 1978. While the Act was brought into the *Revised Statutes of Canada* in 1985 (*Immigration Act*, R.S.C. 1985, c.I-2) all references in this chapter are to the original 1976 Act.

³⁷ Convention refugees were defined in subsection 2(1).

³⁸ Dirks, “A Policy within a Policy” *supra* note 19 at 290.

³⁹ Dirks, *Controversy and Complexity*, *supra* note 14 at 25 (emphasis added).

also be interpreted as a reflection of Canada's overall immigration policy, which has always been premised on overseas selection.⁴⁰

The *Immigration Act, 1976* incorporated the 1951 Convention's refugee definition and the principle of *non-refoulement*.⁴¹ From its first appearance, Canada's refugee legislation stated as an objective "to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted."⁴² The legislation later noted in terms of selection that:

Any Convention refugee and any person who is a member of a class designated by the Governor in Council as a class, the admission of members of which would be in accordance with Canada's humanitarian tradition with respect to the displaced and the persecuted, may be granted admission subject to such regulations as may be established with respect thereto and notwithstanding any other regulations made under this Act.⁴³

And yet, even with this legislated recognition and humanitarian declaration, the 1984 review of the application of Canada's first legislated refugee scheme, concludes that "refugees seeking the right to permanent residence in Canada are informally, if not formally, evaluated in the light of criteria developed for gauging the adjustment potential of regular immigrants" and, ultimately, "neither formal legislation nor authoritative administrative structures guarantee humanitarian and compassionate refugee admission programmes..."⁴⁴ As a country of immigration Canada was welcoming, but this immigration outlook also made decision-makers selective even with refugee admissions.

⁴⁰ Lorne Waldman, *Immigration Law and Practice*, looseleaf (Markham, Ontario: LexisNexis Butterworths, 2nd ed. 2005) at 13.1.

⁴¹ *Immigration Act, 1976*, *supra* note 36 at s.47(3): Where an adjudicator determines that a Convention refugee is a Convention refugee described in subsection 4(2), he shall, notwithstanding any other provision of this Act or the regulations, allow that person to remain in Canada.

⁴² *Ibid.* at paragraph 3(g).

⁴³ *Ibid.* at subsection 6(2).

⁴⁴ Dirks, "A Policy within a Policy" *supra* note 19 at 306.

The program was clearly generous but not necessarily humanitarian with a focus on integration in Canada over protection needs.⁴⁵

Despite these critiques, from a global burden-sharing perspective, Canada was accepting a significant number of resettled refugees. For their contribution to the refugee cause, in 1986 UNHCR awarded the Canadian people the Nansen Medal, named in honour of Fridtjof Nansen.⁴⁶ With the fall of Saigon in 1975 and the eruption of an Indochinese “boat people” crisis, Canada admitted approximately 60,000 Vietnamese, Laotian and Cambodian refugees between 1979 and 1980 alone.⁴⁷ In total, Canada resettled more refugees from overseas camps than any other country on a per capita measurement, with over 150,000 refugees resettled between the eruption of the Indochinese crisis and Canada’s receipt of the Nansen Medal in 1986.⁴⁸ This period was the height of resettlement in Canada. It was mostly the result of the actions and energy of private citizens pushing and challenging the government. The Indochinese resettlement will be covered in detail in Chapter 4 on private sponsorship but it is important to note here as well, as the government enabled the private sponsorship in a manner that happens nowhere else in the world and it marked a monumental moment in Canadian refugee policy.

Enthusiasm was short-lived. The peak of recognition also marked a significant downturn in Canadian receptiveness to refugees. The Canadian Employment and Immigration Advisory

⁴⁵ I take the contrast between generosity and humanitarianism from Matthew Gibney’s critique of the American resettlement program. Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004) at 156.

⁴⁶ UNHCR, *Archive of Past Nansen Winners*; online: <<http://www.unhcr.org/pages/49c3646c467-page4.html>>.

⁴⁷ Employment and Immigration Canada, “Indochinese Refugees: The Canadian Response, 1979 and 1980” (Ottawa: Minister of Supply and Services Canada, 1982) at 14. The *Indochinese Designated Class Regulations*, SOR/78-931 applied to citizens of Kampuchea, Laos, and Vietnam who had left their countries as of April 30, 1975, had not settled elsewhere and had Canadian citizens willing to sponsor their resettlement.

⁴⁸ Aiken, “Of Gods and Monsters” *supra* note 20 at 12.

Council in 1988 reported that most business and labour leaders felt the government had “lost control of the border.”⁴⁹ In 1989, public opinion polls showed 31% of Canadians felt that too many refugees were admitted; by 1991 this number jumped to 49%.⁵⁰ While the Indochinese resettlement program highlighted the value of resettlement, it also raised concerns that the availability of resettlement was acting as a “pull-factor” and encouraging people to flee.⁵¹ At the same time, refugees were increasingly able to reach asylum countries on their own. Beginning in the late 1980s and mirroring UNHCR’s position at the time,⁵² resettlement came to be viewed as a less preferred solution for refugees while access to asylum in Canada became increasingly possible.⁵³

A review of Canada’s *Annual Reports to Parliament on Immigration* highlights this movement from a resettlement-based program to an in-Canada asylum focus. Even after Canada signed the 1951 Convention and legislation was in place, overseas protection was the only aspect of refugee protection considered in the reports. In both 1986 and 1987, the reports specifically state “Canada’s refugee program is directed primarily toward persons in legitimate need of third country resettlement; that is, people who cannot be repatriated voluntarily or settled in first-asylum countries.”⁵⁴ Not until the 1990 *Annual Report to Parliament on Future Immigration Levels* did Canada acknowledge that it “has become a

⁴⁹ Canada Employment and Immigration Advisory Council, *Perspectives on Immigration in Canada*, Final Report (Ottawa: Ministry of Supply and Services Canada, 1988) at 1-2.

⁵⁰ Robert Holten and Michael Lanphier, “Public Opinion, Immigration and Refugees” in Howard Adelman et al. (eds.) *Immigration and Refugee Policy: Australia and Canada Compared* (Toronto, Buffalo: University of Toronto Press, 1994) Volume 1 of 3 at 132.

⁵¹ Michael Casasola, “Current Trends and New Challenges for Canada’s Resettlement Program” (2001) 19 *Refugee* 76 at 77.

⁵² Gary Troeller, “UNHCR Resettlement: Evolution and Future Direction” (2002) 14 *International Journal of Refugee Law* 85 at 85.

⁵³ Employment and Immigration Canada, “Annual Report to Parliament: Immigration Plan for 1991-1995 Year Two” (Canada, 1991) at 7.

⁵⁴ Employment and Immigration Canada, “Annual Report to Parliament on Future Immigration Levels” (Canada, 1986) at 8; Employment and Immigration Canada, “Annual Report to Parliament on Future Immigration Levels” (Canada, 1987) at 10.

country of first asylum for thousands of people.”⁵⁵ The acknowledgement was tied to the implementation of a new in-Canada refugee determination system on January 1, 1989.⁵⁶ The system was the result of the Supreme Court of Canada’s 1985 decision *Singh v. Canada (Minister of Employment and Immigration)* in which the Court considered the procedural rights of refugee claimants and held that inland claimants were entitled to oral hearings.⁵⁷ The follow-up Annual Report in 1991 was the first to include a new section on “The Refugee Determination System.”⁵⁸ It acknowledged the shifting focus of the program from resettlement to asylum:

The government remains committed to its program for resettlement of refugees from abroad. However, Canada’s program is moving away from resettling mass movements of persons...towards emphasis on protection cases. At the same time, the UNHCR is focusing its efforts on voluntary repatriation and local resettlement of refugees. Third country resettlement is considered only in exceptional cases.⁵⁹

In Canada asylum had taken centre stage and resettlement became a subsidiary consideration.

A New Era: Asylum’s Ascendancy

Following more than 30 amendments to the *Immigration Act, 1976*, Canada was again rethinking its immigration and refugee framework in anticipation of introducing new legislation as the 1990s drew to an end. The 1997 legislative review, *Not Just Numbers: A Canadian Framework for Future Immigration* recommended that refugee and immigration

⁵⁵ Employment and Immigration Canada, “Annual Report to Parliament: Immigration Plan for 1991-1995” (Canada, 1990) at 5.

⁵⁶ *Ibid.* at 5,11. Amendments to the Immigration Appeal Board in 1973 had established the first statutory basis for the recognition of refugees in Canada by allowing the Board to quash deportation orders of those found to be refugees under the 1951 Convention. *An Act to Amend the Immigration Appeal Board Act*, S.C. 1973-1974, c.27 ss. 1, 5.

⁵⁷ *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11; [1985] 1 S.C.R. 177; 17 D.L.R. (4th) 422; 58 N.R. 1; J.E. 85-393; 12 Admin. L.R. 137; 14 C.R.R. 13; 30 A.C.W.S. (2d) 369.

⁵⁸ Employment and Immigration Canada, “Annual Report to Parliament: Immigration Plan for 1991-1995 Year Two” *supra* note 53 at 10.

⁵⁹ *Ibid.* at 7.

concerns should be divided into two separate acts.⁶⁰ The proposal highlighted the differing goals of immigration and refugee protection – the former a means of serving national interests, the latter an international legal obligation – and argued that the two “sit uncomfortably” with each other.⁶¹ By framing the contrast between national interests and international law, the authors clearly positioned in-Canada claims for asylum based on the international legal obligation of *non-refoulement* as the cornerstone of refugee protection and gave little regard to the voluntary aspect of resettlement. The report did however recommend that overseas and inland refugee claims processing be unified within a single system with shared decision-makers for both in-country and overseas refugee processing.⁶² The recommendation was based on the desire for more consistent decision-making on refugee status and brushes over the additional necessity for a selection aspect in overseas resettlement.

With the introduction of the *Immigration and Refugee Protection Act (IRPA)* in 2001, Canada opted to continue instead with a single act encompassing both immigration and refugee issues.⁶³ In the preface to their final annotation of the *Immigration Act* in 2002 when *IRPA* was awaiting proclamation,⁶⁴ the editors noted that the new act would “distinguish between objectives of the law that apply to immigration and those objectives that apply to the law pertaining to refugees.”⁶⁵ “It may be,” they continued, “that the confusion of immigration and refugee law principles has impeded the development of the

⁶⁰ Davis, et al., “Not Just Numbers” *supra* note 9.

⁶¹ *Ibid.* at 1.

⁶² *Ibid.* at 82-83.

⁶³ *Immigration and Refugee Protection Act*, S.C. 2001 c. 27. [*IRPA*].

⁶⁴ *IRPA* came into effect on 28 June 2002.

⁶⁵ Frank N. Marrocco and Henry M. Goslett, *The 2002 Annotated Immigration Act of Canada* (Toronto: Carswell, 2001) at vii.

law in both areas.”⁶⁶ The new act however seems only to further the confusion a shared system has created. *IRPA* contains 25 separate paragraphs addressing the objectives and application of the act which only adds to the contradictions and confusions.⁶⁷ In arguing

⁶⁶ *Ibid.*

⁶⁷ Catherine Dauvergne, “Evaluating Canada’s New Immigration and Refugee Protection Act in Its Global Context” (2003) 41 *Alberta Law Review* 725 at 731. Section 3 of *IRPA*, *supra* note 63, contains 11 objectives with respect to immigration, 8 objectives with respect to refugees and 5 paragraphs on the application of the act:

3. (1) The objectives of this Act with respect to immigration are
 - (a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;
 - (b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;
 - (b.1) to support and assist the development of minority official languages communities in Canada;
 - (c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;
 - (d) to see that families are reunited in Canada;
 - (e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;
 - (f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;
 - (g) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;
 - (h) to protect the health and safety of Canadians and to maintain the security of Canadian society;
 - (i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and
 - (j) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.
- (2) The objectives of this Act with respect to refugees are
 - (a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
 - (b) to fulfil Canada’s international legal obligations with respect to refugees and affirm Canada’s commitment to international efforts to provide assistance to those in need of resettlement;
 - (c) to grant, as a fundamental expression of Canada’s humanitarian ideals, fair consideration to those who come to Canada claiming persecution;
 - (d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;
 - (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada’s respect for the human rights and fundamental freedoms of all human beings;
 - (f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;
 - (g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and
 - (h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.
- (3) This Act is to be construed and applied in a manner that
 - (a) furthers the domestic and international interests of Canada;
 - (b) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;
 - (c) facilitates cooperation between the Government of Canada, provincial governments, foreign

for a separate protection act, the authors of the legislative review noted that the “protection of persecuted persons is based on rights; it is inseparable from the notion of human rights. The caring and compassionate nature of Canadians should be at the root of these agreements.”⁶⁸ In maintaining a single act, the legislators chose instead to preserve and perpetuate the tangled roots of immigrant selection and refugee protection. Nor did they merge inland and overseas decision-making processes. Resettlement, which reflects immigration decisions in its selection model for refugee protection, sits at the crux of the conflict.

The depth of the convolution reaches even deeper when one steps back to reconcile the linkage between human rights and compassion made by the authors of the legislative review. The statement merges actions based in legal obligation and those based on a voluntary act of compassion. The two are not the same. The former is based on equality and the latter on inequality.⁶⁹ *Non-refoulement* is a right; resettlement is not. Placed within the context of humanitarianism, resettlement results from compassion,⁷⁰ not rights. And yet, the distinction between the compassionate basis of refugee protection and the strategic self-interest that underlies immigration selection remains valid. Notions of *non-refoulement* and resettlement are already intertwined. The legal obligations to refugees taken on by states results from the same humanitarian compulsion that propels voluntary resettlement.

-
- states, international organizations and non-governmental organizations;
 - (d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;
 - (e) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and
 - (f) complies with international human rights instruments to which Canada is signatory.

⁶⁸ Davis, et al., “Not Just Numbers” *supra* note 9 at 13.

⁶⁹ Dauvergne, *Humanitarianism, Identity, and Nation*, *supra* note 11 at 174.

⁷⁰ Questioning the legitimacy of this compassion is indeed central to the arguments of the dissertation and undoubtedly international relations, burden-sharing and foreign policy are also at play.

States voluntarily opted to commit themselves to the international law.⁷¹ Resettlement is thus the extreme act of compassion because it is not compelled and yet it is also the closest refugee protection comes to mirroring immigration and strategic state self-interest. Indeed, like resettlement, the immigration program is a voluntary program pursued by the government at its own discretion. Resettlement is thus tugged at and tied to both the law of asylum and immigration law.

Boatloads and Backdoors: Resettlement's Return

*With each Chinese migrant rustbucket that shows up off British Columbia's coast, a bizarre form of behaviour becomes more commonplace on the streets of Vancouver. Total strangers will accost you and shout these things into your face: (a) The House of Commons should be recalled for an emergency debate; (b) Parliament should invoke its special powers to override the Constitution to deal with the "crisis"; (c) the Constitution should be amended, if needs be, to deal with these people.*⁷²

IRPA continued the custom of framing Canadian refugee law within a "humanitarian tradition" but tied this to proposals to be "tough on those who pose a threat to Canadian security."⁷³ The perceived threat were those entering Canada on their own to claim asylum. The first bill was introduced in 2000⁷⁴ following the arrival of 4 boats carrying 599 Chinese migrants off the coast of British Columbia in 1999.⁷⁵ Reviewing the first incarnation of the *IRPA* legislation, Michael Casasola, a UNHCR resettlement officer in Canada noted:

Unfortunately the most negative aspect of the legislative package was that the many positive resettlement initiatives were presented as a counter to some of the more punitive

⁷¹ It does seem unlikely however that western states would readily recommit themselves to the same obligations today that they did more than half a century ago.

⁷² Terry Glavin, "Why Such Loopiness over a Few Rusty Boats?" *The Globe and Mail* (10 September 1999) A11.

⁷³ Department of Foreign Affairs and International Trade, "Canada's Actions since the September 11 Attacks Fighting Terrorism – A Top Priority" cited in Erin Kruger, Marlene Mulder and Bojan Korenic "Canada after 11 September: Security Measures and 'Preferred' Immigrants" (2004) 15:4 *Mediterranean Quarterly* 72 at 77.

⁷⁴ Bill C-31 was first tabled in April 2000 but died when Parliament was dissolved later that year. Amended legislation, Bill C-11, was introduced and passed in November 2001.

⁷⁵ Jane Armstrong, "The Boat People's Big Gamble" *The Globe and Mail* (22 July 2000) A7.

actions the government planned in order to limit access to the refugee determination system in Canada. In fact, the resettlement initiatives became an important part of the selling of the bill to the Canadian public. ... Resettled refugees were presented as part of the refugees using the 'front door.' And by providing refugees greater access, Canada suggested it had the moral authority to limit access to those refugees described as using the 'back door.'⁷⁶

By the time amended legislation was passed by Parliament in November 2001, the desire to curtail the arrival of unwanted migrants was heightened by a new awareness of terrorism following the 11 September 2001 terrorist attacks in the United States. While professing the continuance of an imagined tradition, *IRPA* in fact shed many of the pretences of humanitarianism in Canadian refugee law as the threat, but more so the fear, of terrorism granted the government justification and support for restrictive policies. Resettlement initiatives were at the forefront of this readjustment as they were privileged over asylum. Ironically, in so doing, *IRPA* moved Canadian refugee law back closer to its resettlement focused origins. The difference being that at the outset resettlement arose due to the absence of asylum claimants in Canada⁷⁷ whereas its return stemmed from a desire to reduce the number of claimants in Canada.

In the U.S., the terrorist attacks of 11 September 2001 caused a complete freeze of the U.S. Resettlement Program for three months after which acceptance rates slowed. With the largest resettlement program in the world, the consequence was that tens of thousands of

⁷⁶ Casasola, "Current Trends" *supra* note 51 at 79. When tabling Bill C-31 on 6 April 2001, Minister of Citizenship and Immigration, Elinor Caplan stated "Closing the back door to those who would abuse the system allows us to ensure that the front door will remain open." Citizenship and Immigration Canada, "Caplan Tables New Immigration and Refugee Protection Act" *News Release* 2000-09 (6 April 2000); online: <<http://www.cic.gc.ca/english/press/00/0009-pre.html>>.

⁷⁷ In the 1990 Annual Report, the introduction of the in-Canada refugee determination system was premised on the changed reality that "Canada, like most Western countries, has become a country of first asylum for thousands of people." Employment and Immigration Canada, "Annual Report to Parliament: Immigration Plan for 1991-1995" (Canada, 1990) at 7. Ironically, in 1984, the Annual Report justified the need for continued resettlement in Canada because elsewhere large waves of asylum seekers "alienate public support for refugee programs in host countries because they are perceived as movements of illegal migrants motivated by economic concerns." Employment and Immigration Canada, "Annual Report to Parliament on Future Immigration Levels" (Canada, 1984) at 12.

refugees lost the opportunity to be resettled.⁷⁸ The year 2002 marked the lowest year in U.S. resettlement since the country's current program began in 1980.⁷⁹ This halt is a significant reminder of the fragility and vulnerability of state resettlement programs in contrast to asylum. They can disappear. There is irony in the re-embrace of resettlement that the same terrorism triggered. Fear of outsiders may have drawn governments toward the selective control that resettlement offers over the unpredictability and lack of control that is inevitable with asylum entrants, but this same fear also allowed the U.S. government to stop resettlement entirely.

With recent Canadian refugee reform, the 2010 *Balanced Refugee Reform Act*,⁸⁰ the government strengthened the distinction between asylum and resettlement. When a boatload of Sri Lankans arrived on the coast of British Columbia in October 2009 traveling in the bottom of a decrepit cargo ship called the *Ocean Lady*, with limited supplies and facilities, Citizenship and Immigration Minister Jason Kenney suggested the arrival of the Sri Lankan men put Canada at risk of developing "a two-tier immigration system - one tier for legal, law-abiding immigrants who patiently wait to come to the country, and a second tier who seek to come through the back door, typically through the asylum system."⁸¹ The statement belies the fact that Canada has an "*Immigration*" and "*Refugee*" Protection Act that legislates the entrance of both immigrants and refugees. There is no back door. There is an immigration door and an asylum door. While there is a clear legal process for

⁷⁸ Andrew Schoenholtz, "Refugee Protection in the United States Post-September 11" (2005) 36 *Columbia Human Rights Law Review* 323 at 324.

⁷⁹ Since 1980, on average the U.S. has admitted 98,000 annually with a high of 207,000 in 1980 and a low of 27,110 in 2002. Refugee Council USA, *History of the U.S. Refugee Resettlement Program*; online: <<http://www.rcusa.org/index.php?page=history>>.

⁸⁰ *Balanced Refugee Reform Act*, S.C. 2010, c. 8 (Assented to 29 June 2010) (formally Bill C-11).

⁸¹ Jason Kenney quoted in Jane Armstrong and John Ibbitson, "Seeking a safe haven, finding a closed door" *The Globe and Mail* (20 October 2009) A1.

entering Canada as an immigrant, it is specifically acknowledged in the 1951 Convention and by state parties to the Convention, including Canada, that asylum seekers cannot be penalized for illegal entry.⁸²

The 2009 arrival of the *Ocean Lady* and the Minister's statement occurred during the build-up to reform. Another ship, the *MV Sun Sea*, arriving in August 2010 provided further opportunity to promote the dichotomized rhetoric. As the vessel neared Canadian waters, the Citizenship and Immigration Minister's spokeswoman used its approach to reiterate: "Our government is committed to cracking down on bogus refugees while providing protection to those that truly need our help."⁸³ The implication, once again, was that those who approach Canada on their own to access the asylum system are not genuine refugees. Upon the ship's arrival on 13 August 2010, the Minister for Public Safety, Vic Toews, pledged future legislation to distinguish between refugee claimants arriving by boat and those by other means.⁸⁴ An editorial in *The Globe and Mail*, Canada's national newspaper, suggested the solution was for the Canadian government to resettle "legitimate" Tamil refugees.⁸⁵ The inference was that the legitimate refugees would not be found on the boat nor be dependent on smugglers but rather would still be in Sri Lanka or neighbouring countries.

⁸² Article 31(1) of the *Convention relating to the Status of Refugees*, 1951, 189 UNTS 150 (entered into force 22 April 1954) states:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

⁸³ Celyeste Power quoted in Stewart Bell, "Canada monitors suspicious vessel" *National Post* (16 July 2010) A1.

⁸⁴ John Ibbitson, Steven Chase and Marten Youssef "Ottawa plans new rules for boat migrants" *The Globe and Mail* (13 August 2010) A1.

⁸⁵ Editorial "On the lookout for Tigers" *The Globe and Mail* (12 August 2010) A16.

Even amongst refugee populations, who are now permanent residents and Canadian citizens, there is an increasing perception of the illegitimacy of in-Canada asylum claimants. In a report on Colombian refugees in Ontario it is noted:

The dichotomy between the “real” and the “not real” refugee is a topic of constant tension, especially in London [Ontario] where...most of the refugees are refugee claimants. The fact that many of these refugees have arrived through the United States, in contrast with the refugees from abroad by the government or privately, has created an important fracture within the Colombian community.⁸⁶

Elsewhere, those involved in private sponsorship and frustrated by long processing times⁸⁷ are also beginning to embrace the queue jumping portrait of in-Canada asylum claimants. The recent discourse represents an increasing tendency to conflate the protection categories of asylum and resettlement and present them as interchangeable. This is untrue with respect to numbers, access and rights.

Canada’s Resettlement Scheme

The Canadian resettlement program consists of both government-assisted refugees who receive government support and sponsored refugees who are supported by private groups. The Government-Assisted Refugee (GAR) Program makes up the majority of resettled refugees with the Private Sponsorship of Refugees (PSR) Program amounting to 40% of yearly resettlement in 2009, and an average of just over 30% in the preceding four years.⁸⁸ The resettlement increase announced in advance of the 2010 reform was a commitment to resettle 2,500 more refugees. However, only 500 of these refugees were from the GAR

⁸⁶ Pilar Riaño Alcalá, et al., *Forced Migration of Colombians: Colombia, Ecuador, Canada* (Colombia, Vancouver: Corporación Región (Spanish) School of Social Work, University of British Columbia (English), 2008) at 125.

⁸⁷ Canadian Council for Refugees, “Nairobi: Protection Delayed, Protection Denied” (Montreal, 2009); online: <<http://www.ccrweb.ca/documents/Nairobireport.pdf>>.

⁸⁸ Citizenship and Immigration Canada, *Facts and Figures 2009* “Canada – Permanent residents by category, 2005-2009”; online: <<http://www.cic.gc.ca/english/resources/statistics/facts2009/permanent/01.asp>>.

program with the remaining 2,000 coming from the private sponsorship program. By 2011, 42% of resettled refugees were privately sponsored.⁸⁹ With the 2012 Budget, the government shifted 1,000 refugee spaces from the GAR program to private sponsorship further moving numbers to private sponsors.⁹⁰ The actual numeric consequences of this commitment are not known at the time of writing although private sponsorship numbers are on the increase.

Table 3: Government-Assisted/Private Sponsorship Ranges & Landings 2001-2012⁹¹

Year	Government Assisted Range	Government Assisted Numbers	Private Sponsorship Range	Private Sponsorship Numbers
2001	7,300	8,697	2,800-4,000	3,576
2002	7,500	7,505	2,900-4,200	3,041
2003	7,700	7,508	2,900-4,200	3,252
2004	7,400-7,400	7,411	3,400-4,000	3,116
2005	7,300-7,500	7,424	3,000-4,000	2,976
2006	7,300-7,500	7,326	3,000-4,000	3,338
2007	7,300-7,500	7,572	3,000-4,500	3,588
2008	7,300-7,500	7,295	3,300-4,500	3,512
2009	7,300-7,500	7,425	3,300-4,500	5,036
2010	7,300-8,000	7,264	3,300-6,000	4,833
2011	7,400-8,000	7,364	3,800-6,000	5,582
2012*	7,500-8,000		4,000-6,000	

* 2012 numbers do not reflect recent changes included in 2012 Federal Budget.

⁸⁹ Citizenship and Immigration Canada, Summary tables – Permanent and temporary residents, 2011

“Canada – Permanent residents by category, 2007-2011”; online:

<<http://www.cic.gc.ca/english/resources/statistics/facts2011-summary/01.asp>>.

⁹⁰ Government of Canada, 2012 Federal Budget (29 March 2012) shows the planned reduction in Citizenship and Immigration Canada spending in Table 5.1; online: <www.budget.gc.ca>; Debra Pressé, Director of Refugee Resettlement at Citizenship and Immigration Canada, confirmed that some of the savings will result from the GAR/PSR ratio change. E-mail correspondence with author, 28 August 2012.

⁹¹ Table compiled using statistics for Ranges (2003-2012) from Citizenship and Immigration Canada,

“Annual Reports to Parliament on Immigration” (2002-2011); online:

<<http://www.cic.gc.ca/english/resources/publications/index.asp>>; Ranges (2001-2002) from Citizenship and

Immigration Canada “Pursuing Canada’s Commitment to Immigration The Immigration Plan for 2002”

(2001); online: <<http://www.cic.gc.ca/english/pub/anrep02.html>>; Landings (2001-2010) from Citizenship

and Immigration Canada, *Facts and Figures 2010: Immigration overview – Permanent and temporary*

residents “Canada – Permanent residents by category”; online:

<<http://www.cic.gc.ca/english/resources/statistics/facts2010/permanent/02.asp>>; Landings (2011) Citizenship

and Immigration Canada, “Canada – Permanent residents by category, 2007-2011” *supra* note 89.

Every year the government announces a numeric range for resettlement and aims to resettle within that range. Annual resettlement targets are established by the Minister of Citizenship and Immigration following consultations with Citizenship and Immigration Canada, provincial governments, Canadian non-governmental organizations and UNHCR. The annual resettlement target is then allocated among visa offices on the basis of estimated resettlement need, although additional places can be requested.⁹² In 2010, the range given in the 2009 Annual Report to Parliament for government-assisted refugees was 7,300 to 8,000.⁹³ The lower number of 7,300 had been maintained since 2005. The 2010 range marked an increase to the upper number, which previously sat at 7,500. Yet there is no guarantee of actual increased resettlement without an increase to the lower end. Even with such a lower end increase, the government failed to meet the lower threshold of 7,300 in 2010 resettling only 7,264 refugees.⁹⁴ Despite not meeting this target in 2010, in 2011 the lower threshold was raised to 7,400, with only 7,364 refugees resettled, and again to 7,500 in 2012.⁹⁵

The 2010 range for private sponsorship was 3,300 to 6,000.⁹⁶ While there was no change from the two previous years in the lower end of this range, the upper end marked an increase from the limit of 4,500 of the previous three years. This upper limit has remained

⁹² Government of Canada, “Country Chapter: CANADA” in UNHCR, *Resettlement Handbook* (November 2004) at 3; online: <<http://www.unhcr.org/protect/3d4545984.html>>.

⁹³ Citizenship and Immigration Canada, “Annual Report to Parliament on Immigration 2009” (Canada, 2009) at Section 2; online: <<http://www.cic.gc.ca/english/resources/publications/annual-report2009/section2.asp>>.

⁹⁴ Citizenship and Immigration Canada, “Canada – Permanent residents by category, 2007-2011” *supra* note 89.

⁹⁵ Citizenship and Immigration Canada, “Annual Report to Parliament 2010”; online: <http://www.cic.gc.ca/english/resources/publications/annual-report2010/section1.asp#part1_1>; Citizenship and Immigration Canada, “Annual Report to Parliament on Immigration 2011: Supplementary Information for the 2012 Immigration Levels Plan”; online: <<http://www.cic.gc.ca/english/departement/media/notices/notice-levels2012.asp>>.

⁹⁶ Citizenship and Immigration Canada, “Annual Report to Parliament on Immigration 2009” *supra* note 93 at Section 2.

constant for 2011 and 2012.⁹⁷ In 2007, the Standing Committee on Citizenship and Immigration released a report in which the Committee addressed the Government's tendency to change upper but not lower thresholds.⁹⁸ The Standing Committee recommended the Government increase the lower threshold from 3,000 to 4,000.⁹⁹ The Government responded with the lesser increase of 300 in 2008 to 3,300.¹⁰⁰

Just Numbers

The first paragraph of the Preamble to the *Multilateral Framework of Understandings of Resettlement* (MFU) resulting from UNHCR's Convention Plus initiative recognizes the "need to expand resettlement opportunities."¹⁰¹ The MFU later states "[e]xpanding resettlement opportunities is an ambition of this framework."¹⁰² As co-chair of the resettlement strand of Convention Plus, Canada led the authorship of the MFU. Canada's annual resettlement numbers, however, have remained essentially static and miniscule in comparison to the overall issuance of yearly permanent resident visas for the past decade. Government-assisted resettlement averaged 7,554 refugees per year between 1995 and 2005 – an average of 3.4 percent of the number of annual permanent resident visas issued.¹⁰³ The CCR has noted that while the 2009 private sponsorship numbers marked a

⁹⁷ The 2012 numbers may however shift given the 2012 Federal Budget announcement, see note 90.

⁹⁸ Standing Committee on Immigration and Citizenship, M.P. Norman Doyle, Chair, "Safeguarding Asylum-Sustaining Canada's Commitments to Refugees" 39th Parliament, 1st Session (Canada: House of Commons, 2007) at 4; online:

<<http://cmte.parl.gc.ca/Content/HOC/committee/391/cimm/reports/rp2969755/cimmrp15/04-toc-e.htm>>.

⁹⁹ *Ibid.* at 8.

¹⁰⁰ Citizenship and Immigration Canada, "2009 Annual Report" *supra* note 93.

¹⁰¹ High Commissioner's Forum, "Multilateral Framework of Understandings on Resettlement" FORUM/2004/6, 16 September 2004, online: <<http://www.unhcr.org/doclist/protect/408d17494.html>>.

¹⁰² *Ibid.* at 8.

¹⁰³ In calculating the averages, the data from the year 2000 has been excluded. In 2000, Canada resettled 10,666 GARs – 41% more than the average yearly number of the other nine years surveyed. In 1999 Serb-Albanian conflict in the Serbian province of Kosovo escalated under the rule of President Slobodan Milosevic. Serbia's atrocities in Kosovo and the consequent 24 March 1999 NATO bombing triggered an inflow of Albanians into Macedonia. See Samantha Powers, *"A Problem from Hell" America and the Age of Genocide* (New York: Harper Collins, 2002) at 444-450. Canada, among other countries, responded to

significant increase¹⁰⁴ the total number of refugees granted permanent residence in 2009 was significantly lower at 22,844 than the decade average of 28,000.¹⁰⁵ The counter argument is that with *IRPA* Canada moved to more protection-needs based resettlement of vulnerable refugees and has put a focus on protracted refugees, populations with higher settlement costs and medical needs.¹⁰⁶

Legislative and Policy Framework

Whether the numbers are understood as moderate or minute, within a voluntary burden-sharing scheme, the active resettlement of thousands of refugees per year nonetheless places Canada near the top of a small group of only 26 countries worldwide in 2012¹⁰⁷ willing to offer refugee protection through resettlement in addition to the promise of *non-refoulement* in the 1951 Convention. *IRPA*, like its predecessor act, also takes Canada beyond the obligations of international law by enabling claims for refugee protection to be made outside of Canada.¹⁰⁸ The legislation further expands beyond the “Convention refugee” definition which imports the international refugee definition from the 1951

UNHCR’s request to provide asylum for some 750,000 Kosovars in Macedonian and Albanian refugee camps. Canada committed to accept 5,000 Kosovars “over and above” the annual resettlement target. Citizenship and Immigration Canada, “Appeal To Canadians To Sponsor The Kosovar Refugees” *News Release 99-24*, (10 May 1999); online: <<http://www.cic.gc.ca/english/press/99/9924-pre.html>>. In contrast, and demonstrative of Canada’s ever-declining humanitarianism, a recent doubling of the acceptance of Iraqi refugees announced by the Government of Canada was made within the annual quota and at the expense of other eligible refugees. See Laura Madokoro, “Who gets to decide?” *The Globe and Mail* (1 April 2008) A13.

¹⁰⁴ Citizenship and Immigration Canada, *Facts and Figures 2009*, *supra* note 88.

¹⁰⁵ Canadian Council for Refugees, “CCR welcomes opening of door to more privately sponsored refugees” *Media Release* (21 July 2010).

¹⁰⁶ Jennifer Hyndman, “Second-Class Immigrants or First Class Protection” in Pieter Bevelander, et al. (eds.), *Resettled and Included? The Employment Integration of Resettled Refugees in Sweden* (Malmö University, MIM, Malmö: Holmbergs, 2009) 247 at 262-263. Hyndman does, however, also acknowledge, at 257, that funding for the Resettlement Assistance Program, the federal support program for GARs has remained unchanged since 1998.

¹⁰⁷ UNHCR, “Frequently Asked Questions About Resettlement”; online: <<http://www.unhcr.org/4ac0873d6.html>> at 2.

¹⁰⁸ *IRPA*, *supra* note 63 at subsection 99(1)-(2).

Convention directly into the Canadian legislation¹⁰⁹ to include those who do not meet this narrow definition but are a “person in need of protection” due to torture or cruel and unusual treatment.¹¹⁰

Until 2011 there were three classes of persons that could be considered for resettlement to Canada: the Convention Refugees Abroad Class, the Country of Asylum Class and the Source Country Class.¹¹¹ The Country of Asylum Class and Source Country Class were

¹⁰⁹ *IRPA*, *ibid.* at s.96 states:

- A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
- (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
 - (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

¹¹⁰ *IRPA*, *ibid.* at subsection 97(1) states:

- A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
 - (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
 - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
 - (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Note that the definition of a “person in need of protection” only applies to a “person in Canada” and is not considered in resettlement applications.

¹¹¹ *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 145, 147, 148 [*IRPR*]. Section 148 Repealed, SOR/2011-222, s. 6.:

145. A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.

...

147. A foreign national is a member of the country of asylum class if they have been determined by an officer to be in need of resettlement because

- (a) they are outside all of their countries of nationality and habitual residence; and
- (b) they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.

148. (1) A foreign national is a member of the source country class if they have been determined by an officer to be in need of resettlement because

actually subclasses of the Humanitarian Protected Persons Abroad Class.¹¹² Members of each class must be in need of resettlement meaning that there is no other reasonable prospect at the time of assessment or in the near future of another solution. Members of the Convention Refugees Abroad Class must meet the Convention refugee definition. Members of the Country of Asylum Class must be outside their own country and must have been, and continue to be, seriously and personally affected by civil war, armed conflict or a massive violation of human rights, criteria distinct from the inland “person in need of protection” noted above. Members of the Source Country Class were required to be living in one of the specifically listed countries and be seriously and personally affected by civil war or armed conflict in that country, must have been detained or imprisoned as a result of legitimately expressing themselves or exercising their civil rights, or meet the Convention refugee definition aside from not being outside of their home country. In 2011, however,

(a) they are residing in their country of nationality or habitual residence and that country is a source country within the meaning of subsection (2) at the time their permanent resident visa application is made as well as at the time a visa is issued; and

(b) they

(i) are being seriously and personally affected by civil war or armed conflict in that country,

(ii) have been or are being detained or imprisoned with or without charges, or subjected to some other form of penal control, as a direct result of an act committed outside Canada that would, in Canada, be a legitimate expression of freedom of thought or a legitimate exercise of civil rights pertaining to dissent or trade union activity, or

(iii) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, are unable or, by reason of such fear, unwilling to avail themselves of

(2) A source country is a country

(a) where persons are in refugee-like situations as a result of civil war or armed conflict or because their fundamental human rights are not respected;

(b) where an officer works or makes routine working visits and is able to process visa applications without endangering their own safety, the safety of applicants or the safety of Canadian embassy staff;

(c) where circumstances warrant humanitarian intervention by the Department in order to implement the overall humanitarian strategies of the Government of Canada, that intervention being in keeping with the work of the United Nations High Commissioner for Refugees; and

(d) that is set out in Schedule 2.

¹¹² *Ibid.* at s.146

the Source County Class was removed.¹¹³ When speaking of resettlement “refugees” in this dissertation, I am encompassing both those within the Convention Refugee Abroad Class and the Country of Asylum Class.

It is no longer possible for foreign nationals independently to apply directly for a permanent resident visa under these classes.¹¹⁴ An “undertaking” or “referral” is required.¹¹⁵ Referral organizations must have a working knowledge of *IRPA*’s protection criteria and the ability to locate and identify Convention Refugees Abroad.¹¹⁶ UNHCR referrals come by way of a Resettlement Registration Form outlining the protection and resettlement needs on which the referral is based.¹¹⁷ Canadian visa officers decide on the success of resettlement applications. Canada’s Overseas Processing Manual instructs visa officers to “be proactive in requesting referrals of appropriate cases.”¹¹⁸ The referral system, in its current design, is a duplicative process whereby refugees are often doubly screened for credibility and resettlement eligibility by both the resettlement organization and Canada. The trust Canada places in referral agencies and UNHCR is essentially revoked by the independent review then conducted by the visa officer.

¹¹³ Citizenship and Immigration Canada, “Regulations Amending the Immigration and Refugee Protection Regulations and Regulatory Impact Analysis Statement” 145:2 Canada Gazette (19 March 2011); online: <<http://www.gazette.gc.ca/rp-pr/p1/2011/2011-03-19/html/reg3-eng.html>>. SOR/2011-222 *supra* note 111. Chapter 5 reviews this class and its repeal in detail.

¹¹⁴ The regulations do set out one exception: s.150(2): “A foreign national may submit a permanent resident visa application without a referral or an undertaking if the foreign national resides in a geographic area that the Minister has determined under subsection (3) to be a geographic area in which circumstances justify the submission of permanent resident visa applications not accompanied by a referral or an undertaking.” *IRPR*, *supra* note 111.

¹¹⁵ *IRPR*, *ibid.* at s.150(1).

¹¹⁶ *IRPR*, *ibid.* at s.143.

¹¹⁷ The Resettlement Registration Form (RRF) was introduced by UNHCR in 1997 to harmonize resettlement referrals. UNHCR, Annual Tripartite Consultations on Resettlement, “Workshop of the Resettlement Registration Form” Geneva (15-16 June 2004); online: <<http://www.unhcr.org/doclist/protect/409b4ed04.html>>.

¹¹⁸ Citizenship and Immigration Canada, *OP5*, *supra* note 10 at 28.

Following a referral, eligibility for the permanent resident visa requires specific conditions set out in the regulations to be met:

139(1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that

- (a) the foreign national is outside Canada;
- (b) the foreign national has submitted an application in accordance with section 150;
- (c) the foreign national is seeking to come to Canada to establish permanent residence;
- (d) the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely
 - (i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or
 - (ii) resettlement or an offer of resettlement in another country;
- (e) the foreign national is a member of one of the classes prescribed by this Division;
- (f) one of the following is the case, namely
 - ...
 - (ii) in the case of a member of the Convention refugee abroad or source country class, financial assistance in the form of funds from a governmental resettlement assistance program is available in Canada for the foreign national and their family members included in the application for protection, or
 - (iii) the foreign national has sufficient financial resources to provide for the lodging, care and maintenance, and for the resettlement in Canada, of themselves and their family members included in the application for protection;
- (g) if the foreign national intends to reside in a province other than the Province of Quebec,¹¹⁹ the foreign national and their family members included in the

¹¹⁹ The Quebec exception here and in subsequently cited legislation results from the *Canada-Québec Accord Relating to Immigration and Temporary Admission of Aliens*, (5 February 1991); online: <http://www.micc.gouv.qc.ca/publications/pdf/Accord_canada_quebec_immigration_anglais.pdf>. The Accord grants Quebec greater independence in the selection of immigrants. See Joseph Carens, "Immigration, Political Community, and the Transformation of Identity: Quebec's Immigration Policies in Critical Perspective" in Joseph Carens, (ed.) *Is Quebec Nationalism Just? Perspectives from Anglophone Canada* (Montreal: McGill-Queen's University Press, 1995) 20.

application for protection will be able to become successfully established in Canada, taking into account the following factors:

- (i) their resourcefulness and other similar qualities that assist in integration in a new society,
- (ii) the presence of their relatives, including the relatives of a spouse or a common-law partner, or their sponsor in the expected community of resettlement,
- (iii) their potential for employment in Canada, given their education, work experience and skills, and
- (iv) their ability to learn to communicate in one of the official languages of Canada;

...

Over the years, the Canadian government has received pointed criticisms of its overseas requirements. Critiques amounted to accusations of cherry-picking and selecting refugees for resettlement who most resembled independent immigrants.¹²⁰ Little seemed to have changed since the program's origins in the 1950s. Indeed, in its earlier incarnation the regulations did more closely reflect the immigration scheme. Section 7 of the former *Immigration Regulations*¹²¹ that were in force until replaced by the current regulations contained the following criteria for successful establishment in resettlement applications:

7(1)(c) where the person and the accompanying dependents intend to reside in a place in Canada other than the Province of Quebec, a visa officer determines that the person and the accompanying dependants will be able to become successfully established in Canada, taking into consideration:

- (i) the ability of the person and the accompanying dependants to communicate in one of the official languages of Canada,
- (ii) the age of the person,
- (iii) the level of education, the work experience and the skills of the person and the accompanying dependants,
- (iv) the number and ages of the accompanying dependants, and

¹²⁰ Dauvergne, *Humanitarianism, Identity, and Nation*, *supra* note 11 at 93; Debra Pressé & Jessie Thomson, "The Resettlement Challenge: Integration of Refugees from Protracted Refugee Situations" (2007) 24 *Refuge* 48 at 49; Judith Kumin, "New Approaches to Asylum: Reconciling Individual Rights and State Interests" (2004) 22 *Refuge* 3 at 4.

¹²¹ *Immigration Regulations*, SOR/78-172.

(v) the personal suitability of the person and their accompanying dependants, including their adaptability, motivation, initiative, resourcefulness and other similar qualities;

Evaluation under section 7 followed the “points system” assessment for independent immigrants.¹²² In clear terms as asserted in the 1990 *Annual Report to Parliament on Future Immigration Levels*, refugees selected abroad were assessed on “their need for protection and their potential for eventual self-sufficiency in Canada.”¹²³ The legislative review of the 1990s suggested “our requirements sometimes deny us the very tools we require to select those in greatest need, by screening them out.”¹²⁴

With the enactment of *IRPA* in 2001, the Government of Canada claimed a shift in Canadian resettlement policy toward protection rather than ability to establish.¹²⁵ With the new regulations, the “successful establishment” assessment is made only on the foreign national applicant and not on accompanying dependants. “Education, work experience and skills” is referenced in both versions although the current phrasing also directly links these criteria to “employment potential” – arguably a higher standard. Age has been removed as a criteria in the new regulations and “ability to communicate” in one of the official languages has been replaced with the less demanding “ability to learn to communicate” in one of the official languages. The regulations no longer reference “personal suitability” and the list of “adaptability, motivation, initiative, resourcefulness and other similar qualities” has been replaced with “resourcefulness and other similar qualities that assist in integration.” In the context of deferential decision-making, however, this change is

¹²² Davies Bagambiire, *Canadian Immigration and Refugee Law* (Aurora, Ontario: Canada Law Book Inc., 1996) at 244.

¹²³ Employment and Immigration Canada, “Annual Report to Parliament: Immigration Plan for 1991-1995” *supra* note 55 at 10.

¹²⁴ Davis, et al., “Not Just Numbers” *supra* note 9 at 81.

¹²⁵ Government of Canada, “Country Chapter: CANADA” *supra* note 92 at 1.

practically meaningless. Citizenship and Immigration Canada has taken the position that these requirements are “rarely” used as the basis of refusals.¹²⁶ That they remain in the regulations, however, means that they *can* be used as a basis of refusal in as many cases as desired. Thus, despite some reworking of the criteria, the successful establishment criteria in the regulations continue to reflect the desired qualities of economic immigrants.

A significant exception has, however, been added to the long list of requirements in regulation 139. The “successful establishment” requirement of paragraph 139(1)(g) is tempered by subsection 139(2) where it is noted:

139(2) Paragraph (1)(g) does not apply to a foreign national, or their family members included in the application for protection, who has been determined by an officer to be vulnerable or in urgent need of protection.

Definitions of “vulnerable” and “urgent need” are found in regulation 138:

138 The definitions in this section apply in this Division and in Division 2.

“urgent need of protection” means, in respect of a member of the Convention refugee abroad, the country of asylum or the source country class, that their life, liberty or physical safety is under immediate threat and, if not protected, the person is likely to be

- (a) killed;
- (b) subjected to violence, torture, sexual assault or arbitrary imprisonment; or
- (c) returned to their country of nationality or of their former habitual residence. (besoin urgent de protection)

“vulnerable” means, in respect of a Convention refugee or a person in similar circumstances, that the person has a greater need of protection than other applicants for protection abroad because of the person’s particular circumstances that give rise to a heightened risk to their physical safety. (vulnérable)

An Urgent Protection Program (UPP) has been developed by the government to offer rapid resettlement where requested by UNHCR in emergency situations. In these cases, a

¹²⁶ Pressé & Thomson, “The Resettlement Challenge” *supra* note 120 at 50.

decision is made within 24 hours following a referral and CIC tries to ensure accepted individuals are en route to Canada within 3-5 days.¹²⁷ Cases of vulnerability do not lead to emergency processing but will be prioritized over regular cases for expedited processing between one to four months.¹²⁸ Refugees admitted through the UPP or deemed as vulnerable do not need to meet the successful establishment requirement. While a clear shift to need-based protection in theory, Casasola notes that in the years preceding *IRPA*'s enactment "the number of refugees facing urgent or emergency protection concerns [was] actually quite small."¹²⁹ He reports that in 1999 UNHCR referred only 114 urgent and emergency submissions across all resettlement countries.¹³⁰

The legislative changes have shifted the nature of Canada's resettlement enabling more refugees with medical needs and needs associated with psychological trauma to be resettled.¹³¹ Refugee settlement services report a significant change and increased need in the refugees arriving under *IRPA*.¹³² Low literacy in original languages, increased physical and mental health issues, larger households, more single parent (mostly female) led households, and youth with limited formal education create new or heightened barriers to

¹²⁷ Citizenship and Immigration Canada, *OP5*, *supra* note 10 at 29; Citizenship and Immigration Canada, "Guide to the Private Sponsorship of Refugees Program: 3.3 Urgent Protection Program"; online: <<http://www.cic.gc.ca/english/resources/publications/ref-sponsor/section-3-03.asp>>.

¹²⁸ Government of Canada, *Canada Country Chapter* in UNHCR, "Resettlement Handbook" (July 2011) at 8; online:

<<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3c5e55594&query=Canad>>.

¹²⁹ Casasola, "Current Trends" *supra* note 51 at 77.

¹³⁰ *Ibid.* at 77.

¹³¹ Pressé & Thomson, "The Resettlement Challenge" *supra* note 120 at 50.

¹³² Chris Friesen, Immigrant Services Society of British Columbia, Director of Settlement Services, interview with author, 26 February 2010; Marta Kalita, Co-Manager, Settlement Services, Manitoba Interfaith Immigration Council, interview with author, 17 March 2010; John Peters, Manager Sponsorship Services, Manitoba Interfaith Immigration Council interview with author, 17 March 2010.

settlement.¹³³ From the settlement perspective, *IRPA* was seen to shift Canadian resettlement from a settlement framework to a protection framework.¹³⁴

In addition to vulnerable persons and those in need of urgent protection, as of 1988 Canada has also operated a women-at-risk (AWR)¹³⁵ program. Women-at-risk are “without the normal protection of a family unit who find themselves in precarious situations where the local authorities cannot ensure their safety.”¹³⁶ The Overseas Processing Manual notes that women-at-risk “usually receive priority processing” and “may not *fully* meet the requirement to demonstrate an ability to establish themselves in Canada in the short or medium term.”¹³⁷ Women-at-risk may fall within the urgent or vulnerable categories and benefit from priority processing and having the successful establishment requirement waived. A woman may, however, fall within the AWR program without being considered to be vulnerable or in need of urgent protection. In these cases, the successful establishment criteria is to be applied by visa officers on a “sliding scale.”¹³⁸ While

¹³³ Lisa Ruth Brunner & Chris Friesen, “Changing Faces, Changing Neighbourhoods: Government-Assisted Refugee Resettlement Patterns in Metro Vancouver 2005-2009” (2011) 8 *Our Diverse Cities* 93 at 94.

¹³⁴ Friesen, interview, *supra* note 132. Successful settlement is a necessary component of refugee policy when considering both resettlement and in-country refugees. With resettlement, the government must ensure support is in place for the refugees it resettles. While policies concerning selection and integration must be linked, the dissertation is concerned primarily with the selection of resettlement refugees and how this scheme influences and is influenced by law. Refugee integration in Canada has received significant study elsewhere; see: C.M. Lanphier, “Refugee Resettlement: Models in Action” (1983) 17:1 *International Migration Review* 4; Jennifer Hyndman & James McLean, “Settling Like a State: Acehnese Refugees in Vancouver” (2006) 19:3 *Journal of Refugee Studies* 345; N.K. Lamba & H. Krahn, “Social Capital and Refugee Resettlement: The Social Networks of Refugees in Canada” (2003) 4:3 *Journal of International Migration and Integration* 335; Kathy Sherrell, et al., “Sharing the Wealth, Spreading The ‘Burden’? The Settlement of Kosovar Refugees in Smaller British Columbia Cities” (2005) 37 *Canadian Ethnic Studies* 76; Kathy Sherrell, et al., “From ‘One Nation, One People’ to ‘Operation Swagatam’: Bhutanese Refugees in Coquitlam, BC” Metropolis British Columbia Working Paper 11-11 (2011); online: <http://mbc.metropolis.net/wp_2011.html>; Pressé & Thomson, “The Resettlement Challenge” *supra* note 120; Brunner & Friesen, “Changing Faces” *ibid*.

¹³⁵ The acronym AWR is imported from UNHCR’s program “assistance for women at risk”. Citizenship and Immigration Canada, *OP5*, *supra* note 10 at 30.

¹³⁶ *Ibid*.

¹³⁷ *Ibid*. (emphasis added).

¹³⁸ Government of Canada, “Country Chapter: CANADA” *supra* note 92 at 9.

Canada touted the AWR program as a means “to provide women applicants with more equitable access to resettlement opportunities,”¹³⁹ a 2006 Status of Women Canada report indicated that men still out-number women in the government-assisted refugee resettlement category despite evidence that women make up about one half of the refugees currently seeking protection internationally.¹⁴⁰

Unlike economic migrants whose admission to Canada is overtly strategic and self-serving from a national need perspective, and family-reunification where the personal interests of Canadian citizens are met, refugee admissions are premised on international burden-sharing and a vague humanitarian notion.¹⁴¹ And yet, in requiring resourcefulness, relatives, employment potential and language skills, the successful establishment criteria can still apply in the majority of resettlement cases,¹⁴² and closely mimics non-humanitarian migration selection in Canada.

Recognizing this reality behind Canadian resettlement brings the government’s positioning into harsher contrast. As they push to limit asylum based on justifications of abuse and present resettlement as an interchangeable alternative means of protection it is necessary to remember that little numeric increase is in fact guaranteed and that the selection process for resettlement is precisely that – a selection process. Moreover, even when done fairly, resettlement is not an all encompassing answer. Even with UNHCR achieving higher resettlement numbers in recent years, this only amounts to just over 1 percent of the global

¹³⁹ *Ibid.*

¹⁴⁰ Catherine Dauvergne, et al., *Gendering Canada’s Refugee Process* (Ottawa: Status of Women Canada, 2006) at 51.

¹⁴¹ Dauvergne, *Humanitarianism, Identity, and Nation*, *supra* note 11 at 81.

¹⁴² In 2003 the Canadian Council for Refugees stated that “[m]ost refugees seeking resettlement in Canada still need to meet the ‘successful establishment’ requirement.” Canadian Council for Refugees, *First Annual Report Card on Canada’s Refugee and Immigration Programs* (November 2003); online: <<http://www.web.net/~ccr/reportcard2003.htm>>.

refugee population.¹⁴³ With 10.4 million global refugees at the close of 2011,¹⁴⁴ the combined government (7,364) and private sponsorship (5,582) resettlement to Canada in 2011 amounted to offering a solution to 0.1% of the global refugee population. This minor movement of people will not adequately alleviate refugee flows so as to abandon the need for in-country asylum claims.

Jurisprudence: Opportunities for Review¹⁴⁵

While no international legal obligation exists for countries to resettle refugees, in creating a legislative scheme for resettlement, Canada has triggered certain legal rights, although not a right *to* resettlement, and obligations which are subject to judicial review before a Canadian court.

Judicial review enables a court to review the decision-making of a public body or administrative decision-maker. Judicial review in the Canadian Federal Court is permitted under *IRPA* but is not automatic. This means that any person subject to a decision under *IRPA* may apply to the Federal Court for permission (“leave”) to commence the proceedings (*IRPA* s.72). A decision not to grant leave cannot be appealed. If leave is granted, the Federal Court does not rehear the case but reviews the decision-making for errors or failure to observe a principle of natural justice or procedural fairness.¹⁴⁶ The

¹⁴³ As noted in the previous chapter, 2009 resettlement numbers were the highest in 16 years and a six percent increase from 2008. UNHCR, “2009 Global Trends” in Division of Programme Support and Management (2009) at 30-31.

¹⁴⁴ UNHCR, “A Year of Crisis: UNHCR Global Trends 2011” at 11; online: <<http://www.unhcr.org/4fd6f87f9.html>>.

¹⁴⁵ This section is based on an update of earlier unpublished research completed as part of my Masters of Law: Shauna Labman, “The Invisibles: An Examination of Refugee Resettlement” LL.M. Thesis, UBC Faculty of Law (Vancouver: University of British Columbia, 2007).

¹⁴⁶ The *Federal Courts Act*, R.S.C. 1985, c.F-7 sets out the reasons for judicial intervention at s.18.1(4):
The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its

merits of the case are not reviewed. As it is a review and not a rehearing, the Federal Court will not re-decide the case but may set aside or quash the decision and refer it back to the decision-maker in accordance with certain directions for redetermination.¹⁴⁷ In resettlement decisions, the decision-maker is a visa officer and a redetermination would be made by a different visa officer. An appeal of a judicial review from the Federal Court to the Federal Court of Appeal on immigration matters may only proceed if the Federal Court certifies that there is a “serious question of general importance” to be resolved and states the question.¹⁴⁸ If the Federal Court of Appeal hears a case, a further application for leave to be heard by the Supreme Court of Canada may be made.

The starting point for all considerations of immigration law in Canadian jurisprudence is found in the Supreme Court of Canada’s statement in *Chiarelli v. Canada (Minister of Employment and Immigration)*: “[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.”¹⁴⁹ Nonetheless, the decision as to whether a non-citizen *enters* as opposed to *remains* in Canada is approached very differently. While applicable to all non-citizens, this statement is particularly true, and visible, in the treatment of refugees within Canada in contrast to

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- jurisdiction;
 - (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
 - (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
 - (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
 - (e) acted, or failed to act, by reason of fraud or perjured evidence; or
 - (f) acted in any other way that was contrary to law.

¹⁴⁷ *Federal Courts Act*, *ibid.* s.18.1(3).

¹⁴⁸ s.74(4)(d) *IRPA*, *supra* note 63. The Federal Court maintains a list of certified questions: “Immigration – Certified Questions”; online: <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Certified_Questions>.

¹⁴⁹ *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at page 733; [1992] S.C.J. No. 27; 90 D.L.R. (4th) 289; 135 N.R. 161; J.E. 92-511; 2 Admin. L.R. (2d) 125; 72 C.C.C. (3d) 214; 8 C.R.R. (2d) 234; 16 Imm. L.R. (2d) 1; 32 A.C.W.S. (3d) 622.

those outside Canada and desiring to enter. In a discussion paper prepared in the context of the international forum on the strategic use of resettlement, Canada noted:

It has been Canada's experience that resettlement can be effectively managed as an *administrative process*. As a result resettlement decisions are not subject to the same level of formality as asylum determinations. In addition to being *less costly* to administer, this allows for *quicker decision-making* than is the case for asylum adjudication.¹⁵⁰

Canadian courts have confirmed that a legitimate legal distinction exists between asylum determinations and resettlement decisions premised on the individual's presence within or outside of Canada. In the landmark decision *Singh*, where the Supreme Court of Canada determined whether claimants were entitled to oral hearings,¹⁵¹ the Court split three-three on whether entitlement derived from protection under the *Canadian Charter of Rights and Freedoms*¹⁵² or the *Bill of Rights*.¹⁵³ All agreed that there must be an adequate opportunity for refugee claimants to state their case and know the case to be met. The resulting decision triggered the Government of Canada's first redesign of its in-Canada status determination system.¹⁵⁴ However, when the argument was subsequently made in *Jallow v. Canada (Minister of Citizenship and Immigration)*¹⁵⁵ that *Singh* should extend to the resettlement determinations by visa officers, it was flatly rejected at the Federal Court:

In reviewing *Singh, supra*, it is clear to me that the process which was eventually put in place in Canada is not applicable to claimants outside the country. Wilson J. makes

¹⁵⁰ Canada, High Commissioner's Forum, "Resettlement and Convention Plus Initiatives" (Discussion Paper) FORUM/2003/02 (18 June 2003) at para 13.

¹⁵¹ *Singh, supra* note 57.

¹⁵² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11.

¹⁵³ *Bill of Rights*, S.C. 1960, c.44.

¹⁵⁴ Following the 1985 decision in *Singh, supra* note 57, in 1988 the Government introduced the concept that refugee claimants would have access to an oral hearing before a quasi-judicial tribunal in Bill C-55. The tribunal established by the Government went beyond the Supreme Court of Canada's requirements in *Singh*. The 2010 legislative reform is arguably a retraction of the scope of this access.

¹⁵⁵ *Jallow v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1452; 122 F.T.R. 40; 67 A.C.W.S. (3d) 128.

numerous references in her reasons wherein she emphasizes the duty of fairness on decision makers but it is very clear to me that other consequences which flowed from the decision are only applicable to Refugee claimants within Canada.¹⁵⁶

And, as Justice Rouleau reviews in *Jallow*, Justice Wilson clearly stated in *Singh* that:

... The Act envisages the assertion of a refugee claim under s. 45 in the context of an inquiry, which presupposes that the refugee claimant is physically present in Canada and within the jurisdiction of the Canadian authorities. The Act and the Immigration Regulations, 1978, SOR/78-172, do envisage the resettlement in Canada of refugees who are outside the country but the following observations are not made with reference to these individuals....I am prepared to accept that the term includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.¹⁵⁷

While *Jallow* clarified that the decision in *Singh* was not applicable to claimants outside Canada, the application of *Singh* to resettlement decisions was again argued in *Oraha v. Canada (Minister of Citizenship and Immigration)*.¹⁵⁸ Oraha's counsel asserted that through attendance for an interview at a Canadian embassy abroad a Convention refugee claimant effectively becomes a person claiming refugee status in Canada. Justice Gibson of the Federal Court rejected the argument stating: "Persons such as the principal applicant file their applications outside Canada or, at the time of filing, are outside Canada. The fact that they may briefly attend at a Canadian embassy for an interview or other related purpose can in no sense be said to make them persons claiming refugee status from within Canada."¹⁵⁹

¹⁵⁶ *Ibid.* at para 17.

¹⁵⁷ *Singh*, *supra* note 57 at paras 14 and 35; *Jallow*, *supra* note 155 at para 17.

¹⁵⁸ *Oraha v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 788; 39 Imm. L.R. (2d) 39; 72 A.C.W.S. (3d) 140.

¹⁵⁹ *Ibid.* at para 11. This position is consistent with UNHCR's direction that while a person sheltered in a foreign embassy "may be considered to be outside his country's jurisdiction, he is not outside its territory and cannot therefore be considered under the terms of the 1951 Convention." The note addresses the situation of a person claiming refugee status in a foreign embassy in his or her home country. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/Rev.1 (Geneva, 1992) at fn 11.

Unlike refugee claimants within Canada who are accorded a hearing before a quasi-judicial tribunal, resettlement applicants abroad, as the statutory framework above outlines, are subject to the considerable discretion of the visa officer reviewing the resettlement referral. In the resettlement case of *Qarizada v. Canada (Minister of Citizenship and Immigration)* the Court noted “much of the case law cited in support of their arguments by the applicants is of little assistance to the Court as it stems from proceedings of the Refugee Protection Division in a quasi-judicial context. Here, the officer was making an administrative decision.”¹⁶⁰ The distinction between quasi-judicial and administrative decision-making goes to demonstrate why the suggestion by the legislative review to unify overseas and inland protection decisions under one decision-making scheme was not accepted.

Despite the current distinction between administrative and quasi-judicial decision-making, the Federal Court of Appeal has noted in *Chiau v. Canada (Minister of Citizenship and Immigration)* that “the statutory scheme under which immigration control is administered does not leave admission decisions to the untrammelled discretion of the Minister or her officials.”¹⁶¹ Where a visa officer has refused a resettlement referral, UNHCR can initially request that the decision be reconsidered. In such cases the Immigration and Program Manager at the responsible visa office is contacted.¹⁶² There is no formal appeal process through either the visa office or within Canada. This means that the resettlement application will not be reconsidered and reheard in its entirety by a new decision-maker. As noted above, judicial review is, however, provided for in *IRPA* and an application for judicial review of the visa officer’s decision to refuse resettlement can accordingly be

¹⁶⁰ *Qarizada v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 1662 at para 27.

¹⁶¹ *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (2000), 195 D.L.R. (4th) 422 (F.C.A.) at para 38, leave to appeal to S.C.C. dismissed [2001] S.C.C.A. No. 71.

¹⁶² “Country Chapter: CANADA” *supra* note 92 at 5.4.

brought before the Federal Court permitting limited review for procedural errors or bias. If errors are found, the court will not reverse a decision but will send the case back for a redetermination by a different visa officer.

Procedural protections therefore apply even to administrative decisions on resettlement. The degree of protection is dependent on the facts of the case. In *Baker v. Canada (Minister of Citizenship and Immigration)* the Supreme Court of Canada indicated that a key factor in determining the content of the duty of fairness in administrative law is the importance of the decision to the individuals affected: “The more important the decision is to the lives of those affected and the greater its impact on that person or persons, the more stringent the procedural protections that will be mandated.”¹⁶³ The Federal Court has repeatedly recognized that a visa officer deciding an application for permanent residence in Canada of a resettlement refugee has a duty to act fairly.¹⁶⁴ The decision of the visa officer is reviewable on a reasonableness standard but questions of procedural fairness raised by such decisions are decided on a standard of correctness.¹⁶⁵ It is important to note that the decisions examine the level of procedural fairness accorded in making a determination as to whether an applicant meets the definition of Convention refugee and fulfillment of admission requirements – they do not review the decision-making as to which Convention refugees are to be selected for resettlement.

¹⁶³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para 26; [1999] S.C.J. No. 39; 174 D.L.R. (4th) 193; 243 N.R. 22; J.E. 99-1412; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 89 A.C.W.S. (3d) 777.

¹⁶⁴ See *Jallow*, *supra* note 155; *Oraha*, *supra* note 158; *Smajic et al. v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1904; 94 A.C.W.S. (3d) 340.

¹⁶⁵ *Kamara v. Canada (Minister of Citizenship and Immigration)*, 2008 F.C. 785 at para. 19; *Qarizada*, *supra* note 160 at paras 15-18.

In *Oraha*, Justice Gibson, while confirming the duty to act fairly applies in resettlement decisions, clarified that an applicant for refugee resettlement is not entitled to the same level of procedural fairness accorded to a refugee claimant in Canada:

I am in agreement that a visa officer, in matters such as this, has a duty to follow the Immigration Act and to act fairly. That duty of fairness is, I think, somewhat limited by comparison with that owed Convention refugee claimants applying from within Canada by reason of the fact that persons such as the principal applicant are not in Canada and do not face the possibility of deportation by Canadian authorities to the country where they claim to fear persecution if their claims are disallowed.¹⁶⁶

While a decidedly lesser threshold than in-Canada claimants, in the more recent decision *Ha v. Canada (Minister of Citizenship and Immigration)*, the Federal Court of Appeal followed the decision in *Baker* with the acknowledgement that “[t]he fact that the appellants are applying for permanent residence status as Convention refugees suggests that this decision is potentially of great importance in their lives.”¹⁶⁷ The Court of Appeal further noted:

According to *Baker, supra*, at para. 24, the fact that there is no right of appeal from the visa officer’s decision suggests that greater procedural protections should be afforded to the appellants in this case. While people applying for permanent residence status as CRSRs [Convention Refugees Seeking Resettlement] may bring judicial review applications, importantly, the scope of the reviewing judge’s authority may be limited with respect to the substantive issues of the case, and therefore cannot be equated to an appeal right.¹⁶⁸

*Muhazi v. Canada (Minister of Citizenship and Immigration)*¹⁶⁹ appears to be the first case that considered the review of resettlement visa decisions under *IRPA* as opposed to its predecessor *Immigration Act*. Justice Lemieux in *Muhazi* considers *Baker* and *Oraha* in his

¹⁶⁶ *Oraha, supra* note 158 at para 9.

¹⁶⁷ *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 174 at para 61; 2004 FCA 49; [2004] 3 F.C.R. 195; 236 D.L.R. (4th) 485; 316 N.R. 299; 11 Admin. L.R. (4th) 306; 34 Imm. L.R. (3d) 157; 128 A.C.W.S. (3d) 1177.

¹⁶⁸ *Ibid.* at para 55.

¹⁶⁹ *Muhazi v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1670; 2004 FC 1392; 262 F.T.R. 139; 42 Imm. L.R. (3d) 292; 134 A.C.W.S. (3d) 483.

reasoning and makes no distinction between the old and new legislation. Relying on *Oraha*, he equates an interview with a visa officer to a hearing and asks whether the hearing was “full and fair.”¹⁷⁰ However, as Justice Sharlow clearly outlines in *Mohamed v. Canada (Minister of Citizenship and Immigration)*: “Under the regulations that set out the requirements for admission to Canada for a Convention refugee seeking resettlement, the visa officer’s negative assessment of Mr. Mohamed’s prospects in Canada is enough, standing alone, to justify the visa officer’s denial of Mr. Mohamed’s application for admission to Canada.”¹⁷¹

While the scope of intervention available though judicial review is limited, it remains the sole route of legal challenge to a negative resettlement decision by a visa officer. A search of “refugee” and “resettlement” and “visa officer” in the Quicklaw database “All Canadian Court Cases” resulted in 213 cases on 12 August 2010.¹⁷² Only 38 cases, however, involved challenges to resettlement decisions – the remainder of the cases simply contained the search words in quoted legislation that was relevant to another type of overseas visa application and many cases were translated duplicates where the legislation was quoted in both English and French. A further 9 relevant cases were discovered through reviewing the subsequent judicial treatments of the 38 cases. For the most part these were cases where the decision-makers were referred to as embassy officials rather than visa officers. In total

¹⁷⁰ *Ibid.* at para 36.

¹⁷¹ *Mohamed v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1230 at para 23; 173 F.T.R. 261; 90 A.C.W.S. (3d) 449.

¹⁷² Admittedly, this was a limited means of survey. Sean Rehaag has conducted a much more comprehensive review of judicial reviews of in-Canada refugee determinations at the Federal Court. His methodology required the creation of a computer program to code macros in Microsoft Excel in order to import data, manual review and coding by research assistants of 23,047 cases from 2005-2010, and data verification. Rehaag’s study focused on the leave requirement and whether outcomes varied depending on the deciding judge. Cases categorized as “Arising outside Canada”; which would have been relevant here, were filtered out. Sean Rehaag, “The Luck of the Draw? Judicial Review of Refugee Determinations in the Federal Court of Canada (2005-2010)” (2012) *SSRN eLibrary* at 13-14,15.

therefore, 47 challenges to resettlement decisions were found. Recalling that the Federal Court must grant leave under subsection 72(1) of *IRPA* in order for a judicial review application to be heard, 47 resettlement challenges is a significant number.

The Federal Court provides statistics on the number of leave applications granted for all refugee applications for leave but does not break this down further between refugee claimants in Canada and those overseas. Nor does it indicate the total number of leave applications made.¹⁷³ In 2005 the Canadian Council for Refugees received data from the Immigration and Refugee Board that between 1998 to 2004, 89% of applications to the Federal Court for judicial review of in-Canada refugee claim determinations were denied leave.¹⁷⁴ In an analysis of applications for leave from in-Canada refugee determinations between 2005-2010, Sean Rehaag found a leave grant rate of 14.44% but a 43.98% success rate where leave was granted.¹⁷⁵ Similar rates for overseas applications is likely.

Certain observations can be made about these cases that offer further insight into Canadian resettlement. The 47 cases span the years 1994-2010 with zero to five cases being decided each year.¹⁷⁶ 18 of the 47 applications for judicial review, 38% of the cases, were allowed at the Federal Court with the cases being returned for redetermination by a new visa officer.¹⁷⁷ 1 of the 29 applications that were dismissed at the Federal Court of Canada was reversed at the Federal Court of Appeal and returned for redetermination by a new visa officer.¹⁷⁸ The cases arise out of negative visa decisions by officers from 20 countries

¹⁷³ Federal Court, “Statistics”; online:

<http://cas-ncr-nter03.cassatj.gc.ca/portal/page/portal/fc_cf_en/Statistics>.

¹⁷⁴ Canadian Council for Refugees, “The Refugee Appeal: Is No One Listening?” (31 March 2005) at 4.

¹⁷⁵ Rehaag, “The Luck of the Draw” *supra* note 172 at 14.

¹⁷⁶ See Appendix B: Federal Court of Canada Resettlement Cases by Year.

¹⁷⁷ See Appendix C: Federal Court of Canada Resettlement Cases by Result.

¹⁷⁸ *Ha*, *supra* note 167.

where Canada has diplomatic missions abroad.¹⁷⁹ 11 cases, (23%) challenged decisions from Pakistan, 9 cases (19%) challenged the decisions of visa officers in Germany, 4 cases (8.5%) challenged the decisions of visa officers in England and 3 cases (6%) challenged the decisions of the visa officers in Kenya. Visa officers in Italy, Egypt, Colombia, Russia, and Turkey were each challenged in 2 cases (4%). The remaining 11 countries each had a single resettlement decision challenged. While the type of resettlement decision was not always noted in the judgments, 27 of the cases (57%) were identified as sponsored resettlement applications.¹⁸⁰

It is impossible to make any conclusive statements from this data as the search criteria were non-exhaustive and the number of cases where the application for leave was denied is unknown. It does appear that refugees in certain countries (Pakistan and Germany) are more aware of the judicial review option and that applications for judicial review are much more likely to be made when there is a Canadian sponsor with knowledge of, and access to, the Canadian legal system. That one third of these applications were successful does speak to the Canadian legal system's concern for fairness. However, and without knowing the results of the redeterminations, the fact that one third of the visa officers' decisions were found by the Federal Court to breach procedural fairness should also perhaps raise some alarm with respect to the thousands of negative decisions made by visa officers each year that are not reviewed.¹⁸¹

¹⁷⁹ See Appendix D: Federal Court of Canada Resettlement Cases by Visa Application Country.

¹⁸⁰ See Appendix E: Federal Court of Canada Resettlement Cases Identified as Private Sponsorship.

¹⁸¹ Sean Rehaag has analyzed the refugee claim recognition rates by Immigration and Refugee Board members of in-Canada asylum claims and found vast disparities. In 2011, the recognition rate between members varied from 0%-98% of cases. Sean Rehaag, "2011 Refugee Claim Data and IRN Member Recognition Rates" (12 March 2012); online: <<http://ccrweb.ca/en/2011-refugee-claim-data>>; see also Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 *Ottawa Law Review* 335.

In November 2009, ten applications for judicial review were filed at the Federal Court following a series of rejections of Eritrean refugee applicants claiming to be members of the Pentecostal Church at the Canadian visa office in Cairo.¹⁸² The cases were all decided by one visa officer. The reviews were coordinated by frustrated Canadian sponsors and the Canadian Council for Refugees. Again, a signal that connection to Canadian organizations greatly increases the likelihood of a failed refugee applicant pursuing judicial review. Many more cases with the same profile were added. The cases were case managed with three lead cases granted leave in January 2011 with hearings on April 6, 2011.¹⁸³ In its report *Concerns with Refugee Decision-making at Cairo*, the CCR stated:

The CCR has long been concerned about inconsistencies in the quality of decision-making at visa offices abroad for refugees seeking resettlement to Canada. Not all visa officers have been adequately trained on refugee determination: this lack of preparation shows in some of the errors made. When mistakes are made, there is little opportunity for them to be corrected or for visa officers to learn from them, as there is no appeal and few cases are reviewed by the Federal Court. It is much more difficult for people in Canada to gather information on refugee decisions made at visa offices, compared to those made in Canada, and little attention is paid to the area by politicians, academics or the media.¹⁸⁴

Judgments in four lead cases were released on May 5, 2011, each overturning the visa officer's decision.¹⁸⁵ The remaining cases, numbering close to 40, were held in abeyance pending the outcome of the initial cases. The Minister ultimately consented to judgment

¹⁸² Canadian Council for Refugees, "Disturbing Upsurge in Rejection of Eritrean Refugees in Cairo by Canada" *Media Release* (30 November 2009).

¹⁸³ Janet Dench, Executive Director, Canadian Council for Refugees, e-mail correspondence with author, 7 February 2011. The original lead cases were IMM-6000-09, IMM 6005-09, and IMM-6009-09. Ultimately four lead cases were heard.

¹⁸⁴ Canadian Council for Refugee, "Concerns with Refugee Decision-Making at Cairo" (31 January 2010) at 4; online: <<http://ccrweb.ca/files/CairoConcerns.pdf>>.

¹⁸⁵ *Ghirmatsion v. Canada (Minister Of Citizenship and Immigration)* 2011 FC 519 (*Ghirmatsion*); *Kidane v. Canada (Minister Of Citizenship and Immigration)* 2011 FC 520; *Weldesilassie v. Canada (Minister Of Citizenship and Immigration)* 2011 FC 521; *Woldesellassie v. Canada (Minister Of Citizenship and Immigration)* 2011 FC 522.

with all cases being sent back for reconsideration.¹⁸⁶ Madam Justice Snider presided over each of the four lead cases. Her judgment in *Ghirmatsion v. Canada (Minister of Citizenship and Immigration)*¹⁸⁷ provides the most detailed reasons.

The bulk of the decision in *Ghirmatsion* falls within general judicial review considerations on the unreasonableness of the Officer's decision and are not specifically relevant here. Justice Snider does recognize the precarious situation of refugee claimants abroad: "the situation faced by the Applicant cannot be ignored; he is a refugee claimant abroad, without counsel and without the various systems to protect his rights that would be found in Canada."¹⁸⁸ Again, however, the distinction between refugee claimants abroad and those in Canada is clearly drawn.

One interesting aspect of the challenge was the submission that the Visa Officer erred in failing to give any consideration to UNHCR refugee status in her determination.¹⁸⁹ Showing the disjuncture between the Canadian and international systems of protection, *Ghirmatsion*, as well as the 3 other applicants, were recognized as Convention refugees by UNHCR.¹⁹⁰ UNHCR status is not determinative of Canadian eligibility and Canadian law guides the Officer's decision. CIC's operational manual for overseas processing does however set out the eligibility criteria an officer should consider in assessing whether the Convention Refugee Abroad Class is met. This criteria includes "a decision by the UNHCR or a signatory country with regard to an applicant's refugee status."¹⁹¹ In *Ghirmatsion*,

¹⁸⁶ *Ghirmatsion, ibid.* at para 2; *Ghirmatsion v. Canada (Minister Of Citizenship and Immigration)* 2011 FC 773 (costs) at para 4.

¹⁸⁷ *Ghirmatsion, supra* note 185.

¹⁸⁸ *Ghirmatsion, ibid.* at para 34.

¹⁸⁹ *Ghirmatsion, ibid.* at para 54

¹⁹⁰ *Ghirmatsion, ibid.* at para 30.

¹⁹¹ Citizenship and Immigration Canada, *OP5, supra* note 10 at 57.

Justice Snider stated that “In my view, the Applicant’s status as a UNHCR refugee was a personal and relevant consideration.”¹⁹² She held that “The Officer, faced with a UNHCR refugee, should have explained in her assessment why she did not concur with the decision of UNHCR.”¹⁹³

This reassertion by the Federal Court of the operational manual’s recognition of the relevance of UNHCR’s status determination is important for aligning the work of UNHCR with the Canadian process. However, UNHCR status is not determinative in Canadian law and these most recent cases illustrate the failure of visa officers to even reference it in their decision-making. The idea of refugee resettlement as a complementary mechanism to the internationally agreed upon refugee protection through asylum cannot be fully supported when these connections appear so tenuous.

Even more telling is Justice Snider’s subsequent decision that an award of costs was warranted in these cases. The awarding of costs for judicial review in a refugee case requires special circumstances.¹⁹⁴ In *Ghirmatsion*, Justice Snider found there had been unnecessary prolongation of proceedings and blatant errors in the decision-making.¹⁹⁵ In this brief decision on costs, in many ways less legally significant than the substantive decision, Justice Snider speaks emphatically on both the failure and the power of the law. Law failed with the Visa Officer’s decision-making where the “magnitude” of errors and “her lack of adequate training and support” were evident on cross-examination.¹⁹⁶ Justice Snider also acknowledged the rarity of the application of the law in resettlement cases

¹⁹² *Ghirmatsion*, *supra* note 7185 at paras 57-58.

¹⁹³ *Ibid.*

¹⁹⁴ s. 400 of the *Federal Courts Rules*, SOR/98-106 and r. 22 of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22.

¹⁹⁵ *Ghirmatsion* (costs), *supra* note 186 at paras 3, 10.

¹⁹⁶ *Ghirmatsion* (costs), *ibid.* at paras 9, 10.

where the refugee remains outside of Canada: “The four representative Applicants and all of the remaining applicants are refugees in a dangerous foreign country without the resources to finance the judicial review of their claims in Canada.”¹⁹⁷ Financial resources as well as access to and awareness of the law make cases such as *Ghirmatsion* a rarity. However, Justice Snider concludes with a powerful statement on the potential of law: “In such a situation, costs may be appropriate to encourage CIC to review, and perhaps modify, the training and practices of visa officers in overseas posts.”¹⁹⁸ Here, it is not the refugee’s rights nor the state’s obligations that may lead to better resettlement practices, but the court’s ability to make a financial order against the government.

Where the Law Is

*Asylum and resettlement need to be seen as fundamentally part and parcel of the same international refugee protection regime...*¹⁹⁹

Whereas a state’s asylum system originates in the international law of *non-refoulement* and is replicated and implemented within the state’s own legal system, resettlement originates only from an international sense of responsibility for burden-sharing, tied as it may be to foreign policy and international relations. There is no international legal framework²⁰⁰ to set state standards. There is, as a result, an absolute discretion on the part of the state to resettle refugees or not. If refugees are resettled, it is the state’s discretion to decide who to resettle, from where, and how.

¹⁹⁷ *Ghirmatsion* (costs), *ibid.* at para 6.

¹⁹⁸ *Ghirmatsion* (costs), *ibid.* at para 10. My thanks to Donald Galloway for directing me to this point.

¹⁹⁹ John Fredriksson, “Reinvigorating Resettlement: Changing Realities Demand Changed Approaches” (2002) 13 *Forced Migration Review* 28 at 29.

²⁰⁰ Although there are international models from the first half of the twentieth century as reviewed in Chapter 2 as well as the current ExCom guidelines on resettlement priorities also set out in the previous chapter.

Discretion not only on the use of resettlement but as to whom to select for resettlement places the program's structure between in-Canada asylum claims and Canada's immigration program. While resettlement is defined by a humanitarian impulse toward refugee protection and undoubtedly influenced by a sense of international burden-sharing, Canadian resettlement operates in overseas embassies and high commissions much the same way that immigration decisions are made, with visa officers often reviewing both sets of applications.

The discretionary basis of resettlement means that it is approached by a state differently than its legal obligations to refugees. In Canada this can be seen through Canada's active use of resettlement long before it ultimately agreed to sign the 1951 Convention in 1969 and absent any refugee legislation; the exclusion of overseas resettlement from the advisory committee process even when the decision was made to implement legislation dealing with refugees; the more recent announcement of resettlement increases alongside of, but not part of, legislated reform of refugee law; the subsequent numeric shift to private sponsorship significantly reducing government-assisted resettlement, and the confirmation by Canadian courts that a legitimate legal distinction exists between asylum determinations and resettlement decisions premised on the individual's presence within or outside of Canada.

In Canada, geographic realities meant that resettlement preceded a comprehensive in-Canada asylum system. As a consequence, the two refugee protection programs developed to theoretically play complementary roles. The absence of a legal foundation for resettlement has however increasingly placed the program in juxtaposition and competition with in-Canada asylum. The Canadian government exercises a selective assertion of law

while failing to acknowledge other legal rights. This selectivity corrupts the complementarity of the programs.

Resettlement puts into focus the fundamental tension in the concept of refugee protection. The 1997 legislative review clumped together human rights and compassion as the basis of Canada's protection program.²⁰¹ Yet protection sub-divides into in-Canada asylum and overseas resettlement with rights tied to the former and compassion tied to the latter. While compassion links back to the underlying basis for Canada's self-imposition of the legal obligation of *non-refoulement*, resettlement has never been legally imposed, merely legally framed. The same is true of Canada's immigration program which is fundamentally based on self-interest.²⁰² While self-interest undoubtedly also influences compassionately defined decisions, there is likewise compassion inherent in immigration programming as well. The interesting thing is that while compassion and self-interest intermingle and both resettlement and the immigration program are structured through a discretionary legal framework, it is only *non-refoulement* that has acquired the status of legal obligation.

It is the strength of the law and the absence of discretion with *non-refoulement* that now necessitates the discretionary counterpoint of resettlement. For over a decade, the Canadian government has been positioning resettlement as the more valid form of protection. It has been doing so by focusing on law. A 2011 CIC news release makes clear: "All of these individuals who immigrated to Canada through our resettlement programs waited patiently in the queue for the chance to come to Canada legally. They followed the rules."²⁰³ This is not the law of asylum but the immigration laws that control who may legally enter Canada.

²⁰¹ Davis, et al., "Not Just Numbers" *supra* note 9 at 13.

²⁰² James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 231, 233.

²⁰³ Citizenship and Immigration Canada, "Canada's Resettlement Programs" *News Release* (18 March 2011); online: <<http://www.cic.gc.ca/english/departement/media/backgrounders/2011/2011-03-18b.asp>>.

Part 1 of *IRPA* begins with the requirement that a foreign national must “apply to an officer for a visa or for any other document required by the regulations” before entering Canada.²⁰⁴ Immigration law is premised on the principle that non-citizens cannot simply enter and remain in Canada.²⁰⁵ Refugees, by necessity however, may have to enter illegally. The government uses this to discount their right to asylum: they are “bogus refugees”²⁰⁶ whose entrance is unfair to “legal, law-abiding immigrants who patiently wait to come to the country.”²⁰⁷

Within this rhetoric, resettlement, while the voluntary aspect of the program, is privileged for its legal framework and legal entry into Canada. In the most loaded statement by the government in a 2010 backgrounder to its proposed anti-human smuggling legislation, potential resettlement applicants are described as:

waiting patiently and *legally* in the refugee queue to come to Canada. These refugees choose to wait for the chance to come to Canada *legally*, rather than pay human smugglers to help them jump the queue. The Government of Canada appreciates their *respect for our laws*.²⁰⁸

The rhetorical attempt is to replace refugees who claim asylum in Canada with those waiting for resettlement through the suggestion that resettlement refugees are obeying Canadian law whereas asylum claiming refugees break Canadian law by entering Canada illegally. This positioning of the law completely obscures the reality that on another legal plane, resettlement refugees have no legal right to resettlement whereas asylum refugees do possess the right not to be sent back through the legal obligation of *non-refoulement* set out

²⁰⁴ s. 11(1), *IRPA*, *supra* note 63.

²⁰⁵ *Chiarelli v. Canada (Minister of Employment and Immigration)*, *supra* note 149.

²⁰⁶ Power quoted in “Canada monitors suspicious vessel” *supra* note 83.

²⁰⁷ Kenney quoted in “Seeking a safe haven, finding a closed door” *supra* note 81.

²⁰⁸ Public Safety Canada, “Canada’s Generous Program for Refugee Resettlement Is Undermined by Human Smugglers Who Abuse Canada’s Immigration System” *News Release* (21 October 2010), online: <<http://www.publicsafety.gc.ca/media/nr/2010/nr20101021-6-eng.aspx>> [emphasis added].

in Article 33 of the 1951 Convention and confirmed in *IRPA*. Moreover, international law recognizes that refugees may need to enter a state illegally. The 1951 Convention is clear that:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.²⁰⁹

Canada is a state party to the 1951 Convention, and *IRPA* both acknowledges an objective of the act is “to fulfil Canada’s international legal obligations with respect to refugees”²¹⁰ and that an in-Canada refugee claimant may present with no documentation establishing identity whatsoever.²¹¹ Essentially one layer of legality is being asserted by the Canadian government to evade another layer of legal obligation. Recalling the review of Canadian judicial decisions, those potential resettlement refugees that the Government applauds for their respect of Canadian law are less entitled to legal review of their cases than in-Canada asylum claimants and are more squarely in an administrative, rather than quasi-judicial, framework.²¹² Moreover, even with those refugees who fall within the Convention Refugees Abroad Class, recognition by UNHCR of their Convention Refugee status is only a tenuously connected criterion that, from a review of the cases reaching the Federal Court, is not even noted by certain visa officers.

²⁰⁹ 1951 Convention, *supra* note 82, Article 31(1).

²¹⁰ *IRPA*, *supra* note 63, s.3(2)(b).

²¹¹ *IRPA*, *ibid.* s.106.

²¹² *Jallow*, *supra* note 155; *Oraha*, *supra* note 158; *Qarizada*, *supra* note 160.

This vulnerable place of refugees waiting/hoping for resettlement recollects Franz Kafka's parable "Before the Law" which Desmond Manderson deems an "apocryphal mainstay."²¹³

The parable describes a man asking for admittance to the law:

Before the law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. 'It is possible,' says the doorkeeper, 'but not at the moment.' Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last..."

These are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone...he decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at one side of the door. There he sits for days and years. He makes many attempts to be admitted, and wearies the doorkeeper by his importunity. The doorkeeper frequently has little interviews with him, asking him questions about his home and many other things, but the questions are put indifferently, as great lords put them, and always finish with the statement that he cannot be let in yet. The man, who has furnished himself with many things for his journey, sacrifices all he has, however valuable, to bribe the doorkeeper. The doorkeeper accepts everything, but always with the remark: 'I am only taking it to keep you from thinking you have omitted anything.'²¹⁴

Manderson celebrates the parable's broad applicability and suggests that it represents "a prophecy of the triumph of modern bureaucracy where minor gatekeepers wield absolute power in the protection of an authority with which neither they nor we will ever come face to face: the social security officer, the immigration official..."²¹⁵ More specifically to the purposes here, the law, as an embodiment of the state, prevents access to refugees waiting for resettlement but at the same time maintains a perpetual sense of hope for admission. But, as Margaret Davies points out in the context of a protest at a U.S. military base "the

²¹³ Desmond Manderson, "Apocryphal Jurisprudence" (2001) 23 *Studies in Law, Politics and Society* 81.

²¹⁴ Franz Kafka, "Before the Law" in Nahum N. Glazer, *Kafka: The Complete Stories and Parables*, Willa Muir & Edwin Muir (trans.), Quality Paperback Book Club (New York: Schocken Books Inc., 1971) at 3.

²¹⁵ Desmond Manderson, "Desert Island Disks: Ten Reveries on Inter-Disciplinary Pedagogy" (2008) 2 *Public Space: The Journal of Law and Social Justice*.

fence (like all laws) is a fiction...But, although a fiction, it was being very carefully guarded, and operated in the context as a symbol of the frontier between lawful activity and criminal trespass.”²¹⁶ This is the dilemma. These fences and gates represent both the physical borders of the state and the legal framework that determines admission, but they also operate as a constructed fiction that can be manipulated according to the state’s interest on which legality it chooses to promote.

Conclusion

There are those who would argue Canada’s recent reemphasis on resettlement is a return to the country’s original position on refugee protection premised on overseas selection. While not incorrect, that position reflected a time when Canada was simply not a country of first asylum. Nor did resettlement selection at the time reflect a foremost concern with protection. The humanitarianism that is threaded through the government’s policies, positioning and legislation has never truly dictated its behaviour. Resettlement is a small piece of the protection regime. Refugees cannot simply opt to wait for resettlement rather than boarding a boat or a plane or crossing a border to claim asylum.

While the government’s refugee program is influenced by international relations, burden-sharing and its in-country image, the next chapter looks at Canada’s private sponsorship program, which is propelled by the interests of individual Canadians. A very different set of challenges pull at this program and influence the perception and protection of refugees.

²¹⁶ Margaret Davies, *Asking the Law Question* (Law Book Co., 2 ed., 2002) at 17.

CHAPTER FOUR

COMPLEMENTARY OR CONSUMING? PRIVATE SPONSORSHIP

Introduction

The last chapter set out the history and development of government enabled resettlement to Canada. It examined the tensions and rhetorical manipulations that place resettlement in juxtaposition to in-Canada asylum and the role of multiple legal rights and obligations in permitting and encouraging this contrary positioning. This chapter adds a further point of contrast found within resettlement itself. In addition to government directed resettlement of refugees is the potential to involve private citizens in a resettlement partnership. In Canada, this is enabled through private sponsorship where sponsors provide the financial support to bring over additional resettlement refugees. Private sponsorship both adds to Canada's resettlement capacity and creates a division in resettlement between refugees entering through the government program and those brought to Canada by citizens. The interests and motivations of private citizens to involve themselves in refugee resettlement fundamentally influences the concept and breadth of resettlement. This chapter examines how the addition of private citizens into resettlement affects the approach to and selection of refugees for resettlement. It brings to the forefront the relationship between citizens and the state and the ways in which law is used and confused by contrasting the various forms of resettlement.

Private Sponsorship in Canada

Canada's private sponsorship program is unique in the world.¹ It enables groups of individuals, five or more, and private organizations (religious, ethnic, community) to sponsor refugees for resettlement. Sponsorship entails that the group takes on the responsibility of providing assistance, accommodation and support for up to one year. In exceptional circumstances of trauma, torture or women and children at risk, the assistance can be extended for up to three years.

Over 200,000 refugees have been privately sponsored into Canada.² Canadian private citizens have resettled more refugees than most governments, ranking fourth behind the U.S., Canada and Australia.³ While the Canadian government covers the administrative costs of the program, it is private individuals who provide the financial support attached to settling the refugee in Canada. As a general guidance, CIC suggests the level of support should equate to the prevailing rates for social assistance in the settlement community.⁴ The sponsor is essentially taking on the state's responsibility for social welfare. In 2006, the CCR assessed the annual financial costs of private sponsorship at \$79 million with an additional volunteer contribution of over 1,600 hours per refugee family.⁵

¹ Australia offers a Special Humanitarian Program in which applications must be supported by a proposer while resettlement in the United States is dependent on public-private partnerships. Chapter 6 will discuss these programs in detail.

² Citizenship and Immigration Canada, "Canada's Resettlement Programs" *News Release* (18 March 2011).

³ Barbara Treviranus & Michael Casasola, "Canada's Private Sponsorship of Refugees Program: A Practitioners Perspective of Its Past and Future" (2003) 4 *Journal of International Migration & Integration* 177 at 180.

⁴ Citizenship and Immigration Canada, *Guide to the Private Sponsorship of Refugees Program*, (Minister of Public Works and Government Services Canada, 2003); online:

<<http://www.cic.gc.ca/english/resources/publications/ref-sponsor/index.asp>> at 2.7.

⁵ Canadian Council for Refugees, "The Private Sponsorship of Refugees Program: Current Challenges and Opportunities" (Montreal, April 2006) at 2.

Critiquing private sponsorship is an uncomfortable task. The program gives individual Canadians a voice and policy power, demonstrates their generosity and increases Canada's annual resettlement numbers by over one third. The purpose of this chapter is not to argue the program out of existence. Rather, it is to impose a check that the program in fact meets its objective to complement the government program and resettle additional refugees.⁶ While most evaluations of private sponsorship revolve around sponsor motivation, program functioning and refugee integration, these discussions fail to situate sponsorship as a part within the greater whole of the Canadian refugee program. My intent here is different. While cognizant that the structure of the program will have an effect on sponsorship appeal, the focus here is on the effect of sponsorship on refugee protection. Sponsorship's influence on government-assisted resettlement, the inland asylum program and international obligations and burden-sharing will be considered.

Before the Law

Private sponsorship has been a part of Canadian refugee policy since Canada first formally recognized refugees as a separate immigration class in its 1976 *Immigration Act*.⁷ Included with this legislated recognition were innovative and rather incidental⁸ provisions for the private sponsorship of refugees. Lobbying for the private sponsorship scheme within this legislation had come predominantly from ethnic groups wanting to resettle refugees from the Soviet Union and Eastern Europe. The Jewish Immigrant Aid Services of Canada (JIAS) pushed to introduce private sponsorship into the Act.⁹ Commenting on the

⁶ Citizenship and Immigration Canada, *Guide to the Private Sponsorship*, *supra* note 4.

⁷ *Immigration Act*, S.C. 1976-77, c.52.

⁸ Howard Adelman, "Private Sponsorship Consultation" (1991).

⁹ Howard Adelman, *Canada and the Indochinese Refugees* (Regina: L.A. Weigl Educational Associates, 1982) at 85, see also 110. JIAS was widely regarded in this period as a stand-out organization with effective and successful lobbying techniques:

Government's 1967 White Paper on Immigration, Dr. Joseph Kage, JIAS' National Executive Vice-President, wrote "We also suggest that consideration be given to provisions which would enable individuals or responsible voluntary social agencies to offer sponsorship or co-sponsorship to deserving cases of refugees..."¹⁰ In 1973 he suggested that in looking to revise the *Immigration Act* "that consideration be given to provisions which would enable individuals or responsible voluntary social agencies to offer sponsorship or co-sponsorship in deserving cases of refugees or other immigrants, which would come under the category of 'humanitarian immigration'."¹¹ In fact, JIAS advocated not only for private sponsorship but also for other resettlement models embraced under the categories of source country and group resettlement.¹²

Informal private assistance from religious organizations was already in operation. Both the Mennonite Central Committee and the JIAS were founded following the First World War to assist in immigration to Canada.¹³ An Order in Council, 2 June, 1922, permitted

The Jewish community, in the shape of the Canadian Jewish Congress and Jewish Immigrant Aid Services, has exercised pressure in its own areas of concern in immigration in a very individual and successful way...The Canadian Jewish Congress and JIAS do not seek the aid of Members of Parliament. They make direct approaches to senior officials in the Department and, on important issues, to the Minister and, perhaps, to other members of the Cabinet...This kind of approach, which is accompanied by good briefs and proposals which are carefully worked out, has had a high degree of success. Freda Hawkins, *Canada and Immigration; Public Policy and Public Concern* (Montreal: McGill-Queen's University Press, 1972) at 350.

¹⁰ Joseph Kage, "Re-Appraising the Canadian Immigration Policy: An Analysis and Comments on the White Paper on Immigration" (Montreal, January 1967) at 18 (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

¹¹ Joseph Kage, "Stepping Stones Towards the New Canadian Immigration Act" in Jewish Immigrant Aid Society Information Bulletin No. 347 (20 November 1973) at 12 (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

¹² In the full quote from the excerpt above, Joseph Kage suggested to the JIAS Board of Directors:

We hope that the legislation in the forthcoming revisions of the Immigration Act will show sufficient understanding and flexibility by giving consideration to those who are refugees *de jure as well as de facto*. We also suggest that consideration be given to provisions which would *enable individuals or responsible voluntary social agencies to offer sponsorship or co-sponsorship* in deserving cases of refugees or other immigrants, which would come under the category of 'humanitarian immigration'. This may apply to individual cases or *sponsorship of groups*." *Ibid.* at 12 (emphasis added).

¹³ Adelman, *Canada and the Indochinese Refugees*, *supra* note 9 at 107.

Mennonites from the Soviet Union to come to Canada but required that the Canadian Mennonite community take responsibility for the care of the newcomers so that they would not become a burden on the state.¹⁴ As the outbreak of the Second World War approached, and the assistance capacity of the religious groups well-established, the Canadian Christian Council for the Resettlement of Refugees (CCCRR) was created in 1946 to assist the government in the assembly and selection of refugees in Germany.¹⁵ Through a government grant of up to \$10,000 a month, the CCCRR's purpose was "to organize the assembly abroad, selection, presentation to Canadian Immigration offices, and onward movement to Canada of refugees and displaced persons who did not come within the mandate of the I.R.O. [International Refugee Organization]."¹⁶ This was at a time when Canada's overseas immigration program consisted of "a single immigration officer, whose office was in his suitcase and whose method of transportation was by thumbing rides from military or other vehicles on the German roads."¹⁷ The CCCRR operated until the end of 1951 and was followed by the Approved Church Program of 1953 and the National Inter-Faith Immigration Committee established in 1968.¹⁸ The Approved Church Program permitted the Canadian Council of Churches, the Canadian Christian Council for the Resettlement of Refugees, the Rural Settlement Society of Canada, and the Canadian Jewish Congress and Immigrant Aid Services to assist in the selection of unsponsored immigrants as well as the approval and processing of sponsor applications.¹⁹

¹⁴ William Janzen, "The 1979 MCC Canada Master Agreement for the Sponsorship of Refugees in Historical Perspective" (2006) 24 *Journal of Mennonite Studies* 211 at 212.

¹⁵ Adelman, *Canada and the Indochinese Refugees*, *supra* note 9 at 107.

¹⁶ Hawkins, *Canada and Immigration*, *supra* note 9 at 304.

¹⁷ Hugh Keenleyside, Deputy Minister of Mines and Resources, speech at Dalhousie University (November 1948) quoted in Hawkins, *ibid.* at 239.

¹⁸ Adelman, *Canada and the Indochinese Refugees*, *supra* note 9 at 107-108.

¹⁹ Hawkins, *Canada and Immigration*, *supra* note 9 at 305.

JIAS was essentially privately sponsoring refugees to Canada before the scheme was brought into law.²⁰ In 1969, Dr. Kage wrote to R.B. Curry, the Assistant Deputy Minister of Immigration to advocate on behalf of JIAS to sponsor “de facto” refugees from the Middle East, North Africa and Eastern Europe. In the letter Dr. Kage states “We assure your Department [of Manpower and Immigration] that we shall provide for the necessary reception, housing, financial assistance, referral to employment and other adjustment and integration services.”²¹ The “Immigration Service” of JIAS was described at the time as “provid[ing] sponsorship and guarantees for certain applicants who would otherwise not be able to enter Canada.”²² In a further letter to Robert Adams, the Assistant Deputy Minister of Immigration in 1972, Dr. Kage noted “In all cases where the sponsor or nominator cannot fulfil the requirements for satisfactory settlement arrangements, JIAS will offer a letter of co-sponsorship and thereby assume on behalf of the Jewish community, the responsibility for the post-arrival adjustment of the immigrant, with reference to the provisions of essential housing, referral to employment and such other social assistance that may be required to effect satisfactory settlement.”²³ The idea of private sponsorship was thus driven by the commitment and generosity of private Canadians.

The Sponsorship Scheme

At the outset, private resettlement could be done by a “group of five” or through organizations holding “master agreements” with the government.²⁴ The master agreements

²⁰ Rivka Augenfeld, former JIAS employee, e-mail correspondence with author, 7 July 2010.

²¹ Letter from Joseph Kage to R.B. Curry, 29 May 1969, at 2 (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

²² Jewish Immigrant Aid Society, “1972 in Review: Highlights - JIAS Activities and Pending Issues” (1972) at 1 (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

²³ Letter from Joseph Kage to Robert M. Adams, 18 December 1972, at 1-2 (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

²⁴ Treviranus & Casasola, “Canada’s Private Sponsorship of Refugees Program” *supra* note 3 at 184.

limited the government's need to vet individual sponsoring groups and left the bulk of responsibility to the agreement holders.²⁵ They also encouraged resettlement by smaller groups who were unable or unwilling to take on full liability as this liability rested with the agreement holder.²⁶ Relatively few changes to this initial design have been made. The current sponsorship scheme permits three types of sponsorship groups: "Groups of Five"; "Community Sponsors"; and "Constituent Groups" (CG) who are members of an organization that is a "Sponsorship Agreement Holder" (SAH). As of 2007, SAHs and CGs constituted approximately 85% of sponsors. At that time, there were 87 SAHs, the majority of which are either faith-based organizations, ethno-cultural groups, or humanitarian organizations.²⁷ SAHs must be incorporated organizations. These organizations represent the evolution of the original "Master Agreements" of the 1970s. Since 2002, organizations which have not signed a sponsorship agreement with CIC and are not partnered with a SAH or a CG may still sponsor as Community Sponsor.²⁸ Groups of Five consist of at least five individuals who are willing and eligible to sponsor. These groups are independently formed but each member must complete a financial profile and the group must set out a settlement plan and financial assessment. *IRPA* brought in the new possibility of co-sponsorships permitting an individual to partner with an SAH, CG or

²⁵ Mike Molloy, Former Director of Refugee Policy Division, interview with author, 24 March 2011. Janzen, "The 1979 MCC Canada Master Agreement" *supra* note 14 at 212.

²⁶ Janzen, *ibid.* at 212.

²⁷ Citizenship and Immigration Canada, *Summative Evaluation of the Private Sponsorship of Refugees Program* (2007) at 1.2.2.; online: <<http://www.cic.gc.ca/english/resources/evaluation/psrp/psrp-summary.asp#summary>>.

²⁸ Canadian Council for Refugees & Elected Sponsorship Agreement Holder Representatives, "Comments on Private Sponsorship Evaluation" (Montreal: Canadian Council for Refugees, 2007) at 8.

community sponsor.²⁹ There is thus a government imposed legal framework structuring private sponsorship.

In addition to the Private Sponsorship program, a Joint Assistance Sponsorship (JAS) program is also in operation.³⁰ With the JAS program, private sponsors provide supplemental, non-financial, support to vulnerable refugees with special needs. These refugees also receive government support through the Resettlement Assistance Program.³¹ Private and government support continues for 24 months and the private sponsorship can be extended for an additional year in exceptional circumstances.³² In statistical counts, JAS cases are considered as Government Assisted Refugees³³ and are identified and referred by the visa officers rather than originating through the sponsorship organizations.³⁴

Joint sponsorship is rooted in the *ad hoc* historical origins of the sponsorship model. Canadian resettlement forms used by agencies in Europe in the 1970s gave three resettlement options: 1) GARS; 2) JIAS; 3) JOINT.³⁵ The conceptual basis for Canadian resettlement thus began with refugees coming through public, private or shared public-private responsibility.

²⁹ Citizenship and Immigration Canada, *Guide to Private Sponsorship*, *supra* note 4 at 2.3.

³⁰ *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] s.157:

- (1) If an officer determines that special needs exist in respect of a member of a class prescribed by Division 1, the Department shall endeavour to identify a sponsor in order to make the financial assistance of the Government of Canada available for the purpose of sponsorship. A sponsor identified by the Department is exempt from the financial requirements of paragraph 154(1)(a).
- (2) In this section, “special needs” means that a person has greater need of settlement assistance than other applicants for protection abroad owing to personal circumstances, including
 - (a) a large number of family members;
 - (b) trauma resulting from violence or torture;
 - (c) medical disabilities; and
 - (d) the effects of systemic discrimination.

³¹ Citizenship and Immigration Canada, *Guide to the Private Sponsorship*, *supra* note 4 at 19.

³² *Ibid.*

³³ Treviranus & Casasola, “Canada’s Private Sponsorship” *supra* note 3 at 182.

³⁴ Citizenship and Immigration Canada, *Guide to the Private Sponsorship*, *supra* note 4 at 20.

³⁵ Rivka Augenfeld, former JIAS employee, telephone interview with author, 9 July 2010; interview with author 23 August 2010.

Refugees in the private sponsorship scheme may be either “visa office-referred” or “sponsor-referred.”³⁶ Visa office-referred refugees will have already been approved by CIC for sponsorship and completed the application process. Sponsor-referred refugees are chosen by the sponsoring group and must still be reviewed by CIC to determine resettlement eligibility and protection need before the application can be accepted. The overwhelming majority of private sponsorship is of sponsor-referred refugees. In data from 2002 to 2005, visa office-referred cases accounted for less than 2% of private sponsorship.³⁷

The obligations of the sponsoring group to the principal refugee applicant and all family members both accompanying and non-accompanying are clearly set out in the sponsorship application forms. They begin with the refugees’ arrival in Canada and reception in the community and include lodging (“suitable accommodation, basic furniture and other household essentials”), and care (“food, clothing, local transportation costs and other basic necessities of life”). Non-financial assistance is also required to assist the refugees in learning an official language and seeking employment, teaching the refugees the rights and responsibilities of permanent residence in Canada, and providing a general extension of “ongoing friendship.”³⁸ The sponsorship obligations are for 12 months or until the refugees become self-sufficient if this occurs before the 12 month timeframe concludes. In exceptional circumstances the sponsorship can be extended to 36 months. During the sponsorship period, privately sponsored refugees are not entitled to government assistance, either through the federal or provincial government. As is the case with refugees resettled by the government, the costs of the required medical exams and transportation to Canada

³⁶ Citizenship and Immigration Canada, *Guide to Private Sponsorship*, *supra* note 4 at 2.9.

³⁷ Citizenship and Immigration Canada, *Summative Evaluation*, *supra* note 27 at 3.2.4.

³⁸ Citizenship and Immigration Canada, “Undertaking/Application to Sponsor - Groups of Five” (IMM 5373 (10-2009) E) at G, Citizenship and Immigration Canada, “Undertaking/Application to Sponsor - Sponsorship Agreement Holders and Constituent Groups” (IMM 5439 (10-2009) E) at J.

are paid by the refugee, usually by way of a loan from the Federal Government. In a case where a visa officer feels the refugee will be unable to repay the loan, sponsoring groups may be asked to pay a portion or all of these costs.³⁹

Private sponsor support parallels the support CIC provides to GARs through the Resettlement Assistance Program which includes financial assistance for up to one year subject to self-sufficiency and a one time household goods and furniture package.⁴⁰ The common assumption is that privately sponsored refugees are more likely to obtain self-sufficiency in the one year period than government assisted refugees. This may be due to the personalized support and the social capital value of sponsors as network ties.⁴¹ While the point has been acknowledged in CIC documents, empirical data is lacking.⁴²

The objective of private sponsorship is to complement the government-assisted program.⁴³ In its *Guide to the Private Sponsorship of Refugees*, CIC begins by situating private sponsorship in this complementary role. The GAR program is set out along Canada's continuing myth as "[i]n keeping with [Canada's] humanitarian tradition and international obligations." Through private sponsorship, the guide continues, "Canadian citizens and permanent residents are able to provide additional opportunities for refugees."⁴⁴ These opportunities are recognized as equipping Canadians with a voice on refugee policies, to

³⁹ Citizenship and Immigration Canada, *Guide to the Private Sponsorship*, *supra* note 4 at 8.

⁴⁰ Citizenship and Immigration Canada, "Resettlement Assistance Program"; online: <<http://www.cic.gc.ca/english/refugees/outside/resettle-assist.asp>>.

⁴¹ N.K. Lamba & H. Krahn, "Social Capital and Refugee Resettlement: The Social Networks of Refugees in Canada" (2003) 4 *Journal of International Migration and Integration* 335 at 339. Although Lamba and Krahn go on to note "In the same way that private sponsors become valuable network ties for some refugees, government-sponsored refugees have access to host-matching programs coordinated by refugee service-providing agencies that are designed to aid newcomers in the first years of resettlement" at 347.

⁴² Treviranus & Casasola, "Canada's Private Sponsorship" *supra* note 3 at 182. Lamba and Krahn's survey, *ibid.*, for example, consisted of data collected from only 525 adult refugees resettled in Alberta in the 1990s on their formal and informal social networks.

⁴³ Employment and Immigration Canada, "Private Sponsorship of Refugee Program" (1992) 12 *Refugee* 2 at 8.

⁴⁴ Citizenship and Immigration Canada, *Guide to the Private Sponsorship*, *supra* note 4.

“let interested groups express their concerns for refugees in concrete ways.”⁴⁵ Elsewhere the program has been described as an enhancement of Canada’s refugee protection capacity.⁴⁶ Despite this conceptual orientation of the program, maintenance of private sponsorship’s complementary role has been the continual challenge. Both the government and sponsoring groups have pulled the program in differing directions to meet their own interests. In the grip of this tug of war, the objective and ideal of additional protection is stretched and strained to the point that it risks snapping.

The Public-Private Pull

Many large church groups were initially suspicious of the legalization of private sponsorship. They feared “the government intended to use the plan as a means of dumping its responsibilities for refugees onto the private sector.”⁴⁷ While JIAS had lobbied for the legislation, the organization itself remained hesitant to sign a master agreement with the government, content with the resettlement they were doing without any such agreement.⁴⁸ If anything, JIAS imagined using the legislation to continue a small-scale resettlement of Jews from Eastern Europe as well as North Africa and the Middle East. The Mennonite Central Committee Canada was the first national church body to sign a Master Agreement.⁴⁹

⁴⁵ Employment and Immigration Canada, “Private Sponsorship of Refugee Program” *supra* note 43 at 2.

⁴⁶ Citizenship and Immigration Canada, *PSRP: Results-Based Management and Accountability Framework (RMAF)*, Final Report, (November 2004) at 4.

⁴⁷ Adelman, *Canada and the Indochinese Refugees*, *supra* note 9 at 85, see also 109; see also Janzen, “The 1979 MCC Canada Master Agreement” *supra* note 14 at 219.

⁴⁸ Augenfeld, interviews, *supra* note 35.

⁴⁹ Janzen, “The 1979 MCC Canada Master Agreement” *supra* note 14 at 211.

Two years passed between the drafting of the 1976 *Immigration Act* and its implementation in 1978.⁵⁰ The introduction of the private sponsorship scheme thus merged with the Indochinese “boat-people” crisis of the late 1970s. Counter to expectations, the Indochinese resettlement thus marked the first opportunity to test the private sponsorship scheme in practice.

The Indochinese

The Indochinese refugee outflow followed the collapse of the government of South Vietnam in 1975. That year, Canada agreed to admit up to 3,000 Indochinese with no ties to Canada from evacuation camps in the United States and elsewhere.⁵¹ Following this initial intake, Canada processed applications from refugee camps of those applicants with sponsoring families in Canada and began to admit small numbers of “boat people” attempting escape on small vessels. 176 such boat people were accepted in October 1976 and another 450 in August 1977.⁵² By 1978 Canada had decided upon an on-going response of accepting 50 “boat” families a month and by August 1978 had added 20 families per month who had escaped overland to Thailand.⁵³

In 1979, following the coming into force of the *Immigration Act*, Canada introduced its first global refugee plan. The plan included 5,000 refugees from Southeast Asia, a number that was later increased to 8,000.⁵⁴ Private sponsorship was considered outside of these numbers. In 1979, the intent was for 2,000 additional refugees to come through family sponsorship under the general immigration scheme and another 2,000 from the private

⁵⁰ *Immigration Act*, *supra* note 7.

⁵¹ Employment and Immigration Canada, *Indochinese Refugees: The Canadian Response, 1979 and 1980* (Ottawa: Minister of Supply and Services Canada, 1982) at 8.

⁵² *Ibid.* at 8.

⁵³ *Ibid.* at 8.

⁵⁴ *Ibid.* at 8.

sponsorship program.⁵⁵ These numbers of privately sponsored refugees had not been anticipated. Those in charge of designing the program before the crisis exploded, had imagined approximately 100 private sponsorship applications a year.⁵⁶ The provision had been originally regarded as something good to have and to be used when necessary rather than depending on *ad hoc* arrangements.⁵⁷ By the spring of 1979 the government had prepared slides and mimeographs for sponsorship applications but the actual forms had not yet been designed.⁵⁸

Despite this lack of preparation, the government considered sponsorship an ideal means of enabling the settlement of the Indochinese. Howard Adelman documents a Sunday meeting organized at his home in June 1979 to petition the government to take more refugees. Two top civil servants appeared at the private meeting and proposed private sponsorship as a more proactive alternative to the petition.⁵⁹ When worsening circumstances and ever-increasing outflows made the above total of 12,000 refugees appear insignificant and inadequate, the government responded to public, media and international pressure by increasing numbers to 50,000.

This increase, however, came with a caveat. Using the newly legislated sponsorship scheme, the private sector would be responsible for half this intake. The government

⁵⁵ David Humphreys, "Two Ministers Condemn Vietnam, Canada Will Take 3,000 More Asian Refugees" *The Globe and Mail* (22 June 1979) P9.

⁵⁶ Molloy, interview, *supra* note 25.

⁵⁷ Janzen, "The 1979 MCC Canada Master Agreement" *supra* note 14 at 217.

⁵⁸ Molloy, interview, *supra* note 25. As a consequence the operation design of the private sponsorship program occurred in the midst of the Indochinese crisis.

⁵⁹ Howard Adelman, "The Policy Maker and the Advocate: Case Studies in Refugee Policy" in Peter Harries-Jones (ed.), *Making Knowledge Count: Advocacy and Social Science* (Montreal: McGill-Queen's University Press, 1991) 54 at 62; Howard Adelman, telephone interview with author, 8 July 2010. The meeting resulted in the creation of "Operation Lifeline", a name given by Dick Beddoes in a newspaper article on the sponsorship that credited Adelman with its genesis; Dick Beddoes, "A Rush of Aid" *The Globe and Mail* (27 June 1979) P8. Operation Lifeline became a leader in organizing and promoting the Indochinese sponsorship.

proposed to “match” each privately sponsored refugee with a government resettled refugee until the end of 1980.⁶⁰ With the government number already at 8,000, the matching program envisioned the government and private sponsors each resettling 21,000 additional refugees to bring the number to 50,000.⁶¹ The matching scheme enabled the government to promote its new sponsorship program⁶² and appear responsive to both domestic and international pressure to assist the Indochinese without an excessive financial toll. The matching formula further offered a “political barometer” for the government to measure continued public support for Indochinese resettlement.⁶³

Despite these clear government advantages, descriptions of the matching program suggest the government presented the program as a concession to the Canadian public. James Hathaway writes: “The government *agreed to permit* Canadian organizations and groups of individuals to privately sponsor the admission of Convention refugees and designated class members from abroad.”⁶⁴ At the time the matching system was announced, private and family sponsorship was at 4,000 per year and government numbers set at 8,000. Sponsorship was regarded by sponsoring groups as providing additional resettlement “over and above” government support.⁶⁵ Doubling these numbers to cover both 1979 and 1980, the original resettlement numbers stood at 16,000 for the government and 8,000 for sponsors. The increase to 50,000 by way of a matching scheme therefore meant an increase

⁶⁰ Robert Sheppard, “Ottawa’s Challenge: Triple Flow of Refugees to 50,000” *The Globe and Mail* (19 July 1979) P1.

⁶¹ Adelman, “The Policy Maker and the Advocate” *supra* note 59 at 60.

⁶² Treviranus & Casasola, “Canada’s Private Sponsorship of Refugees Program” *supra* note 3 at 184.

⁶³ Gertrude Neuwirth & J.R. Rogge, “Canada and the Indochinese Refugees” in Supang Chantavanich and E. Bruce Reynolds (eds.), *Indochinese Refugees: Asylum and Resettlement* (Bangkok: Institute of Asian Studies, Chulalongkorn University, 1988) 249 at 254.

⁶⁴ James C. Hathaway, “Selective Concern: An Overview of Refugee Law in Canada” (1987-1988) 33 *McGill Law Journal* 676 at 685 (emphasis added).

⁶⁵ Canada Employment and Immigration Commission, Refugee Policy Division “Refugee and Humanitarian Plans” (1980) at 3.

of 13,000 more refugees for the government and private sponsors to each resettle over the two years. The government was thus expecting sponsors to almost double their numbers.⁶⁶

To facilitate and expedite the resettlement, the Indochinese were made a “designated class.” The 1976 *Immigration Act* set out the potential to establish a “designated class” that “includes persons oppressed in their own country or displaced by emergency situations such as war or revolution.”⁶⁷ By designating the Indochinese as a class, a foreshadowing of the more recent group processing methodology that will be discussed in Chapter Five, the need for individualized assessments of refugee status could be avoided. As well as reducing processing time, the designated class structure reduced the requisite knowledge necessary for facilitating resettlement. Protection need and refugee status were presumed. These designations opened the door for the more broadly based sponsorships that now occur.

Although church groups had been initially reluctant to support the program, private sponsorship support for the Indochinese was immediate and overwhelming. Church groups and private citizens embraced sponsorship for the protection and increased refugee resettlement numbers it offered. Fewer than 100 private sponsorships had taken place under the new act by the spring of 1979.⁶⁸ Remarkably, numbers reached 29,269 by the end of that year. The supplementary support of sponsors became the foundational core of Canadian resettlement. Liberal opposition critic, M.P. Robert Kaplan observed that “If anything, it has been the government of Canada that has been challenged by the Canadian

⁶⁶ Rosie Dimano, “Refugee Burden Is Too Heavy, Private Sponsorship Head Says” *The Globe and Mail* (25 July 1979) P4.

⁶⁷ *Immigration Act*, *supra* note 7.

⁶⁸ Employment and Immigration Canada, *Indochinese Refugees*, *supra* note 51 at 18.

people.”⁶⁹ With the private sector exceeding its quota, the program was extended to an additional 10,000 refugees in 1980.⁷⁰ Of the 60,000 Indochinese refugees admitted to Canada between 1979 and 1980, approximately 26,000 were government assisted and 34,000 were privately sponsored.⁷¹ Over 7,000 Canadian sponsoring groups took part in the resettlement.⁷²

The story is not, however, quite so simple. The Indochinese resettlement weaves through two federal elections in Canada and three changes of the political party in power. The Liberal government of Pierre Trudeau made the original pledge in 1979 to accept 5,000 refugees. It was Joe Clark’s minority Conservative government that increased the number to 8,000 and made the later promise of 50,000 through the matching formula by the end of 1980.⁷³ While private sponsors easily exceeded their quota, the government was in need of funds. Canada had pledged \$15 million in food and medical aid to Cambodia.⁷⁴ The government had over-extended itself. With sponsorships soaring there was a concern that the government could not keep up. It lacked the capacity to process the sponsorship applications and continue with its own resettlement obligations.

An internal government proposal in 1979 addressed extending the matching timeline into 1981 and prioritizing the processing of private sponsor applications over government assisted refugees.⁷⁵ The government feared losing sponsors due to frustration if sponsored

⁶⁹ Robert Kaplan, “A Critique of Government Policy on Refugees” in Howard Adelman (ed.) *The Indochinese Refugee Movement, The Canadian Experience* (Toronto: Operation Lifeline, 1979) 17 at 18.

⁷⁰ Neuwirth & Rogge, “Canada and the Indochinese Refugees” *supra* note 63 at 255.

⁷¹ Employment and Immigration Canada, *Indochinese Refugees*, *supra* note 51 at 8.

⁷² *Ibid.* at 14.

⁷³ Ninette Kelley & Michael J. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) at 407.

⁷⁴ Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared*, 2nd ed. (Montreal: McGill-Queen’s University Press, 1991) at 184.

⁷⁵ Adelman, telephone interview, *supra* note 59.

refugees were slow to arrive in Canada. Ultimately, and seemingly without having read the internal proposal,⁷⁶ the government opted to shift more of the Indochinese resettlement numbers to the clearly capable private sponsors.⁷⁷ The strategic decision was thus made to maintain the 50,000 resettlement figure for the year by substituting government sponsored refugees with privately sponsored refugees.⁷⁸

At the time of the government's decision, on 5 December 1979, it was reported that private sponsorship had exceeded its portion and was at 26,196 refugees, whereas the government had only resettled approximately 12,000 refugees. This left a further 11,800 refugees to be resettled, now by private citizens, to meet the 50,000 promise by the end of 1980.⁷⁹ To many private sponsors this felt like a betrayal. The matching formula was compromised whether interpreted as matching merely the target quota of 50,000 or more generously matching every privately sponsored refugee with a government sponsored refugee. The Standing Conference of Canadian Organizations Concerned for Refugees⁸⁰ sent a letter on 13 December 1979 to Prime Minister Joe Clark, Minister of External Affairs Flora MacDonald, Secretary of State David MacDonald and Immigration Minister Ronald Atkey expressing their discontent with the government's reversal of its July 1979 commitment to match sponsored refugees on a one-to-one basis and allow private sponsorship to continue unrestricted. They wrote, "We are not prepared to release the government from its

⁷⁶ *Ibid.*

⁷⁷ Adelman, "The Policy Maker and the Advocate" *supra* note 59 at 62; Howard Adelman, "Changes in Policy: Background on the Federal Government Decision to Alter Its Position with Respect to the Indochinese Refugees" in Adelman (ed.) *The Indochinese Refugee Movement*, *supra* note 69, 23 at 23.

⁷⁸ Adelman, "Changes in Policy" *ibid.* at 23.

⁷⁹ Canadian Press, "Onus Put on Public Groups, Ottawa Won't Sponsor More Refugees" *The Globe and Mail* (6 December 1979) P1.

⁸⁰ Formed in 1978, the Standing Conference of Organizations Concerned for Refugees was the original name of the Canadian Council for Refugees; Canadian Council for Refugees, "Canada Refugee History"; online: <<http://ccrweb.ca/canadarefugeeshistory5.htm>>.

obligations.”⁸¹ Having moved beyond their initial reluctance to support sponsorship to taking full advantage of the scheme, the sponsorship community had been quickly reminded of the danger of over-reliance on sponsorship support to release the government from its own obligations.

The timing of events could not have been more dramatic or less consequential. Politics again came into play. That same day the minority government failed to pass a Motion of Confidence and Parliament was dissolved on the following day, 14 December 1979. The majority Liberal government of Pierre Trudeau assumed power in April 1980. While a return to matching did not occur, as the new Immigration Minister, Lloyd Axworthy announced the government’s renewed commitment to resettlement and the 10,000 refugee increase to 60,000 on 2 April 1980.⁸² The 60,000 number essentially but not formally re-balanced the matching formula between sponsorship and government resettlement. The announcement and swift changes mark the line between politics and law and the role each plays. Shortly after, Gerald Dirks observed: “Any contentiousness associated with refugee admission to Canada in recent years has not arisen due to inadequacies in the legislation but rather has resulted from policy preferences and day-to-day administrative procedures determined by the cabinet and officials of the Employment and Immigration Commission.”⁸³ The law was broad and the policy malleable.

Such policies could easily manipulate the complementary design of private sponsorship. Private sponsorship was originally conceived as limited only by the generosity and

⁸¹ Quoted in Adelman, “Changes in Policy” *supra* note 77 at 25.

⁸² Canadian Press, “Ottawa Revamps Refugee Program, Increases 1980 Quota by 10,000” *The Globe and Mail* (3 April 1980) P1.

⁸³ Gerald E. Dirks, “A Policy within a Policy: The Identification and Admission of Refugees to Canada” (1984) 17 *Canadian Journal of Political Science* 279 at 299.

willingness of private Canadians. While the government released annual immigration quotas that included refugees, only federally assisted refugees were originally included.⁸⁴ Sponsorship's role was complementary: "because sponsored refugees are admitted to Canada over and above those accepted into the government's annual resettlement plan."⁸⁵ By the mid-1980s, the fault-line of this numeric division was identified. The government tied its failure to meet its GAR quota to the requirement that visa officers also process private sponsorship applications.⁸⁶ Sponsorship groups accused the government of preferential processing of sponsorship applications over GARs to the extent that privately sponsored refugees made up close to one-half of the government's annual quota.⁸⁷ While not as overt an action as the Conservative government's abandonment of the matching formula, the result was practically the same. Only a few years into the program, the Inter-Church Committee on Refugees expressed concern that the government had endorsed a policy shift placing the majority of responsibility for refugee resettlement on the private sector.⁸⁸ This shifting of responsibility is the first major challenge of private sponsorship. Initial hesitations had proven true but already the protection potential of the program was too much for private sponsors to now abandon the scheme.

After Indochina - Reining in Family Reunification

Following the surge of Indochinese resettlement in 1979-1980, private sponsorship settled at 4,000-6,000 arrivals a year. By the end of 1981 the crisis had subsided and the government felt it could not fill its Southeast Asian quota of 8,000 and announced a

⁸⁴ *Ibid.* at 295-296.

⁸⁵ Canada Employment and Immigration Commission, "Refugee and Humanitarian Plans" *supra* note 65 at section 3.

⁸⁶ Dirks, "A Policy within a Policy" *supra* note 83 at 296.

⁸⁷ *Ibid.* at 299.

⁸⁸ *Ibid.* at 299.

reduction to 4,000 for the following year and more regionally balanced resettlement.⁸⁹ Even as numbers diminished, the Canadian public was celebrated by the international community for its contribution to the refugee cause.⁹⁰ Perhaps as a result of this recognition, the late 1980s brought a jump in private sponsorship with numbers growing from 7,437 in 1987 to 21,631 in 1989.⁹¹ The height of sponsorship, however, also marked a significant downturn in Canadian receptiveness to refugees. A numeric increase of this measure raised suspicions and strained government-sponsor relations.⁹² Public opinion polls showed Canadian resistance to resettlement went from 31% in 1989 to 49% by 1991.⁹³

A review of the private sponsorship program was initiated by the government in 1990. At the time, financial overextension by sponsorship groups and mutual mistrust between government and sponsors plagued the program.⁹⁴ The review commenced with a Steering Committee involving representatives from private sponsorship groups, NGOs, academia and the federal government. Initial research and consultations led to a report which was then discussed at a national consultation. Following the consultation, a comprehensive report was compiled, reviewed and forwarded to the Minister.⁹⁵ The review points to the second major challenge of a private sponsorship protection scheme. While the first

⁸⁹ Thomas Walkom, "No Bias in Shuffled Border Quotas, Axworthy" *The Globe and Mail* (4 November 1981) P8.

⁹⁰ It was in 1986 that UNHCR awarded the people of Canada the Nansen Medal for their resettlement of the Indochinese. UNHCR, "Archive of Past Nansen Winners"; online: <<http://www.unhcr.org/pages/49c3646c467-page4.html>>. While recipients have included private citizens, politicians, royalty and organizations, the award to the Canadian people is the only instance where the entire population of a country has been recognized.

⁹¹ See Table 4: Private Sponsorship Ranges and Landings (1979-2012).

⁹² Treviranus & Casasola, "Canada's Private Sponsorship" *supra* note 3 at 186.

⁹³ Robert Holten & Michael Lanphier, "Public Opinion, Immigration and Refugees" in Howard Adelman, et al. (eds.) *Immigration and Refugee Policy: Australia and Canada Compared* (Toronto and Buffalo: University of Toronto Press, 1994) 125 at 132.

⁹⁴ Employment and Immigration Canada, "Private Sponsorship of Refugee Program" *supra* note 43 at 5; Adelman, "Private Sponsorship Consultation" *supra* note 8.

⁹⁵ Employment and Immigration Canada, "Private Sponsorship of Refugee Program" *supra* note 43 at 3.

challenge, the shifting of responsibility, was government driven, this second challenge lies with the sponsorship community and threatens the refugee concept. In the midst of declining sympathy for refugees, visa officers expressed concern that the program was turning into a tool of family reunification.

One theme explored in this dissertation is the expansion of protection along broader human rights criteria. The extension of Canada's government resettlement program beyond protection of Convention refugees is closely tied to sponsor influence and the desire for greater leeway in meeting the protection need. The consultations pointed to sponsor interest in participating in setting eligibility and admissibility criteria for resettlement.⁹⁶ The sponsorship community was also involved in the development of the humanitarian class consisting of the country of asylum and source country classes.⁹⁷ This expansion provides increased scope to use the program for family reunification. It also threatens to stretch protection to its breaking point: "Among the refugee-sponsoring community, the demand for family-linked sponsorships is seen as being effectively without limit, because for every refugee who arrives sponsors estimate that at least two more sponsorship requests are generated."⁹⁸ Family sponsorship generates sustainable sponsorship but also continued need.

By this time, the nature of sponsorship had shifted significantly from the Indochinese. The Indochinese sponsorship was primarily a sponsorship of strangers. There was no real Indochinese base in Canada. Canadian willingness to sponsor resulted from extensive

⁹⁶ *Ibid.* at 4.

⁹⁷ Treviranus & Casasola, "Canada's Private Sponsorship" *supra* note 3 at 190.

⁹⁸ Thomas R. Denton, "Understanding Private Refugee Sponsorship in Manitoba" (2003) 4 *Journal of International Migration & Integration* 257 at 264.

media coverage of the protection need.⁹⁹ Referrals were through the government.¹⁰⁰ Overseas offices originally sent refugee lists to Ottawa where pre-matching with sponsors was done by a matching centre. By September 1979 a computer system was introduced which matched passenger lists for incoming refugees with sponsors.¹⁰¹ The sponsorship that followed after the Indochinese crisis reverted back to a conception closer to that of the original sponsorship lobbyists with sponsors naming the refugees to be resettled.¹⁰² By 2003 some estimates put nominations of family or close friends at between 95-99% of sponsorship referrals.¹⁰³

Sponsor-based referrals mean that the program is conceptually global and flexible. Sponsors may draw their referrals from anywhere in the world. In reality, as recognized in the comprehensive review, social capital tends to guide sponsor selections. Ethnic and religious groups already settled in Canada understandably focus on sponsoring others from their families, communities and countries. Thomas Denton describes this as “relational migration” to differentiate this sponsorship from the defined family class sponsorship permitted as an immigrant class.¹⁰⁴ In this manner, however, the private sponsorship program serves to better complement and expand the narrowly structured family reunification in the immigration stream,¹⁰⁵ than the objective of refugee protection. As Denton himself argues as the Co-Chair of Manitoba Refugee Sponsors and Executive Director (Administration & Refugee Sponsorship) at Hospitality House Refugee Ministry

⁹⁹ Rivka Augenfeld, “Giving Refugees a Second Chance: A Personal Reflection on Refugee Sponsorship” (April 2004) 2 *JIAS Canada Newsletter*.

¹⁰⁰ Treviranus & Casasola, “Canada’s Private Sponsorship” *supra* note 3 at 178.

¹⁰¹ Employment and Immigration Canada, *Indochinese Refugees*, *supra* note 51 at 12.

¹⁰² Citizenship and Immigration Canada, *Summative Evaluation*, *supra* note 27 at 3.2.4.

¹⁰³ Denton, “Understanding Private Refugee Sponsorship in Manitoba” *supra* note 98 at 258.

¹⁰⁴ Thomas R. Denton, “Relational Migration and Refugee Policy” Conference paper presented at 2011 National Metropolis Conference, Vancouver, British Columbia (25 March 2001).

¹⁰⁵ *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, s.12 [IRPA].

Inc.: “They may not be refugees, but they are still ‘family’, yet unwelcome in Canada.”¹⁰⁶

The idea of, and argument for, refugee protection is lost in the push for family reunification through any means possible.

Both over-expansion and the extension of coverage in the wrong direction risk missing those most in need of protection. The review recognized the legitimate reasons for the familial link. Sponsors are in closer contact with refugees from their family or country and find it easier to offer support and transfer knowledge to refugees from the same cultural background.¹⁰⁷ The Discussion Paper concluded “Experience indicates that ‘naming’ refugees from within Canada is a legitimate and worthwhile means of accessing persons who are in need of protection.”¹⁰⁸ Family reunification does have a positive settlement influence. UNHCR has further found that “the family unit has a better chance of successfully ... integrating in a new country rather than individual refugees. In this respect, protection of the family is not only in the best interests of the refugees themselves but is also in the best interests of States.”¹⁰⁹ The assessment of protection need must however remain central; otherwise family reunification risks corrupting the refugee concept. As was the concern with the expansion of protection through broader recognition of human rights violations, family reunification poses the same expansion dangers.

¹⁰⁶ Denton, “Relational Migration and Refugee Policy” *supra* note 104 at 4.

¹⁰⁷ Employment and Immigration Canada, “Private Sponsorship of Refugee Program” *supra* note 43 at 4.

¹⁰⁸ *Ibid.* at 4

¹⁰⁹ UNHCR “Standing Committee 15th Meeting - Family Protection Issues Ec/49/Sc/Crp.14.” (1999) 18(4) *Refugee Survey Quarterly* 155 at 159.

Table 4: Private Sponsorship Ranges & Landings 1979-2012¹¹⁰

Year	Planned Range	Actual Landings
1979		13,893
1980		21,244
1981		4,405
1982		5,863
1983		4,161
1984		3,976
1985		3,881
1986		5,222
1987		7,437
1988		12,387
1989		21,631
1990		19,307
1991		17,433
1992		8,960
1993		4,768
1994		2,838
1995		3,244
1996		3,063
1997		2,580
1998	2,800 – 4,000	2,148
1999	2,800 – 4,000	2,331
2000	2,800 – 4,000	2,905
2001	2,800 – 4,000	3,570
2002	2,900 – 4,200	3,044
2003	2,900 – 4,200	3,254
2004	3,400 – 4,000	3,115
2005	3,000 – 4,000	2,976
2006	3,000 – 4,000	3,337
2007	3,000 – 4,500	3,581
2008	3,300 – 4,500	3,512
2009	3,300 – 4,500	5,036
2010	3,300 – 6,000	4,833
2011	3,300 – 6,000	5,582
2012	4,000 – 6,000	

¹¹⁰ Table compiled using statistics (1979- 1993) from Treviranus & Casasola, “Canada’s Private Sponsorship of Refugees Program” *supra* note 3 at 181; (1994-2006) Citizenship and Immigration Canada, *Summative Evaluation*, *supra* note 27 at 3.2.1; (2007-2012) Citizenship and Immigration Canada, “Annual Reports to Parliament on Immigration” (2007-2011); online: <<http://www.cic.gc.ca/english/resources/publications/index.asp>>.

Resettlement numbers continued to drop in the 1990s, tied to processing delays, the end of the Cold War, recession and a significant increase of in-Canada claims.¹¹¹ Numbers dropped from 17,433 in 1991 to 2,838 in 1994 and sat somewhere in the range between 2,000 and 4,000 privately sponsored refugees a year until 2008. Since that time, private sponsorship ranges have been on the rise with actual landings amounting to over 5,500 in 2011.¹¹²

In the midst of sponsorship's diminishing numbers, the Canadian government appeared to re-embrace the program. Since 1994, an NGO-Government Committee on the Private Sponsorship of Refugees has been closely involved in the policy and legislative developments of the private sponsorship program.¹¹³ Kelley and Trebilock suggest the committee's creation marked a fiscal decision by the government to shift the focus away from GARs and toward private sponsorship.¹¹⁴ Arguably this shift is in actuality a simple reality that has existed since the creation of the program or at least since the Inter-Church Committee on Refugees complained that the government's use of private sponsorships to fill its annual quota represented a policy shift placing the majority of responsibility for refugee resettlement on the private sector.¹¹⁵ Kelley and Trebilock's observation is accurate in that outlined in the government's immigration planning for 1995-2000,

¹¹¹ Treviranus & Casasola, "Canada's Private Sponsorship" *supra* note 3 at 187.

¹¹² These numbers may increase even more given the Federal Government's 2012 Budget shift of 1,000 spaces from the GAR to PSR program over the next few years. Government of Canada, 2012 Federal Budget (29 March 2012) shows the planned reduction in Citizenship and Immigration Canada spending in Table 5.1; online: <www.budget.gc.ca>; Debra Pressé, Director of Refugee Resettlement at Citizenship and Immigration Canada, confirmed that some of the savings will result from shifting 1,000 spaces from the GAR program to the PSR program. E-mail correspondence with author, 28 August 2012.

¹¹³ In 2005 an NGO-Government Sub-Committee was created as a sub-set of the NGO-Government Committee and meets more frequently with a greater focus on operational and policy issues. Citizenship and Immigration Canada, *Summative Evaluation*, *supra* note 27 at 1.2.1.

¹¹⁴ Kelley & Trebilcock, *The Making of the Mosaic*, *supra* note 73 at 406.

¹¹⁵ Dirks, "A Policy within a Policy" *supra* note 83 at 299.

improvement of private sponsorship was first on the list of refugee planning.¹¹⁶ The 2012 Federal Budget more concretely moved government attention from GARs to private sponsorship with the announced shift of 1,000 resettlement spaces by decreasing the GAR target range and increasing the private sponsorship target range over the next few years.¹¹⁷

Private-Public Partnerships

Part of the government reorientation occurred through a greater intersection of government and private resettlement. The resettlement of 1,800 Afghan Ismaili refugees between 1994 and 1998 is the first example of “blending” of government and private support. Blended projects are distinct from JAS and involve a sharing of financial responsibility between the government and a sponsoring group. Project FOCUS Afghanistan was a partnership between CIC, the Ismaili Council for Canada, and FOCUS Humanitarian Canada, a Canadian NGO. CIC provided the first three months of resettlement support through the Adjustment Assistance Program which enabled the community to fundraise and organize support for the remaining nine months of the refugees’ first year.¹¹⁸ Referrals came from the sponsors but the cases were counted as GARs. The project is hailed by CIC as a key point in its “Chronological History of the Private Sponsorship of Refugee Program” and listed as a “cost effective use of government resources.”¹¹⁹ A Special 3/9 Sponsorship Pilot Program for refugees from the former Yugoslavia was similarly designed but with the referrals coming from the government. The program was conceived by the government as

¹¹⁶ Citizenship and Immigration Canada, “A Broader Vision: Immigration and Citizenship Plan 1995-2000” (Canada, 1994) at 21.

¹¹⁷ 2012 Federal Budget, *supra* note 112.

¹¹⁸ Debra Pressé, Director of Refugee Resettlement at Citizenship and Immigration Canada, interview with author, 18 November 2009.

¹¹⁹ Citizenship and Immigration Canada, *Summative Evaluation*, *supra* note 27 at 1.2.1.

a “catalyst to increase private sponsorship and stretch the benefits of the private sector funds.”¹²⁰

Blending encourages private sponsorship by groups unable to take on complete financial responsibility.¹²¹ Denton suggests that had private sponsorship not moved beyond its charitable origins of bringing in strangers to a more family or relational incentive based program it would likely not have survived. He notes that the church organizations that spearheaded the initial push now lack the financial resources to continue to bear the financial burden and instead contract the financial responsibility for the refugee to the familial link.¹²² The increasing use of blended projects seems to indicate an again changing financial reality that leaves sponsors dependent on the government and thereby grants the government renewed control of the program. The 2012 announced range shift from GARs to private sponsorship will be done through a blended program.¹²³

A further program with the Sierra Leonean community was based on a 4/8 sponsorship scheme with the government financing the first four months and the community responsible for the next eight months. The program was family oriented and is discussed in more detail below under the heading “Family Reunification as Sponsorship.” A program between CIC and the Anglican Primate initiated in 2009 and running until March 2011 likewise followed this model.¹²⁴ This time, however, approximately 150 refugees from diverse parts of the

¹²⁰ Citizenship and Immigration Canada, “A Broader Vision: Immigration Plan (1996 Annual Report to Parliament)” (Canada: Minister of Supply and Services Canada, 1995) at 14.

¹²¹ Citizenship and Immigration Canada, *Guide to the Private Sponsorship of Refugees Program*, *supra* note 4 at 22.

¹²² Denton, “Relational Migration and Refugee Policy” *supra* note 104 at 3.

¹²³ Canadian Council for Refugees, “Government information on refugee healthcare changes is misleading, may be fatal” Media Release (3 May 2012); online: <<http://ccrweb.ca/en/bulletin/12/05/03>>.

¹²⁴ Citizenship and Immigration Canada, “Government of Canada and the Anglican Church of Canada Encourage Canadians to Sponsor Refugees” *News Release* (16 April 2009); Suzanne Rumsey, Public

world, Afghanistan, Burma, Colombia, Democratic Republic of Congo, Eritrea, Ethiopia, Iran, Iraq, Liberia, Somalia, Sri Lanka and Sudan, were resettled.¹²⁵ Each project appears to arise as an *ad hoc* negotiation between the government and a community or organization. Despite their apparent successes, nothing beyond further pilots on slightly different models have yet to be launched. This marks a movement away from the regulated legal framework for sponsorship set out in *IRPA*'s regulations. Law is lessened.

On 18 March 2011, CIC announced a new blended program for Iraqi refugees.¹²⁶ The program followed the announcement in CIC's 2009 Annual Report to Parliament, highlighting a doubling of privately sponsored Iraqi refugees accepted from the Middle East over the next five years.¹²⁷ The commencement of a blended program over a year later speaks to the government's inability to control private sponsorship by simply announcing a willingness to increase numbers. Additional governmental support is required to direct sponsorship.¹²⁸ The blended program was once again a "pilot project" with the Armenian Community Centre of Toronto, and the Asmaro Society in Windsor.¹²⁹ The program appears to mirror the 3/9 model used for the pilot projects with the Ismaili Council of Canada for Project FOCUS Afghanistan and the Special 3/9 Sponsorship Pilot Program for refugees from the former Yugoslavia. With this project, both the Armenian Community

Engagement Program Coordinator, The Primate's World Relief and Development Fund, The Anglican Church of Canada, e-mail correspondence with author, 13 December 2010.

¹²⁵ Citizenship and Immigration Canada, "Canada and Anglican Church Give 50 Refugee Families New Hope" *News Release* (13 February 2012).

¹²⁶ Citizenship and Immigration Canada, "Canada's Commitment to Iraqi Refugees Remains Strong" *News Release* (18 March 2011).

¹²⁷ Citizenship and Immigration Canada, "2009 Annual Report to Parliament on Immigration" (978-1-100-14029-2); online: <www.cic.gc.ca/english/resources/publications/annual-report2009/index.asp>.

¹²⁸ Significant Iraqi resettlement had already been achieved. In 2009, more than 1,400 Iraqi refugees were resettled as GARs and 2,500 were privately sponsored. In 2010, 1,700 Iraqi refugees were resettled through the GAR program and 2,300 were privately sponsored. Citizenship and Immigration Canada, "Canada's Resettlement Programs" *supra* note 2.

¹²⁹ Citizenship and Immigration Canada, "Canada's Commitment to Iraqi Refugees Remains Strong" *supra* note 126.

Centre and the Asmaro Society will receive up to \$100,000 in assistance in the form of three months of income support for each Iraqi refugee they sponsor.¹³⁰

Another blended pilot project was revealed less than a week later. On 24 March 2011 it was announced that CIC would partner with Rainbow Refugee Committee to sponsor lesbian, gay, bisexual, transgendered and queer/questioning (LGBTQ) refugees.¹³¹ The program follows a 3/9 support model with \$100,000 of government assistance available over a three year term with a possibility of extension.¹³² The project is interesting as it marks the first example of a non-ethnic/religious based blended agreement. Instead it moves closer to the core of refugee protection by focusing the sponsorship not on a country of origin but a specific persecution nexus - refugees fleeing persecution because of their sexual orientation or gender identity. While the agreement is with the Vancouver based Rainbow Refugee Committee, the project is considered national in scope with the organization connecting with other groups interested in sponsoring LGBTQ refugees.¹³³

In some ways these blending programs reflect the era of resettlement before it was formally brought into the regulations when organizations like JIAS negotiated sponsorship arrangements with the government. This model facilitates private involvement and financial support. However, by not moving beyond pilot projects to a recognized scheme, the government maintains greater control over the projects than it does with traditional private sponsorship. The legal influence, meanwhile, is less.

¹³⁰ *Ibid.*

¹³¹ Citizenship and Immigration Canada, "Government of Canada to Help Gay and Lesbian Refugees Fleeing Persecution" *News Release* (24 March 2011).

¹³² *Ibid.* Sharalyn Jordan, Rainbow Refugee Committee, e-mail correspondence with author, 1 April 2011.

¹³³ Citizenship and Immigration Canada, "Government of Canada to Help Gay and Lesbian Refugees" *ibid.*; Sharalyn Jordan, *ibid.*

Another form of “blending” with the municipal and provincial levels of government can be seen in Winnipeg, Manitoba where refugee sponsorship is encouraged as part of a population building strategy. In 2002, \$250,000 of municipal funds was set aside by the City to establish the Winnipeg Private Refugee Assistance Program, an assurance fund to encourage private sponsorship.¹³⁴ The program was proposed by Manitoba Interfaith Immigration Council (MIIC) in response to the Homegrown Economic Development Strategy approved by Winnipeg City Council in June 2002 that stated the City must “play a leadership role in supporting enhanced immigration sponsorship programs.”¹³⁵

The City of Winnipeg essentially guarantees the sponsorship by sponsoring groups in the event of a breakdown in sponsorship and ensures no dependency on the federal government.¹³⁶ As of March 2011, the fund has only been drawn upon twice, once for \$400 because the sponsoring family moved to Edmonton and once for \$5,000 when an emergency required the sponsored family to return to Ethiopia.¹³⁷ The value of the fund is therefore growing and now sits at over \$300,000.¹³⁸

The Agreement between the City and the Manitoba Refugee Sponsors Group begins with “Guiding Principles” that set out the vision of the program as a population building strategy:

1. The City desires to support private family-linked or community-linked refugee sponsorships as one effective mechanism for increasing the city’s population...

...

¹³⁴ Citizenship and Immigration Canada, *Summative Evaluation*, *supra* note 27 at 1.2.1.

¹³⁵ Jackie Halliburton, City of Winnipeg, Wellness & Diversity Coordinator, interview with author, 11 March 2011.

¹³⁶ The Winnipeg Private Refugee Assurance Program, *Report of the Executive Policy Committee*, File G-8 (Vol.6), (18 September 2002) at 199.38.

¹³⁷ Halliburton, interview, *supra* note 135.

¹³⁸ Halliburton, interview, *ibid*.

3. The parties wish to collaborate with each other and with the Government of Canada and the Province of Manitoba in increasing Winnipeg's population while meeting the humanitarian need for refugee resettlement...¹³⁹

The original agreement was only between the City and the Manitoba Refugee Sponsors Group. The City contributed the total amount for the assurance fund and \$30,000 yearly for the first five years to cover the administrative support of the program.¹⁴⁰ From the outset however, the intention was for a tri-level agreement involving the City, the Province of Manitoba, and the Federal Government.¹⁴¹ It was CIC that requested the program encompass not only family sponsored refugees but also "community-linked" sponsorship so CIC could identify "unnamed" refugees from its missions abroad for sponsorship.¹⁴²

Not all sponsored refugees to Winnipeg fall under the assurance fund. The intent of the fund is to enable additional sponsorship and the administrative operation of the program overseen by the MIIC¹⁴³ involves developing the qualifying criteria and identifying sponsorships that will receive the assurance.¹⁴⁴ Between 1 January 2003 and 30 September 2009, 1,092 arrivals occurred under the program.¹⁴⁵

Winnipeg is the hub of Canadian private sponsorship. A reported 60-70% of SAH cases initiated across Canada come from the City.¹⁴⁶ The program speaks to the value the City

¹³⁹ *Agreement to Establish The Winnipeg Private Refugee Sponsorship Assurance Program, Between the City of Winnipeg and Manitoba Refugee Sponsors Group*. Tom Carter, et al., "Privately Sponsored Refugees Phase One Report" Prepared for Manitoba Labour and Immigration (Winnipeg: University of Winnipeg, 2008) at 57.

¹⁴⁰ *Agreement to Establish The Winnipeg Private Refugee Sponsorship Assurance Program, ibid.* The yearly \$30,000 was initially renewed for 2 years by Mayor Katz and is now subject to annual renewal.

¹⁴¹ The Winnipeg Private Refugee Assurance Program, *Report of the Executive Policy Committee, supra* note 136 at 199.37.

¹⁴² *Ibid.* at 199.38.

¹⁴³ Manitoba Interfaith Immigration Council, "2010 Annual Report" Summarized Financial Statements (31 March 2010).

¹⁴⁴ *Agreement to Establish The Winnipeg Private Refugee Sponsorship Assurance Program, supra* note 139.

¹⁴⁵ Halliburton, interview, *supra* note 135.

¹⁴⁶ Denton, "Relational Migration and Refugee Policy" *supra* note 104.

and the Province see in family refugee sponsorship and the potential for this sponsorship to bring in contributing and valued members of the population. That the assurance fund has barely been drawn upon is attributed further to the strength of this family support.¹⁴⁷ Immigrant Settlement and Integration Services, a community organization in Nova Scotia, developed an assurance fund and became an SAH in 2011 to facilitate private sponsorship along the Manitoba model.¹⁴⁸

The Kosovars: Best Known and Least Accurate

The most recognized example of sponsor-government cooperation is the case of the Kosovar resettlement in 1999. In terms of the public face of private sponsorship following the Indochinese, the Kosovar resettlement stands out in Canada as a period of pride and momentum. Yet, as with the Indochinese, the Kosovar resettlement was in no way representative of the private sponsorship program as a whole. In fact, it was not private sponsorship. The resettlement was entirely government-assisted. The Kosovars were determined to be special needs refugees and their sponsorship fell into the JAS non-financial scheme of support. But neither were the Kosovars typical refugees. Their movement was an emergency evacuation through a NATO operation.

Serbian atrocities in Kosovo and the NATO bombing of 24 March 1999 triggered a mass exodus of displaced ethnic Albanian Kosovars into Macedonia. Macedonia, itself a fragilely balanced ethnic state with one quarter of its population Albanian, risked

¹⁴⁷ Halliburton, interview, *supra* note 135.

¹⁴⁸ Evelyn Jones, Immigrant Settlement and Integration Service, Refugee Sponsorship Coordinator, e-mail correspondence with author, 18 June 2012; Immigrant Settlement and Integration Services, *ISIS Annual Report 2012* at 6; online: <http://www.isisns.ca/wpcontent/uploads/2010/06/isis_annualreport_2012_WEB.pdf>.

destabilization with the inflow of ethnic Albanians from Kosovo.¹⁴⁹ UNHCR requested the international community to provide asylum for some 750,000 Albanian Kosovars in Macedonian and Albanian refugee camps. Canada, among other countries, responded and committed to accept 5,000 Albanian Kosovars “over and above” the annual resettlement target.¹⁵⁰

While the Kosovar resettlement was unique, so was Canada’s response in relation to that of other states. Elsewhere the Kosovars were taken in on a temporary basis. Canada linked their reception to fast-tracked family reunification and offered the option of permanent residence.¹⁵¹ In addition to the 7,367 GARs resettled in 2000, 3,258 Kosovars also obtained permanent residence.¹⁵² This explains CIC’s year 2000 numbers showing that Canada resettled 10,666 GARs – 41% more than the average yearly number between 1995 and 2005.¹⁵³

Despite the unusual circumstances of their movement and the lack of individual status determinations, UNHCR was explicit in its acknowledgement that the Kosovars were refugees. On 30 April 1999, UNHCR published a “Protection Framework Guidance” on Kosovo that began:

the majority of those displaced outside the Federal Republic of Yugoslavia in the current circumstances are properly considered **refugees** - they are displaced because of conflict or on account of well-founded fear of persecution based on their ethnicity, imputed

¹⁴⁹ Samantha Power, *“A Problem from Hell” America and the Age of Genocide* (New York: Perennial, 1st Perennial ed., 2003) at 444-450.

¹⁵⁰ Citizenship and Immigration Canada, “Appeal to Canadians to Sponsor the Kosovar Refugees” (*News Release 99-24* (10 May 1999)).

¹⁵¹ Treviranus & Casasola, “Canada’s Private Sponsorship” *supra* note 3 at 192; see also Pressé, interview, *supra* note 118.

¹⁵² Citizenship and Immigration Canada, “Planning Now for Canada’s Future - Introducing a Multi-Year Planning Process and the Immigration Plan for 2001 and 2002” (Canada, 2001) at 19.

¹⁵³ Citizenship and Immigration Canada, *Facts and Figures 2005* (2005); online: <<http://web.archive.org/web/20061231004748/www.cic.gc.ca/english/pub/facts2005/overview/01.html>>.

political opinion and/or religion¹. The deportation of important numbers was one means by which the forced flight was effected. It does not change their refugee character as persons unable to return to their country for refugee relevant reasons.

The footnote in the above quote further clarified: “This is the case for the Kosovo Albanians.”¹⁵⁴ The resettlement of the Kosovars is thus exemplary as it served a clear protection need and brought together efficient government support and generosity in collaboration with sponsorship assistance.

The timing of the evacuation, like the Indochinese crisis, coincided with massive changes to Canada’s immigration legislation. While the Indochinese flow occurred just as refugees were being recognized as an immigrant group in the *Immigration Act*, the Kosovars’ arrival occurred alongside *IRPA*’s reorientation toward an increased emphasis on protection, family reunification and NGO cooperation. It is hailed as part of the development of a more flexible and global resettlement program in Canada.¹⁵⁵ Government and public reaction to the Kosovars also sits in stark contrast to the Canadian reaction to the Chinese migrants that arrived by boat that same summer¹⁵⁶ - the controlled and generous welcome of one group by way of resettlement compared to the resistant push against migrants seeking asylum.

The Kosovar resettlement is also considered to have generated a new community of sponsors,¹⁵⁷ a fact that may be tied to the reality that sponsors were not required to make a financial contribution. However, by demonstrating the ability of the government to act so

¹⁵⁴ UNHCR, “Protection Framework Guidance: Kosovo Situation - Revision 1” (30 April 1999); online: <<http://www.unhcr.org/refworld/docid/3ae6b33414.html>>.

¹⁵⁵ Treviranus & Casasola, “Canada’s Private Sponsorship” *supra* note 3 at 194.

¹⁵⁶ Jane Armstrong, “The Boat People’s Big Gamble” *The Globe and Mail* (22 July 2000) A7.

¹⁵⁷ For a review of the local support for this settlement in rural British Columbia see Kathy Sherrell, et al., “Sharing the Wealth, Spreading The “Burden”? The Settlement of Kosovar Refugees in Smaller British Columbia Cities” (2005) 37 *Canadian Ethnic Studies* 76.

quickly on a massive movement of people, sponsoring groups became more forceful in their demands for the resettlement of other groups and focuses on other regions.¹⁵⁸

Present Realities

Refusal Rates and Protection Concerns

Both the Kosovar resettlement and pilot blending projects present examples of cooperative partnerships in which the government retains significant control. This control has been lost in traditional private sponsorship despite the government's ultimate discretion and oversight role. In recent years, CIC has attempted to move the sponsorship program back to its visa office-referral origins but has met with resistance from the sponsorship community.¹⁵⁹ A consequence of the sponsor-referred model is that there is a high refusal rate of sponsor-referred names (averaging 49% between 1998-2007) which then drains CIC resources without achieving resettlement¹⁶⁰ and leaves sponsors frustrated. Statistics from 2010 show an overall sponsorship approval rate for privately sponsored refugees was 65%, down from 69% in 2009.¹⁶¹ The refusal rate is linked to a stated concern by CIC that the protection need is lacking in many of these cases.¹⁶² One response by sponsorship groups has been to note the difficulty in assessing refugee cases and protection needs from within Canada.¹⁶³ The practical difficulty of privatized responsibility for protection challenges the

¹⁵⁸ Treviranus & Casasola, "Canada's Private Sponsorship" *supra* note 3 at 194.

¹⁵⁹ Pressé, interview, *supra* note 118; Citizenship and Immigration Canada, *Summative Evaluation*, *supra* note 27 at 3.2.3.

¹⁶⁰ *Summative Evaluation*, *ibid.* at 4.0.

¹⁶¹ Statistics prepared by Canadian Council for Refugees from CIC data, April 2010. On file with author.

¹⁶² Standing Committee on Immigration and Citizenship, M.P. Norman Doyle, Chair, "Safeguarding Asylum-Sustaining Canada's Commitments to Refugees" 39th Parliament, 1st Session (Canada: House of Commons, 2007) at "Introduction"; online:

<<http://cmte.parl.gc.ca/Content/HOC/committee/391/cimm/reports/rp2969755/cimmrp15/04-toc-e.htm>>.

¹⁶³ *Ibid.* at "Introduction." Ed Wiebe, Coordinator, National Refugee Program, Mennonite Central Committee Canada noted to the committee: "Last spring, I and six of my colleagues from Canada and two based in Africa spent several weeks exploring refugee protection issues in Kenya and South Africa, including many NGO visits, visits with UNHCR hubs and branch offices, and also visits with the respective Canadian

easy shifting of such responsibility. The return to visa office-referrals is a simple answer to this dilemma but it requires the sponsorship community to sacrifice more control than it is willing.

The CCR has countered that sponsors play an important role in identifying refugees in need of resettlement:

For example, sponsors work with partners such as the overseas arms of Canadian NGOs with presence in the field, NGOs' overseas implementing partners, and formal and informal connections with other NGOs in the field or engaged in refugee protection. Sponsors also work closely with refugee networks who have sources of information about refugees in need that may not be available to the government or UNHCR.¹⁶⁴

As an example they cite Iraqi resettlement and note: "While SAHs responded quickly to the crisis of displaced persons from Iraq...the UNHCR was until quite recently considering the displacement of Iraqis as a temporary problem."¹⁶⁵ CCR has further challenged the assumed accuracy and fairness of the refusals and the assumption that refusals signify ineligibility rather than a change in country conditions or circumstances unknown at the time the sponsor submitted the application.¹⁶⁶ Thus while the risk of private sponsorship is that it may blur the protection need, there is also the potential for sponsors to have a better pulse on protection need than the government. It is the art of cultivating this potential while negating the risks that is the challenge of an effective program.¹⁶⁷

High Commissions in each of those countries. Something that stands out was a comment we heard several times from NGOs involved in resettlement. They noted how difficult it must be for Canadian SAHs to assess refugee cases exclusively from within Canada when they find it incredibly difficult to do that right at the source."

¹⁶⁴ Canadian Council for Refugees, "Comments on Private Sponsorship Evaluation" *supra* note 28 at 4.

¹⁶⁵ *Ibid.* at 6.

¹⁶⁶ *Ibid.* at 4.

¹⁶⁷ The government has taken proactive measures to increase sponsors' protection knowledge and assessment capabilities. The Refugee Sponsorship Training Program (RSTP), commenced in 1998 serves to both educate and assist sponsors. CIC obtained permanent funding for the program in 2003. Citizenship and Immigration Canada, "Departmental Performance Report for the Period Ending March 31, 2003" (Canada: Minister of

Family Reunification as Sponsorship

Tied to the unwillingness to relinquish referral capacity to the government, as well as the high rejection rate, is the continued reality that the use of private sponsorship as a family reunification tool undoubtedly plays a role in the refusal rate and protection concerns. Blame can not be placed entirely on sponsors for this conundrum. The line is fine and CIC has sent out mixed messages as it negotiates its role in facilitating sponsorship. CIC uses the scheme to complement its own government assisted program and look responsive to demands by the Canadian public.

As already noted above, in response to pressure from the Sierra Leonean community in Canada for the government to assist in the resettlement of their relatives, CIC offered up private sponsorship as the main solution. A blended initiative was proposed in which the government would provide the initial four months of support followed by eight months of sponsor support. The project's intent was to "enhance the community's knowledge and understanding of Canada's refugee resettlement programs and to help the community participate in the private sponsorship program."¹⁶⁸ Five Sierra Leonean community groups joined the sponsorship program. To facilitate this sponsorship, CIC sent out a "Request for Assistance" calling on existing sponsorship groups to assist the Sierra Leonean sponsors.¹⁶⁹ The pilot project, ending in June 2001, sponsored 250 people. CIC's assistance request has been interpreted as a clear message in support of family reunification: "For the first time CIC was recruiting support for a community to assist their refugee relatives — an

Public Works and Government Services, 2003). Operated by the SAH community, it provides training, guidance and resources as well as offering an annual forum. As of May 2008, there is also an RSTP website; online: <<http://www.rstp.ca/index.php>>.

¹⁶⁸ Citizenship and Immigration Canada, "Departmental Performance Report for the Period Ending March 31, 2002" (Canada: Minister of Public Works and Government Services, 2002) at 23.

¹⁶⁹ Pressé, interview, *supra* note 118.

acknowledgement therefore that family reunification was a legitimate use of the Private Sponsorship Program when those overseas were refugees in need of resettlement.”¹⁷⁰ The key clause here is the last, that the Sierra Leoneans “were refugees in need of resettlement.” It is not that sponsorship should not be of relatives. It is that these relatives must be refugees in need of protection – a balance that is easily recognized but difficult to achieve. Perhaps as an indicator of this distinction and its blurry line for sponsors, sponsorship undertakings were submitted for approximately 700 Sierra Leoneans.¹⁷¹ The success rate was thus less than 40%.

The example perhaps illustrates another reason why the government remains content to continue with individualized pilot projects linking public and private support. Such projects not only grant the government enhanced control but they enable the government to appear responsive to refugee issues while relegating the majority of responsibility to the private sector. It is thus a merging of the two main challenges of private sponsorship – both the shifting of state responsibility for refugees and the blurring of the refugee concept and protection focus by equating the program with family reunification.

In 2011, the Minister of Citizenship and Immigration administratively capped the number of applications SAHs can submit per year in a stated attempt to better manage the program.¹⁷² With a similar goal, the Government issued a Notice of Intent in December 2011 to formalize application procedures and limit eligibility for group of five and

¹⁷⁰ Treviranus & Casasola, “Canada’s Private Sponsorship” *supra* note 3 at 195.

¹⁷¹ Citizenship and Immigration Canada, “Departmental Performance Report 2002” *supra* note 168 at 23.

¹⁷² Kristen Shane, “Feds Cut Privately-Sponsored Refugee Claim Intake to a Trickle” *Embassy* (9 November 2011); see also *infra*.

community sponsorships to refugees recognized by UNHCR or a state.¹⁷³ Both changes grant the government increased control over the selection of privately sponsored refugees. In a Letter to the Editor responding to coverage of the proposed changes, the Minister of Citizenship and Immigration clearly outlined the government's intent "Ending the abusive practice of using the 'Group of Five' program for extended family reunification rather than refugee resettlement will mean that more, not fewer, resettlement opportunities will be available for legitimate refugees."¹⁷⁴ Expressing concern that the changes might create barriers and instead limit sponsorship, the CCR warned "the Program should not be made too complicated, legalistic or inaccessible."¹⁷⁵ The challenge again is encouraging private sector involvement while maintaining control. Law, here, is seen on the government's side of control and counter to the interests of the sponsoring groups.

Complaint and Review

Critiques of the sponsorship program tend to come from sponsorship groups. Three main complaints are the low targets for private sponsorship; lengthy processing delays; and high refusal rates.¹⁷⁶ Ironically, and illustrative of the difficult balance, present complaints mark a pendulum swing from the program's origins when complaints focused on over

¹⁷³ Citizenship and Immigration Canada, "Notice requesting comments on a proposed regulatory amendment that will affect the Private Sponsorship of Refugees Program" 145:50 Canada Gazette (10 December 2011); online: <<http://www.canadagazette.gc.ca/rp-pr/p1/2011/2011-12-10/html/notice-avis-eng.html#d111>>. Citizenship and Immigration Canada, "Regulations Amending the Immigration and Refugee Protection Regulations" 146:23 Canada Gazette (9 June 2012); online: <<http://www.gazette.gc.ca/rp-pr/p1/2012/2012-06-09/html/reg1-eng.html>>. The change would be to paragraph 153(1)(b) of Immigration and Refugee Protection Regulations, SOR/2002-227.

¹⁷⁴ Jason Kenney, "Kenney Responds to Immigration Story" Letter to the Editor, *X-tra* (4 February 2012).

¹⁷⁵ Canadian Council for Refugees, "Comments on Notice of Intent - Changes to the Private Sponsorship of Refugees Program" (9 January 2012); online: <http://ccrweb.ca/files/g5_comments_jan2012.pdf>.

¹⁷⁶ Standing Committee on Immigration and Citizenship, "Safeguarding Asylum" *supra* note 158 at "Introduction"; Canadian Council for Refugees, "Nairobi: Protection Delayed, Protection Denied" (Montreal, 2009); online: <<http://www.ccrweb.ca/documents/Nairobireport.pdf>>; Canadian Council for Refugees, "Disturbing Upsurge in Rejections of Eritrean Refugees in Cairo by Canada" *Media Release* (30 November 2009).

processing of sponsorship applications. In 2007, CIC prepared a *Summative Evaluation of the Private Sponsorship of Refugees Program*. The report sought to assess the program's relevance, integrity, success and cost effectiveness.¹⁷⁷ The evaluators struggled to actually evaluate the operation of the program due to incomplete data maintenance by CIC, lack of formal monitoring and inconsistent reporting criteria by SAHs.¹⁷⁸ The program's objectives of enhancing refugee protection and facilitating the assistance of the voluntary sector were found to align with Canada's humanitarian tradition and *IRPA*'s objectives to protect refugees and meet international obligations.¹⁷⁹ Analysis of the program's ability to meet its objectives failed however to intersect with these broader issues. While sponsorship was compared to government-assisted resettlement with respect to refusal rates, operating costs, and integration success in terms of employment, income and timeframe for self-support, it failed to consider the intersections between the programs or the effect of one on the other. Nor was the role that family reunification plays in sponsorship, either positively or negatively, evaluated.

The report did attempt a direct comparison between the operating costs for the GAR and PSR programs. Per application, the report determined the PSR program was more costly to administer with an individual processing cost in 2004-2005 of \$1,192, compared to the GAR processing cost of \$1,552.¹⁸⁰ The report added that the higher refusal rate for PSR applications than GARs would make this cost distinction even greater.

¹⁷⁷ Citizenship and Immigration Canada, *Summative Evaluation*, *supra* note 27.

¹⁷⁸ *Ibid.* at 4.0.

¹⁷⁹ *Ibid.* at 3.1.1.

¹⁸⁰ *Ibid.* at 3.4.

CCR prepared a response to the evaluation prompted by “[c]oncerns with serious flaws in the report.”¹⁸¹ While mainly similarly focused on internal issues in direct response to the evaluation, certain absences are identified. The cost-evaluation is critiqued for being unclear on what aspect of costs is described and flawed for failing to take into account Canadian funding of UNHCR referrals for GAR refugees.¹⁸² CCR further adds the government resources for private sponsorship are used to “leverage” volunteer contributions.¹⁸³ As noted earlier, a CCR report from 2006 assessed the annual financial costs of private sponsorship at \$79 million with an additional volunteer contribution of over 1,600 hours per refugee family.¹⁸⁴ The CCR response to the Summative Evaluation further points to the evaluation’s failure to measure sponsors’ ability to assess protection need or the information and resources CIC makes available to SAHs to perform such eligibility assessments.¹⁸⁵ These broader protection questions are completely taken for granted in the evaluation. Responding to the evaluation’s implicit assumption that high application numbers are a problem, the report notes “This needs to be considered as an opportunity to better meet the objective of the program, i.e. to protect refugees, not as a challenge to the program’s integrity.”¹⁸⁶ This comment can be applied to the program and its critiques as a whole.

¹⁸¹ Canadian Council for Refugees, “Comments on Private Sponsorship Evaluation” *supra* note 28 at 1.

¹⁸² *Ibid.* at 4.

¹⁸³ *Ibid.* at 4.

¹⁸⁴ Canadian Council for Refugees, “The Private Sponsorship of Refugees Program” *supra* note 5 at 2.

¹⁸⁵ Canadian Council for Refugees, “Comments on Private Sponsorship Evaluation” *supra* note 28 at 6.

¹⁸⁶ *Ibid.* at 4.

From Complementary to Consuming

As noted above, in CIC's 2009 Annual Report to Parliament, the Minister highlighted a doubling of privately sponsored Iraqi refugees accepted over the next five years.¹⁸⁷ For the government to boast of an intended accomplishment that it has relinquished to private citizens is problematic. Similarly the 2010 increase of 2,500 resettlement places¹⁸⁸ put sponsors responsible for 80% of the increase. The 2012 budget shift of 1,000 spaces to private sponsorship from the government program will further increase private responsibility for resettlement.¹⁸⁹ With the resurgent responsibility shifting by the government, the statements mark a further subsuming of privatized responsibility within the government's own humanitarianism. Catherine Dauvergne notes that "[p]rivate sponsorship both allows the government an easy response to domestic pressure to act more humanely and allows it to withdraw from direct responsibility for admission totals...the obligation is privatized and thus the responsibility of the nation is drastically reduced."¹⁹⁰ The announced increase in the Annual Report implies a control over the selection of privately sponsored refugees that the government clearly does not possess given the ratio of visa office-referrals to sponsorship-referrals.¹⁹¹ In response to the changes to the group of five and community sponsorships, the CCR warned "Motivation should not be taken for

¹⁸⁷ Citizenship and Immigration Canada, "2009 Annual Report" *supra* note 127.

¹⁸⁸ Citizenship and Immigration Canada, "Expanding Canada's Refugee Resettlement Programs" *News Release* (29 March 2010).

¹⁸⁹ 2012 Federal Budget, *supra* note 112.

¹⁹⁰ Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005) at 93.

¹⁹¹ CIC's Director of Resettlement, Debra Pressé, described the Annual Report statement not as a promise but as a plea. She noted that the Government's GAR commitments were full and the statement was meant as an appeal to the sponsorship community to facilitate the Iraqi resettlement. Pressé, interview, *supra* note 118. She acknowledged that there was no backlog of Iraqi sponsorship applications, the existence of which could have explained the Minister's statement as a processing promise and demonstrated sponsorship interest in Iraqi resettlement.

granted.”¹⁹² The announcement of the blended pilot project for Iraqis in 2011 speaks to the acknowledged failure to increase these numbers solely through private sponsorship and the increasingly used solution of blending support in the alternative.¹⁹³

The complementary role of private sponsorship has given way to the risk that it may consume the government program, at the government’s behest. Private sponsorship is receiving an increasing profile and attention from the government. The government, however, appears to be claiming the program as its own humanitarianism. The 2010 range announced for private sponsorship was 3,300-6,000.¹⁹⁴ While there was no change in the lower end of this range from the 2 previous years, the upper end marked an increase of 1,500 from the upper range of 4,500 of the three previous years. In 2012 the lower range was increased to 4,000.¹⁹⁵ These increases, along with a similar adjustment of GAR numbers was used by the government to justify a reduction in inland refugee numbers:

With respect to the Protected Persons Class, the Government of Canada is increasing the admission range for government-assisted and privately sponsored refugees...The range for protected persons in-Canada and their dependants is lower, but this will likely increase in future years when the Immigration and Refugee Board of Canada achieves its full decision-making capacity.¹⁹⁶

The government has since abandoned any increase to government-assisted resettlement with the shift of 1,000 places from this program onto private sponsors.¹⁹⁷ The government is not playing private sponsorship numbers against GAR numbers as it has done in the past.

¹⁹² Canadian Council for Refugees, “Comments on Notice of Intent” *supra* note 175.

¹⁹³ Citizenship and Immigration Canada, “Canada’s Commitment to Iraqi Refugees Remains Strong” *supra* note 126.

¹⁹⁴ Citizenship and Immigration Canada, “2009 Annual Report” *supra* note 127.

¹⁹⁵ Citizenship and Immigration Canada, “Annual Report to Parliament on Immigration 2011: Supplementary Information for the 2012 Immigration Levels Plan”; online:
<<http://www.cic.gc.ca/english/departement/media/notices/notice-levels2012.asp>>.

¹⁹⁶ Citizenship and Immigration Canada, “2009 Annual Report” *supra* note 127.

¹⁹⁷ 2012 Federal Budget, *supra* note 112.

Rather, it is playing resettlement, both private and government-assisted, against the in-Canada asylum scheme. When the balancing was between GARs and privately sponsored refugees at least the refugees were entering Canada through one scheme or the other. By balancing in-Canada asylum claims against increased ranges in resettlement numbers, there is no guarantee this upper range will be met, particularly when the lower end remains constant. In 2010 and 2011, despite the increased ceiling to 6,000, private sponsorship totaled only 4,833 in 2010 and 5,582 in 2011.¹⁹⁸ Moreover, the government is pitting its legal obligation to recognize refugees who arrive in Canada to claim asylum against the voluntary discretion to bring further refugees to Canada, and privileging the latter.

Resettlement and in-country asylum were originally conceived of as complementary schemes. Private sponsorship was conceived of as a complement to government resettlement. Now, resettlement is pitted against asylum and this resettlement is increasingly on the shoulders of private sponsors. This was never the intention of the program.

The State of Sponsorship

*On balance, however, private sponsorship is an important vehicle for the direct injection by Canadians of humanitarianism into refugee resettlement priorities.*¹⁹⁹

Private sponsorship intertwines Canadians in a personal refugee experience.²⁰⁰ It is often credited with creating and sustaining the refugee advocacy community in Canada²⁰¹ and hailed as a “leading mechanism for providing the kind of direct contact between

¹⁹⁸ Citizenship and Immigration Canada, “Supplementary Information for the 2012 Immigration Levels Plan” *supra* note 195.

¹⁹⁹ Hathaway, “Selective Concern” *supra* note 64 at 700.

²⁰⁰ Treviranus & Casasola, “Canada’s Private Sponsorship” *supra* note 3 at 178; UNHCR, *Resettlement Handbook* (November 2004) at 220, online: <<http://www.unhcr.org/protect/3d4545984.html>>.

²⁰¹ Treviranus & Casasola, “Canada’s Private Sponsorship” *ibid.* at 183.

newcomers and members of the host society that is essential for promoting widespread acceptance that newcomers constitute an asset to society.”²⁰² It also serves as a continual reminder to the government of public support for the refugee cause. The Government of Canada has itself acknowledged: “The willingness of so many Canadians to give so generously of their time to assist refugees is a visible demonstration of their commitment to continuing Canada’s humanitarian tradition.”²⁰³ Beyond the practical positive infusions, Donald Galloway argues that individual members of a state who want “to go beyond the call of duty to help others” should not be prevented from doing so by the state authority. He reasons that while there is no overarching moral duty to permit free migration “[i]t may be the case that some members of a community rightly identify it to be their moral duty to render assistance to an alien in need, not by giving that person money or other resources, but by providing shelter and a human support network.”²⁰⁴ For the state to prevent the admission of people under these circumstances, Galloway argues, would hinder the fulfillment of an individual member’s personal moral duty. An alternative twist on this argument, is that this was the twentieth century liberal-conservative vision – government legislation to facilitate non-governmental action.²⁰⁵

Private sponsorship further adds a layer to the charity-rights dichotomy. In Chapter 3 the distinction between the legal right to *non-refoulement* and the humanitarianism that premises the charitable act of resettlement was addressed. Yet, to probe this further, government assisted refugees have been designated as entitled to assistance by the government, whereas privately sponsored refugees depend on the generosity of private

²⁰² Canadian Council for Refugees “Comments on Private Sponsorship Evaluation” *supra* note 28 at 5.

²⁰³ Employment and Immigration Canada, “Private Sponsorship of Refugee Program” *supra* note 43 at 3.

²⁰⁴ Donald Galloway, “Liberalism, Globalism, and Immigration” (1993) 18 *Queen’s Law Journal* 266 at 295.

²⁰⁵ Adelman, “The Policy Maker and the Advocate” *supra* note 59 at 56.

citizens.²⁰⁶ It is this charitable aspect that partially grounds a resistance to privately supported resettlement in Europe. Nordic countries in particular are known for their generous acceptance and support of the most needy refugees.²⁰⁷ And yet this is firmly seen as a government responsibility.²⁰⁸ The nature of the state as a provider of public welfare assistance can be seen as a determining factor on the extent to which private actors play a role in resettlement. Stronger welfare states may take a greater role in assisting refugees whereas other states might leave assistance to the private sector meaning that greater private sector involvement increases the promotion of private-public partnerships.²⁰⁹ Citizens of social-welfare states tend to find the idea of private sponsorship distasteful as it suggests a discontent with the government services and also threatens to undermine the stability of the social welfare state.²¹⁰

From the outset, the concern with private sponsorship in Canada has been the privatization of a responsibility that is considered to rest with the state as a whole. There is no clear consensus on the basis of this responsibility, be it moral, humanitarian or burden-sharing demonstrative of international solidarity. Since the 1976 *Immigration Act*, the vague allusion to “Canada’s international legal obligations with respect to refugees and...its humanitarian tradition with respect to the displaced and the persecuted”²¹¹ has defined the

²⁰⁶ Hathaway, “Selective Concern” *supra* note 64 at 700.

²⁰⁷ The Nordic countries provide UNHCR with an emergency quota permitting the quick transfer of refugees in certain circumstances, usually for medical reasons. UNHCR, “Resettlement in the Nordics and the Role of UNHCR”; online: <<http://www.unhcr.se/en/what-we-do/durable-solutions/resettlement-in-the-region.html>>.

²⁰⁸ Gregor Noll & Joanne van Selm, “Rediscovering Resettlement: A Transatlantic Comparison of Refugee Protection” (2003) 3 *MPI Insight*; Joanne van Selm, “Public-Private Partnerships in Refugee Resettlement: Europe and the US” (2003) 4:2 *Journal of International Migration & Integration* 157.

²⁰⁹ van Selm, “Public-Private Partnerships” *ibid.* at 159.

²¹⁰ Stephen Castles explains: “the welfare state follows a logic of inclusion: failure to grant social rights to any group of residents leads to social divisions and can undermine the rights of the majority” Stephen Castles, “The Factors That Make and Unmake Migration Policies” (2004) 38 *International Migration Review* 852 at 870.

²¹¹ *Immigration Act*, *supra* note 7 at s.3(G).

government's sense of its refugee responsibility. Thus, with the Indochinese resettlement, church groups expressed concern that the Government was shifting its international burden onto Canadian citizens.²¹² Hathaway has observed: "Moreover it may be argued that the government should not be permitted to make the implementation of its international burden-sharing obligation largely dependent on the goodwill of the private sector."²¹³ But why is it that this burden is perceived to be governmental? The assistance of private citizens enabled Canada to offer more resettlement places per capita than any other state during the Indochinese crisis.²¹⁴

Moral objections aside, there are practical reasons to resist the attractions of private sponsorship. While the benefits of sponsorship support to all refugees, be they sponsored, government-assisted or asylum seekers, are continually hailed, there is a risk in hinging refugee advocacy on a group working in a specific refugee niche. In bringing the compelling face of refugees to Canada, private sponsors see a very particular need. Private sponsors are continually frustrated by long processing delays and outright rejections of the refugees they are seeking to protect.²¹⁵ In following these cases both during processing in camps and the slow work of integration, sponsors are acutely aware of the immense suffering and challenges these refugees face. Often, by their very ability to independently arrive, the stories and situations of refugees who claim protection in Canada are markedly different from those resettled from overseas. These distinctions and the visible desperation

²¹² Dirks, "A Policy within a Policy" *supra* note 83 at 299.

²¹³ Hathaway, "Selective Concern" *supra* note 64 at 700.

²¹⁴ Between the spring of 1975 and the spring of 1980, Canada's 5 year resettlement total was 74,000. With a population of 24 million, this meant a ratio of refugees to population of 1: 324. Australia's ratio during the same period was 1: 332 and the United States was 1: 374. Employment and Immigration Canada, *Indochinese Refugees*, *supra* note 51 at 33.

²¹⁵ Canadian Council for Refugees, "Nairobi" *supra* note 176; Canadian Council for Refugees, "Disturbing Upsurge in Rejections" *supra* note 176.

of sponsored refugees can lead to an assessment of deservingness. Private sponsors are susceptible to see truth in the rhetorical divisions between genuine refugees “over there” and false refugees abusing the in-Canada system.²¹⁶

If private sponsorship serves as a “political barometer”²¹⁷ it may be a tainted and biased barometer jeopardizing one aspect of the protection scheme in justification of another. While this concern speaks to the heightened protection focus of sponsors, the alternative risk of overly focusing on family reunification over protection equally risks the program’s complementary objective. The argument has been made in the U.S. context that “In some sense, however, the use of family ties in refugee resettlement can be seen as an admission of defeat in efforts to protect the vulnerable – a reversion to traditional immigration predilections when more need-based policies are too troublesome to implement.”²¹⁸ A correlated concern is that where family reunification and protection do properly intersect, continued sponsorship may not be sustainable as either the willingness or ability to sponsor may be quickly strained.²¹⁹

A further issue with a protection scheme dependent on private support is that such support works well for singular appeals but lacks the sustainability of a government program. The first comprehensive review of the private sponsorship program in the 1990s cautiously acknowledged this dilemma: “It remains to be seen whether the resource is renewable, like

²¹⁶ Pilar Riaño Alcalá, et al., *Forced Migration of Colombians: Colombia, Ecuador, Canada* (Colombia, Vancouver: Corporación Región (Spanish) School of Social Work, University of British Columbia (English), 2008) at 125.

²¹⁷ Neuwirth & Rogge, “Canada and the Indochinese Refugees” *supra* note 63 at 254.

²¹⁸ David Steinbock, “The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement” (2003) 36 *University of Michigan Journal of Law Reform* 951 at 990.

²¹⁹ Denton, “Understanding Private Refugee Sponsorship in Manitoba” *supra* note 98 at 267.

forests, or whether it more closely resembles gold and, once again mined, is depleted.”²²⁰

These concerns point to the slippery slope between a complementary program of private sponsorship and the government becoming reliant on such a scheme.

Government resettlement results from a combination of factors that include the sense that as a geographic outlier to refugee flows, Canada’s international obligation includes resettlement and the burden-sharing role in resettlement that Canada has not only played, but led since the outset of the modern regime. There is also the scope, examined in the previous chapter, that the government values resettlement as a means of controlling entrance to Canada and creating increasing obstacles to asylum while still maintaining a strong commitment to refugee protection through resettlement.

Private sponsorship is conversely driven by a different incentive basis. With outsider-strangers such as the Indochinese, the support was driven by a purer humanitarian desire to ameliorate human suffering than can likely ever be present in government actions tied to political interests. With the current dominance of sponsor-based referrals, the incentives behind private sponsorship are much more personal.

Where the Law Is

The place of law in refugee resettlement becomes further blurred when examined in the context of citizen guided private sponsorship. Beyond the state’s choice to voluntarily resettle refugees is the additionally required voluntariness of private citizens who take on responsibility for this resettlement. Despite these layers of choice, independence and discretion, law is still present. Private sponsorship has been legislated in Canada since

²²⁰ Employment and Immigration Canada, “Annual Report to Parliament: Immigration Plan for 1991-1995 Year Two” (Canada, 1991) at 22.

refugees were first recognized in the 1976 *Immigration Act*. As was the case with government resettlement, the law was a formalization of a process that was already taking place in an *ad hoc* manner. The law provides predictability and structure but sponsorship is not dependent on the law.

A benefit of the law over the *ad hoc* responses of the past is in the ability to expedite resettlement as was done in the use of designated classes for the Indochinese and will be seen again in the discussion of group processing in Chapter 5. Similarly, as was seen with *IRPA* where the law brought in the new possibility for co-sponsorship, law can also grant individual Canadians greater flexibility in participating in sponsorship applications. The law is thus the facilitator of change in resettlement. Today's sponsors would likely argue however that the law is an inhibitor that delays processing times and prevents sponsorship at the numeric levels they desire.

While prior to legalization the government possessed absolute discretion to allow or deny sponsorship, the law further structures the government's oversight role. The regulatory framework of private sponsorship, permitting sponsorship but only under certain conditions such as the requirement that groups be composed of five or more people, places the program within the government's control. Most significantly, all sponsor-referred refugees must be reviewed by CIC for eligibility and protection need, giving the government ultimate discretion on sponsored resettlement. The high refusal rate of sponsorship applications is indeed one of the greatest tensions between the government and private sponsors.

As controller of the law, the government permits private action and thereby takes a degree of credit for the private choice. This can be seen in the interpretation of events suggesting that the government “agreed to permit” private sponsorship of the Indochinese at the outset of private sponsorship,²²¹ and more recent examples by the Minister of Citizenship and Immigration announcing numeric increases to resettlement primarily based on private sponsorship. Not only is the government here assuming acknowledgement for the actions of its citizens, but it is simultaneously shifting responsibility further away from itself to its citizens for this protection responsibility. The initial suspicion of the legalization of private sponsorship was based on this feared shifting of responsibility.

At the same time, the willingness of private Canadians to partner with the government to complement and increase the government’s resettlement program should arguably remind the government of its own obligations and of the strength of public support for resettlement. Sponsors, as active partners with the government on refugee protection, also feel a vested interest in the resettlement program and thereby both desire and feel entitled to influence the law as the bearers of the financial responsibility for a significant portion of Canadian resettlement. Alternatively then, rather than shifting responsibility, private sponsorship can be seen as both an indicator of support for the resettlement program and a crucial means of advocacy for the refugee cause. As such, private sponsorship reminds the government that its voluntary commitment to refugees is supported by the public and should be maintained. And yet, it is partially the strength of this support and the dominance of sponsorship support for refugee resettlement that currently permits the government to rhetorically privilege this manner of protection over its legal obligation of *non-refoulement*.

²²¹ Hathaway, “Selective Concern” *supra* note 64 at 685.

Despite the law, there is thus an interpretative malleability to the government-sponsor relationship that can lead in different directions depending on the predilections of the government in power. While the legal framework for private sponsorship has experienced only subtle revisions since it was introduced over thirty years ago, the application of the provisions has differed significantly, fluctuating from numeric highs to lows and now creeping back up, shifting from the sponsorship of strangers to that of family, and from complaints that the government favoured the processing of sponsorship applications over GARs to the reverse current complaints of excessive delays in processing time. The legal framework and use of quotas and thresholds makes resettlement a flexible program that can prioritize or ignore certain refugee groups and issues. As was seen with the 2012 Federal Budget, this numeric shift of responsibility can occur as a fiscal change absent any law. Individualized pilot programs along a blending model grant the government further discretion. This chapter thus clearly illustrates the intersection of politics and law in resettlement that private sponsorship brings particularly to the fore. Legislation can remain unchanged while the policies that underlie the legislation can drastically differ. The Indochinese resettlement over changing governments encapsulates this reality. The listing of source-country resettlement countries that will be explored in Chapter 5 further confirms this point.

Ultimately this chapter sought to examine how the addition of private citizens into resettlement effects the approach to and selection of refugees for resettlement. Two key themes emerged: the shifting of responsibility for refugee protection from the government to private citizens and the compromising of the international refugee definition through the increasing desire to use private sponsorship for family reunification. The law is a crucial

element in both issues. The shifting of responsibility from one voluntary actor, the government, to another voluntary actor, private citizens, is not in and of itself a legal issue but the law becomes relevant in the consequences of this shift. As seen in both this chapter and the previous chapter, the government plays resettlement against the in-Canada asylum scheme. The majority of resettlement increases have been directed toward private sponsorship and timed alongside proposals for more restrictive legislation concerning asylum. The government is therefore not only shifting resettlement responsibility to private sponsors but it is furthermore reorienting Canada's refugee protection away from in-Canada asylum and away from its legal obligations towards refugees. Private sponsors in their commitment to refugees and desire for increased sponsorship, enable the government's aversion of the law.

While sponsors are pawns in the government's responsibility shifting, they are more active participants in the corruption of the law through the push for family reunification under the private sponsorship scheme. Where family members are refugees in need of protection there is no issue and much value in using private sponsorship to bring over these refugees. The challenge lies in ensuring protection remains the core criteria for sponsorship. The sponsorship community has played a powerful role in influencing the expansion of Canada's protection criteria. As discussed in both the previous and upcoming chapters, the expansion of protection does risk losing sight of the refugee definition. Particularly in resettlement where action is not hinged on a legal obligation tied to the refugee definition, there is nothing that necessitates continued reference to refugees. Resettlement, and particularly the sponsorship programs, are vulnerable to morph into more of a familial

migration scheme than a true complement to Canada's international refugee protection obligations.

Conclusion

The purpose of this chapter was to examine Canada's private sponsorship program in its entirety and in relation to in-Canada asylum. While the program's objective is to complement the government program and resettle additional refugees, the reality is that the program has the potential to, and is often used for the purpose of, shifting resettlement responsibility to the private sector and compromising the in-Canada asylum program. By both enabling the government's restrictive actions toward asylum through the justification of continued refugee support by way of resettlement, and increasingly private sponsorship, and pushing for sponsorship that is more family oriented than protection focused, the chapter demonstrates how sponsorship risks moving Canada further away from its international obligations rather than complementing these commitments. This is not to say that sponsorship necessitates such a shift. There are, indeed, many positive aspects to sponsorship explored in this chapter that both promote refugee protection and increase Canada's protection capacity. Many of the recommendations in Chapter 7 will focus on re-orientating Canada's refugee program to ensure it is these aspects of private sponsorship that are cultivated.

With the review of Canada's government resettlement program in the previous chapter and private sponsorship in this chapter, the two components of Canada's resettlement program have been examined. And yet within these two streams, other modes of resettlement also occur. The next chapter focuses on Canada's use of source country and group resettlement – the demise of the former program while the latter seems to be gaining momentum. As

programs that interweave both government and private support, group and source country resettlement permit the program to be examined in yet another light. They are, moreover, the clearest abandonments of the refugee definition that requires an assessment of an individual outside his or her home country.

CHAPTER FIVE

BEYOND THE CONVENTION

Introduction

Overseas refugee resettlement is not built on the foundation of non-refoulement at all. It is completely discretionary because resettlement is about admission, not removal.¹

At this point the dissertation has looked at resettlement from the international, governmental and private citizen perspectives. While the previous chapters have provided the framework of resettlement in Canada, it is the smaller programs within this framework that increasingly define and direct Canadian resettlement. To an extent this was seen in the previous chapter's discussion of the recurring use of blended pilot projects that combine government and private support. This chapter moves to examine two further forms of resettlement in Canada. The first is a resettlement class that previously existed within the regulations, the Source Country Class. This class allowed individuals who remain in their home country to seek resettlement. The second is an administrative processing method that enables the recognition of a group of refugees for resettlement rather than the traditional individual process. Despite their differences, both programs fundamentally shift away from the refugee definition in the scope of protection they offer: the former by the exemption from the definition's requirement to have fled across an international border, the latter by circumventing the individual assessment required by the definition.

Canada appears to be increasingly drawn to the appeal of the relatively new concept of group resettlement. Meanwhile, Source Country Class resettlement; which had been a component of the Canadian resettlement program in some form from the outset, has fallen from favour. The Canadian government in 2011 repealed the Source Country Class from

¹ Bill Frelick, "In-Country Refugee Processing of Haitians: The Case Against" (2003) 21 *Refuge* 66 at 69.

IRPA's regulations.² Understanding both of these programs, their use of discretion and their relationship to protection at a time when they are expanding and shrinking respectively, completes and clarifies the picture of Canadian resettlement.

Source Country Resettlement

Asylum in Canada expands beyond those within the international convention definition of a refugee. Expansion beyond the refugee definition has been part of Canada's refugee law since the implementation of the 1976 *Immigration Act*. That Act conceived of designated classes in "refugee-like" situations.³ A government document explains: "Such persons may not be able to meet the strict definition of 'refugee' in the Convention for such technical reasons as that they remain in their own countries."⁴ In 1979, the Self-Exiled Designated Persons Class, the Indochinese Designated Class and the Political Prisoners and Oppressed Persons Class were established.⁵ The Political Prisoners and Oppressed Persons Class was accessible to nationals of enumerated countries who remained in their country of origin.⁶ The class was known as the Latin American designated class until the addition of Poland in 1982.⁷ Following Canada's massive Indochinese resettlement, there remained a willingness to resettle but UNHCR was no longer able to provide enough referrals to meet with capacity. As was the case with private sponsorship, the Canadian government used these designated classes to fill their referral-capacity gap. Originally as a response to a call

² Citizenship and Immigration Canada, "Repeal of the Source Country Class of Humanitarian-Protected Persons Abroad" Operational Bulletin 346 (7 October 2011).

³ *Immigration Act*, R.S.C. 1985, c.I-2, s.6(2).

⁴ Employment and Immigration Canada, Policy and Program Development Immigration "Future Immigration Levels: 1988 Consultation Issues" (1988) at 12.

⁵ *Indochinese Designated Class Regulations*, SOR/78-931, s.6; *Self-Exiled Persons Designated Class Regulations*, SOR/78-933, s.6; *Political Prisoners and Oppressed Persons Designated Class Regulations*, SOR/82-977, s.6.

⁶ *Political Prisoners and Oppressed Persons Designated Class Regulations*, *ibid.*, s.2

⁷ James C. Hathaway, "Selective Concern: An Overview of Refugee Law in Canada" (1987-1988) 33 *McGill Law Journal* 676 at 694.

from UNHCR to address the plight of Chileans and Argentinians, the Political Prisoners and Oppressed Persons Class broadened to include El Salvador, Uruguay, Guatemala, and Poland.

As with private sponsorship, the concept of source country resettlement preceded legislative recognition. In 1973, Robert Adams, the Assistant Deputy Minister of Immigration wrote to Dr. Joseph Kage, the National Executive Vice President of JIAS acknowledging the concept of source country resettlement: “In summary, we have already recognized that there are oppressed minorities in certain countries and that these people could be refugees within the universally accepted definition, except that they are still within their country of origin.”⁸ This recognition was both humanitarian and strategic. It enabled the government to broaden the scope of recognition to offer greater protection but also to have greater selective control in the granting of that protection.

The Political Prisoners and Oppressed Persons Class and predecessor Latin American class was also largely influenced by visa considerations. As inland asylum claims from Latin American countries surged, visa requirements were imposed. Source country resettlement through the designated classes served as a “safety valve” for the acknowledged real refugees requiring escape.⁹ It also equipped the government with the humanitarian base from which to justify the tightening of borders.

⁸ Letter from Robert M. Adams to Joseph Kage, 9 January 1973 at 1-2 (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

⁹ David Matas, “Political Prisoners and Oppressed Persons Class and the Soviet Union” (1991) 10 *Refuge* 3 at 8.

From the beginning, Canada's resettlement of refugees was further tied to "invisible conscription"¹⁰ as refugee plans and allotments combined designated classes and convention refugees. Analysis from the early 1980s indicates 70% of government resettlement fell within the designated classes with resettlement of convention refugees at only 30%.¹¹ Here then is a clear indication of law creating enhanced discretion. Rather than imposing on the government any obligation to resettle refugees, the law enabled the government to structure a politically discretionary settlement program with a label of refugee and humanitarian protection, while increasingly controlling the border. At the same time the discretion moves this program further from the ambit of refugee law. Bill Frelick notes:

A discretionary refugee admissions program, therefore, does not come close to meeting international legal requirements to protect refugees. In-country programs are even more problematic. Since the applicant is already inside his or her home country, he cannot actually be a refugee at all at the time of applying for refugee status, and, logically, his denial cannot be called *refoulement* since he or she cannot be returned to a place where he or she is already present.¹²

Going to the Source

In its final form, the Humanitarian Protected Persons Abroad Class set out in *IRPA*'s regulations included those who did not meet the refugee definition either because they did not meet the definition's requirement of a nexus to persecution or because they had not fled across an international border. Those in the Humanitarian Protected Persons Abroad Class fell within two sub-classes: the Country of Asylum Class and the Source Country Class.¹³

¹⁰ Hathaway, "Selective Concern" *supra* note 7 at 697.

¹¹ *Ibid.* at 697.

¹² Frelick, "In-Country Refugee Processing of Haitians" *supra* note 1 at 69.

¹³ Regulation s.146 previously read:

(1) For the purposes of subsection 12(3) of the Act, a person in similar circumstances to those of a Convention refugee is a member of one of the following humanitarian-protected persons abroad classes:

Until 2011, when the latter Source Country Class was repealed, these had classes existed in their same form since May 1997.¹⁴

The Source Country Class was defined in the *Immigration and Refugee Protection Regulations*.¹⁵ Source country resettlement could be achieved through the government GAR program, through private sponsorship or the individual could come as a self-supporting refugee.¹⁶ The class applied to individuals who had not crossed an international border and remained in their home country of nationality or permanent residence. Schedule

(a) the country of asylum class; or

(b) the source country class.

(2) The country of asylum class and the source country class are prescribed as classes of persons who may be issued permanent resident visas on the basis of the requirements of this Division. *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] [Repealed, SOR/2011-222, s. 5].

¹⁴ Citizenship and Immigration Canada, “Repeal of the Source Country Class” *supra* note 2.

¹⁵ IRPR, *supra* note 13, s.148:

(1) A foreign national is a member of the source country class if they have been determined by an officer to be in need of resettlement because

(a) they are residing in their country of nationality or habitual residence and that country is a source country within the meaning of subsection (2) at the time their permanent resident visa application is made as well as at the time a visa is issued; and

(b) they

(i) are being seriously and personally affected by civil war or armed conflict in that country,
(ii) have been or are being detained or imprisoned with or without charges, or subjected to some other form of penal control, as a direct result of an act committed outside Canada that would, in Canada, be a legitimate expression of freedom of thought or a legitimate exercise of civil rights pertaining to dissent or trade union activity, or
(iii) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, are unable or, by reason of such fear, unwilling to avail themselves of the protection of any of their countries of nationality or habitual residence.

(2) A source country is a country

(a) where persons are in refugee-like situations as a result of civil war or armed conflict or because their fundamental human rights are not respected;

(b) where an officer works or makes routine working visits and is able to process visa applications without endangering their own safety, the safety of applicants or the safety of Canadian embassy staff;

(c) where circumstances warrant humanitarian intervention by the Department in order to implement the overall humanitarian strategies of the Government of Canada, that intervention being in keeping with the work of the United Nations High Commissioner for Refugees; and

(d) that is set out in Schedule 2. [Repealed, SOR/2011-222, s. 6].

¹⁶ A self-supporting refugee is a refugee who has enough money for basic necessities. Self-supporting refugees still require a referral or private sponsorship undertaking. They are eligible for government language and orientation programs but do not receive the financial assistance provided to GARs. Citizenship and Immigration Canada, “Guide 6000 - Convention Refugees Abroad and Humanitarian-Protected Persons Abroad” (2012); online: <<http://www.cic.gc.ca/english/information/applications/guides/E16000TOC.asp>>.

2 of the *Immigration and Refugee Protection Regulations* listed the eligible countries for source country resettlement. In its final form, six countries were listed in the Schedule: Colombia, the Democratic Republic of the Congo, El Salvador, Guatemala, Sierra Leone and Sudan.¹⁷ Applicants had to be “residing in their country of nationality or habitual residence” and that country be a country on the list when a visa for Canada was issued.¹⁸ The Schedule was generally reviewed annually and could be amended by CIC. That said, the list had not been amended since 29 June 2001.¹⁹ In evidence given before the House of Commons Subcommittee on International Human Rights in 2010, Debra Pressé, as acting director general, Refugee Affairs Branch at CIC, stated that: “The source country list as a tool, we will acknowledge, is not particularly flexible.”²⁰ Ultimately, it seems the government determined the source country class was not a tool worthy of continued use.

Table 5: Designated Source Countries by Year 1997-2010²¹

Year	Designated Source Countries
1997	Bosnia-Herzegovina, Croatia, El Salvador, Guatemala, Sudan
1998	Bosnia-Herzegovina, Croatia, El Salvador, Guatemala, Sudan, Colombia, Cambodia, Liberia*
1999-2000	Bosnia-Herzegovina, Croatia, El Salvador, Guatemala, Sudan, Colombia, Democratic Republic of Congo (Cambodia and Liberia removed)
2001-2010	El Salvador, Guatemala, Sudan, Colombia, Democratic Republic of Congo, Sierra Leone (Bosnia-Herzegovina and Croatia removed)

* Newly added states are in bold.

¹⁷ *IRPR*, *supra* note 13, Schedule 2 [Repealed, SOR/2011-222, s. 12].

¹⁸ *IRPR*, *supra* note 13, s.148(1)(a) [Repealed, SOR/2011-222, s. 6].

¹⁹ The list was last reviewed in 2003 but no change to the listed countries was made. Debra Pressé, 40th Parliament, 3rd Session, Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, Evidence, (9 December 2010).

²⁰ *Ibid.*

²¹ Citizenship and Immigration Canada, “Regulations Amending the Immigration and Refugee Protection Regulations and Regulatory Impact Analysis Statement” 145:2 Canada Gazette (19 March 2011); online: <<http://www.gazette.gc.ca/rp-pr/p1/2011/2011-03-19/html/reg3-eng.html>>.

The class, however, did not seem that inflexible or difficult to change through the annual review. Beyond being from a listed country on the Schedule, individuals in this class had to be “seriously and personally affected by civil war or armed conflict,” “been or are being detained or imprisoned with or without charges, or subjected to some other form of penal control, as a direct result of an act committed outside Canada that would, in Canada, be a legitimate expression of freedom of thought or a legitimate exercise of civil rights pertaining to dissent or trade union activity,” or meet the refugee definition aside from the out of country requirement.²²

Those in the Source Country Class had to therefore meet the same requirements of either the Convention Refugee Abroad Class or the Country of Asylum Class aside from not crossing an international border. To be on the list, it was required that the country also be safe enough for Canadian officials to work. The regulations required that a source country be a country “where an officer works or makes routine working visits and is able to process visa applications without endangering their own safety, the safety of applicants or the safety of Canadian embassy staff.”²³ From an administrative perspective, Source Country Class resettlement resolved some of the issues that tend to make resettlement difficult. A cooperative government offers a safe environment for visa officers and a relatively stable location for an office to be established. However, it is the combined requirements that there be civil war or armed conflict but also safe working conditions that limited both the list and the use of source country resettlement.²⁴ Thus, despite six listed potential source

²² *IRPR*, *supra* note 13, s.148(1)(b) [Repealed, SOR/2011-222, s. 6].

²³ *IRPR*, *supra* note 13, s.148(2)(b) [Repealed, SOR/2011-222, s. 6].

²⁴ Pressé, Evidence, *supra* note 19.

countries in the Schedule, operative source country resettlement only occurred out of Colombia. Prior to the repeal, Pressé stated:

Quite frankly, there are countries on the list now that we know could come off, but we don't want to waste the valuable time of members of parliament by taking countries off when we couldn't add any new countries to the list because the countries that people would want to add today are not countries that we can operate in.²⁵

The class therefore failed to act with the intended reactive flexibility for which it was conceived.

Applications to the class were, however, high. Between 2005 and 2009, the Canadian embassy in Colombia received an average of 4,700 applications annually.²⁶ In Bosnia, from 1998-2001 there were approximately 6,236 applications.²⁷ These applications, when considered to include family members, amounted to potential refugee numbers far outweighing the upper range for resettled refugees in the annual immigration plan. At the time of repeal, the government reported low success rates amounting to less than 10% in Colombia.²⁸

The government conducted a review of the Source Country Class in 2009 to evaluate its continued effectiveness.²⁹ The review identified three issues with the program: 1) limited eligibility and lack of flexibility; 2) lack of referral capacity and necessity for direct access which encompasses foreign nationals; and 3) lack of access or awareness by vulnerable persons.³⁰ In a news release on 18 March 2011, Minister Kenney announced the

²⁵ *Ibid.*

²⁶ Citizenship and Immigration Canada, *Gazette*, *supra* note 21.

²⁷ *Ibid.*

²⁸ Citizenship and Immigration Canada, "Government to Refocus Resettlement Efforts" *News Release* (18 March 2011).

²⁹ Citizenship and Immigration Canada, *Gazette*, *supra* note 21.

³⁰ *Ibid.*

government's intent to repeal the Source Country Class.³¹ Notice was given in the Canada Gazette on 19 March 2011 of the proposal to remove the Source Country Class from *IRPA*'s regulations.³² The news release came the same day as the announcement of blended support for Iraqi refugees.³³ In fact, the news release announcing the repeal oddly includes multiple references to the unrelated Iraqi resettlement and the group resettlement of Bhutanese from Nepal.³⁴ This rhetorical interlacing of resettlement models, positioning both blended private sponsorship and group resettlement in contrast to source country resettlement, is a clear signal of the direction of the government's interests.

The proposed repeal emphasized CIC's desire to return the resettlement program closer to the original intentions of refugee protection for those meeting the Convention refugee definition. It was couched in two major justifications: better management by eliminating direct access and the ability for Canada to work more with partner organizations including UNHCR, other resettlement countries and private Canadian sponsors.³⁵ The Regulatory Impact Analysis Statement that accompanied the announcement noted: "Consultations with the UNHCR have suggested that repealing the class could benefit the organization and persons in need of humanitarian protection by making available more resettlement spaces for UNHCR-referred refugees."³⁶ The report further indicated that: "The proposed repeal of the class and the transfer of resettlement spaces to UNHCR-referred refugees would be

³¹ Citizenship and Immigration Canada, "Government to Refocus Resettlement Efforts" *supra* note 28.

³² Citizenship and Immigration Canada, Gazette, *supra* note 21.

³³ Citizenship and Immigration Canada, "Canada's Commitment to Iraqi Refugees Remains Strong" (*News Release* (18 March 2011)).

³⁴ Citizenship and Immigration Canada, "Government to Refocus Resettlement Efforts" *supra* note 28. The Bhutanese resettlement is addressed in detail in the group processing section of this chapter.

³⁵ Citizenship and Immigration Canada, Gazette, *supra* note 21.

³⁶ *Ibid.*

consistent with UNHCR's appeals for more resettlement spaces for Convention refugees."³⁷

The analysis went on, however, to note that the greatest impact and consequences of the repeal would be felt by private sponsorship groups:

Additional pressure may be put on the private sponsorship community and certain ethnic communities in Canada...to sponsor refugees who would have previously applied for resettlement through direct access and been eligible for government assistance... Colombians in Canada may also face pressure to sponsor relatives abroad through the family class, or the PSR program, in the case of refugees who have fled across the border.³⁸

This recognition seemingly contradicts the renewed focus on protection by returning to a more family-centric resettlement approach which tends not to support UNHCR-referred refugees.

The anticipated pressure on private sponsors that the repeal will cause appears to be yet another significant shifting of the burden from government to private responsibility. Moreover, resettlement of these individuals following the repeal requires the often dangerous and illegal crossing of an international border in order to access non-source country resettlement. This amounts to a shifting of the burden to host countries neighbouring the source country. Estimates suggest that approximately 500,000 Colombians have already fled to the neighbouring countries of Ecuador, Panama and Venezuela.³⁹ And contrary to Canada's aggressively voiced concern with human smuggling set out in the government's Bill C-4's *Preventing Human Smugglers from Abusing*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Refugee Council USA, "Living on the Edge: Colombian Refugees in Panama and Ecuador" (2011) at 1. In response to expressed concern from the CCR on the fate of Colombians who benefited from the Source Country Class, CIC indicated that: "once the class is repealed, CIC can increase the number of resettlement spaces for UNHCR-referred refugees, some of which may go to Colombian refugees in need of protection in Ecuador." Citizenship and Immigration Canada, Gazette, *supra* note 21.

Canada's Immigration System Act,⁴⁰ repeal of the source country provisions will presumably lead more people to turn to smugglers to escape their country of origin.⁴¹ Essentially, despite the government's stated intent to return to UNHCR referred refugees, the consequences of the repeal of the Source Country Class will be increased dependence on private sponsors and increased usage of human smugglers leading to increased burdens in neighbouring countries. Commitment to international protection does not appear to be at the forefront of this decision.

The repeal demonstrates the fragility of the legal framework that regulates resettlement. Any component of Canada's resettlement program could likewise be repealed. We have seen in the previous chapters that resettlement is never a smooth or uncomplicated process. Here the government has opted to deal with program difficulties by abandonment rather than reform. There is no legal basis to prevent the government from doing the same with any or all other components of its voluntary resettlement program.

In an apparent acknowledgement of the underlying rationale for the creation and benefit of the Source Country Class and predecessor designated classes, the Government has noted that the discretionary power of the Minister in section 25 of *IRPA* could still be used to grant admission to those who do not meet the refugee definition.⁴² Commonly referred to as a "Humanitarian & Compassionate (H&C) application" the Minister of Citizenship and Immigration possesses discretionary power under section 25 to grant a foreign national

⁴⁰ Formerly Bill C-49, reintroduced as Bill C-4 on 16 June 2011 and then brought into the omnibus Bill C-31 *Protecting Canada's Immigration System Act*, S.C. 2012 c.17 (introduced on 16 February 2012, assented to 28 June 2012).

⁴¹ Jim Creskey, "Jason Kenney's Troubling Refugee Legacy" *Embassy* (30 March 2011).

⁴² "As a discretionary measure, the Minister may also choose to offer admission to Canada to vulnerable persons who do not qualify for the refugee classes by using subsection 25.1(1) or subsection 25.2(1) of the *Immigration and Refugee Protection Act*." Citizenship and Immigration Canada, Gazette, *supra* note 21. *Immigration and Refugee Protection Act*, S.C. 2001 c. 27. [*IRPA*].

permanent resident status or an exemption from any applicable criteria or obligations of *IRPA* to a foreign national either in Canada or outside of Canada who is inadmissible or who does not meet the requirements of the Act, if justified by humanitarian and compassionate considerations.

While legally accurate that an H&C application could be made, it is unlikely this discretionary power will better enable identification of the most vulnerable individuals in need of protection. Section 25 has been changed significantly by the *Balanced Refugee Reform Act*.⁴³ Previously, the section gave the Minister of Immigration the discretionary power to grant permanent residence to a foreign national either inside or outside of Canada on the basis of humanitarian and compassionate grounds, the best interests of the child, or public policy considerations.⁴⁴ The amendments limit the circumstances in which public policy can be considered by the Minister, ensuring the payment of fees before the

⁴³ *Balanced Refugee Reform Act*, S.C. 2010, c.8 (assented to 29 June 2010) s.4.

⁴⁴ The previous section read:

25 The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

...

25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

...

25.2 (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by public policy considerations.

application is considered. It is specifically noted that the Minister may not consider factors taken into account during refugee determination:

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

(1.1) The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid.

...

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

(2) The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1).

...

25.2 (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by public policy considerations.

(2) The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1).

...

Table 6: Humanitarian & Compassionate Applications Outside Canada 2002-2010⁴⁵

Year	Passed	Refused	Withdrawn	Total	Visas Issued	Approval Rate*
2002	7	3	0	10	5	70%
2003	445	41	8	494	429	92%
2004	456	61	24	541	454	88%
2005	856	1,079	390	2,325	850	44%
2006	1,450	1,733	197	3,380	1,429	46%
2007	1,009	273	309	1,591	1,002	79%
2008	1,029	155	278	1,462	1,029	87%
2009	738	151	256	1,145	729	83%
2010	596	219	323	1,138	579	73%

* Excluding Withdrawn Applications

From *IRPA*'s introduction in 2002 to 2010, a total of 6,506 visas were issued on humanitarian and compassionate grounds to foreign nationals outside of Canada. The approval rating on applications ranged from a high of 92% in 2003 to a low of 44% in 2005. These numbers, however, do not differentiate between asylum seekers and other foreign nationals with strong ties to Canada.⁴⁶ It is difficult to predict what the addition of asylum applicants from previous source countries will do to these numbers. While applications may increase, the narrowed scope of section 25 prohibiting consideration of refugee factors means any increase in admissions is highly unlikely.

The Regulatory Impact Analysis indicates that consultations preceding the repeal were undertaken with UNHCR, the CCR, the Province of Quebec, and the Department of Foreign Affairs and International Trade.⁴⁷ The CCR has responded that the suggestion that

⁴⁵ Access to Information Request A-2011-02100/bm. Prepared by IR Statistics Unit.

⁴⁶ For example, the section is used in instances of family class sponsorship where the sponsor does not meet the eligibility requirements. Citizenship and Immigration Canada, "OP4: Processing of Applications under Section 25 of the IRPA" Manual (2008) at 8.2; online: <<http://www.cic.gc.ca/english/resources/manuals/op/index.asp>>.

⁴⁷ Citizenship and Immigration Canada, Gazette, *supra* note 21.

⁴⁷ *Ibid.*

there were consultations is a misrepresentation. The organization asserts that it was never consulted on the elimination of the program, only its improvement.⁴⁸ The CCR details meetings with CIC in 2009 and 2010 and that in 2010 CIC indicated the purpose of the Regulatory Impact Analysis was to determine how to make the class flexible and responsive.⁴⁹ This failure by the government to honestly consult the largest umbrella organization representing refugee issues in Canada in advance of proposing the repeal further confirms the vulnerability of discretionary resettlement.⁵⁰

Interestingly, while practically no academic attention has been devoted to this form of resettlement, a short piece by Judith Kumin addresses source country resettlement in an edited collection from 2007 titled *Innovative Concepts for Alternative Migration Policies*.⁵¹ Kumin starts from the reality of increasingly restrictive measures by states to deter illegal entry and argues "...there is at least a moral responsibility for states to offset control measures with other means to allow persons in need of protection to find it."⁵² Recognizing the traditional concerns associated with resettlement, that it is a pull factor which discourages voluntary repatriation and has the potential for fraud and camp security concerns when demand exceeds availability, Kumin proposes source country processing as a potentially better alternative.⁵³ A convincing list of benefits to this approach including

⁴⁸ Canadian Council for Refugees, "D) Proposal to End Source Country Class" 6 *Canadian Council for Refugees E-Chronicle* (8 April 2011); online: <http://ccrweb.ca/en/bulletin/11/04/08#_Toc290021136>.

⁴⁹ Canadian Council for Refugees, "Comments on Proposed Elimination of Source Country Class" (18 April 2011); online: <<http://ccrweb.ca/en/comments-proposed-elimination-source-country-class>>.

⁵⁰ Interested persons did have the opportunity to make representations concerning the proposed Regulations within 30 days after the date of publication of the Gazette notice. I sent comments on 14 April 2011 regarding the interviews I participated in as part of the CCR delegation in Bogota and the interest expressed by organizations in Colombia to continue making referrals to the Canadian Embassy.

⁵¹ Judith Kumin, "In-Country 'Refugee' Processing Arrangements: A Humanitarian Alternative?" in Michael Jandl (ed.) *Innovative Concepts for Alternative Migration Policies* (Amsterdam: Amsterdam University Press, 2007) at 79.

⁵² *Ibid.* at 79.

⁵³ *Ibid.*

the reduction of irregular and dangerous movement; use as a burden-sharing mechanism through the reduction of spontaneous arrivals in the region of origin; the ability for states to manage and control intake; the reduced time spent in limbo; and the required dialogue between the country of resettlement and country of origin all support Kumin's argument.⁵⁴ Conversely, her acknowledged disadvantages seem no less daunting than those attached to traditional resettlement and include: the potential risk to the applicant while the process is underway if the application is denied, as he or she remains in the country where persecution is feared; the risk that source country processing will serve as an excuse for states to prevent access to asylum; and the realities that the process lacks transparency, is subject to discretion and is likely to only benefit a small number of individuals.⁵⁵ These latter two listed disadvantages are in fact identical to those attached to traditional resettlement. The article suggests that source country processing may be an appealing option in Europe and something UNHCR should consider as a strategic complement to the strategic use of resettlement.⁵⁶ Canada, noted as the clear leader in this form of resettlement for over thirty years and an example to the world, has now, less than five years after the article's publication, ended its program.

A case study of Colombia offers a better understanding of the operation of the Source Country Class, the justifications for its removal and the consequences of the repeal.

Colombia

Colombia has one of the largest populations of internally displaced persons in the world. There are over three million displaced persons within Colombia and hundreds of thousands

⁵⁴ *Ibid.* at 80.

⁵⁵ *Ibid.* at 85.

⁵⁶ *Ibid.* at 83.

seeking refuge in other countries in the region.⁵⁷ The areas of forced displacement are quite concentrated with ten percent of the districts in Colombia generating more than sixty percent of the displacement.⁵⁸

Resettlement requires cooperation between the host and resettlement countries. With so few resettlement places available, the Canadian government can afford to be selective in terms of where it focuses its resettlement. For a long time, CIC perceived source country resettlement from Colombia as extremely workable. Colombia is a developed country with a cooperative government that wants the persecutory agents out.⁵⁹ Colombians can also be seen as desirable refugees. They tend to be well-educated and easily integrated: “One of the representations that was most frequently put forward was that of Colombian refugees as self-sufficient, independent and committed to their goals in Canada.”⁶⁰

The ease of resettlement from Colombia is matched with the foreign-policy, burden-sharing argument it provides.⁶¹ Colombians represent the largest human displacement in the

⁵⁷ The Colombian Government commenced registering internally displaced persons (IDPs) in 1997 and by the end of 2011 more than 3.8 million were registered. Other observers place the estimate much higher at 5.3 million. See Internal Displacement Monitoring Centre, “Global Overview 2011: People Internally Displaced by Conflict and Violence” Norwegian Refugee Council (April 2012) at 8; online: <<http://www.internal-displacement.org/publications/global-overview>>; UNHCR, “UNHCR Global Appeal 2010-2011” *UNHCR Fundraising Reports* (1 December 2009) at 100; UNHCR, “A Year of Crisis: UNHCR Global Trends 2011” at 19; online: <<http://www.unhcr.org/4fd6f87f9.html>>.

⁵⁸ UNHCR, “UNHCR Global Appeal 2010-2011” *ibid.* at 10.

⁵⁹ Debra Pressé, Director of Refugee Resettlement at Citizenship and Immigration Canada, interview with author, 18 November 2009.

⁶⁰ Pilar Riaño Alcalá, et al., *Forced Migration of Colombians: Colombia, Ecuador, Canada* (Colombia, Vancouver: Corporación Región (Spanish) School of Social Work, University of British Columbia (English), 2008) at 96, see also 103, 104.

⁶¹ Pressé, interview, *supra* note 59. In a preparatory meeting held in Brasilia (26-27 August 2004), the Government of Brazil proposed the creation of a regional resettlement programme for Latin American refugees in the framework of international solidarity and responsibility-sharing. This initiative opens the possibility for any Latin American country to participate and to receive refugees who are in other Latin American countries. “Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America” Mexico City (16 November 2004). As well, a pillar of the Mexico Plan of Action is a regional resettlement programme that seeks durable solutions for Colombian refugees in Ecuador and Costa Rica by resettling them in other countries in the continent.

western hemisphere and currently the world.⁶² Canada was the only country to resettle directly from Colombia. Both Canada and the U.S. take Colombians from neighbouring countries through resettlement or as refugees who reach their territory. UNHCR has likewise increasingly focused on internally displaced persons (IDPs) in Colombia. In its 2010 Global Appeal, the agency noted “UNHCR’s financial requirements in Latin America have increased steadily in recent years. This is mostly due to the Office’s greater involvement with IDPs in Colombia and the reinforcement of protection for unregistered individuals in refugee-like situations in the neighbouring countries”⁶³ With little assistance from the rest of the world with Colombians, a policy argument can be made in Canada for regional burden-sharing and a justifiable reduction of responsibility for the arguably more complicated and less desirable refugee flows in other parts of the world that are closer to other states. And, for a long time, Canada operated a successful source country resettlement program out of Colombia.

Yet, despite these incentives and the attractions of resettlement from Colombia, Canada steadily decreased its resettlement targets in the region. In 2008, the Bogota target was 1,960. It dropped to 1,350 in 2009 and was halved to 700 in 2010.⁶⁴ In 2011 the target was set for less than 400.⁶⁵ Previously, the Canadian Embassy in Bogota had agreements with humanitarian organizations to refer persons in need of protection for Source Country Class

⁶² Colombia is the only country with more than one million IDPs in the western hemisphere. The other four countries currently with more than one million IDPs are Iraq, Sudan, the Democratic Republic of the Congo and Somalia. Internal Displacement Monitoring Centre, “Global Overview 2011” *supra* note 57 at 8.

⁶³ UNHCR, “UNHCR Global Appeal 2010-2011” *supra* note 57 at 9 “Latin America.”

⁶⁴ Francisco Rico Martinez & Canadian Council for Refugees, “The Future of Colombian Refugees in Canada: Are We Being Equitable?” (Canadian Council for Refugees, 2011) at 5; online: <http://ccrweb.ca/files/ccr_colombia_report_2011.pdf>. These targets include both government and private sponsorship.

⁶⁵ *Ibid.* at 5. Full resettlement targets for government and privately sponsored refugees for 2010 and 2011 are on file with author.

resettlement.⁶⁶ In the past few years, the government eliminated the referral capacity. The Protection Coordinator for the International Committee of the Red Cross (ICRC) in Colombia indicated in November 2010 that the ICRC previously supported Canadian Embassy requests for resettlement but was told that Canadian resettlement was reduced and the available numbers were already filled for 2010-2011 through the backlog of applications at the Embassy.⁶⁷ At that time, the ICRC signaled that it was able and willing to recommence with referrals if requested.⁶⁸ An NGO representative spoken to during the CCR delegation to Bogota indicated that she had previously worked for a different NGO that made referrals to the Canadian Embassy and had enjoyed an open trusting relationship with the visa officers but that relationship no longer existed.⁶⁹ One organization did confirm to the delegation, prior to the repeal of the class, that while the referral program no longer officially existed, this organization was still able to communicate with the Embassy on a number of cases, about 10 groups comprising a total of 60 people over the year.⁷⁰ In a few of the cases, the Embassy recommended finding a private sponsor and the resettlement was successful.⁷¹ This organization also reinforced, however, that while they previously enjoyed a fluid and privileged relationship with the Canadian visa officers in Bogota, this

⁶⁶ Alcalá, et al., *Forced Migration of Colombians*, *supra* note 60 at 141.

⁶⁷ Guilhelm Ravier, Protection Coordinator, ICRC Colombia, CCR delegation interview, 11 November 2010. See also Rico Martinez “The Future of Colombian Refugees in Canada” *supra* note 64 at 27.

⁶⁸ Ravier, interview, *ibid*; see also Rico Martinez “The Future of Colombian Refugees in Canada” *supra* note 64 at 27.

⁶⁹ Amanda Romero, Proceso De Comunidades Negras De Colombia, CCR delegation interview, 12 November 2010. See also Rico Martinez “The Future of Colombian Refugees in Canada” *supra* note 64 at 27.

⁷⁰ CCR delegation interview, X, 13 November 2011 (not identified for security purposes). See also Rico Martinez “The Future of Colombian Refugees in Canada” *supra* note 64 at 27.

⁷¹ CCR delegation interview, X, *ibid*. See also Rico Martinez “The Future of Colombian Refugees in Canada” *supra* note 64 at 27.

was no longer the case and they had been given the impression the Source Country Class program was being shut down.⁷²

Indeed, four months after these interviews took place in Bogota, the Canadian government announced its intention to not only close down the source country program in Colombia but to repeal the Source Country Class regulations altogether.⁷³ As already discussed, a key justification underlying the repeal was the arguable necessity for direct access applications for source country resettlement. The difficulties identified with direct access were the inundation of claims it created while at the same time failing to grant access to the most vulnerable of persons. CIC's Regulatory Impact Analysis Statement indicates that "there were no organizations willing to refer Source Country Class applicants without funding and no funding was available."⁷⁴ This assessment contradicts the information received from organizations interviewed in Bogota who expressed both a willingness to provide referrals and a concern for the vulnerable persons identified by them with diminishing protection options.⁷⁵ Pastor Peter Stucky of the Colombian Mennonite Church in Bogota has called the program "a lifesaver for many people in Colombia" and noted that the repeal of the legislation "closes the last option."⁷⁶

Impressions gained from interviews in Bogota suggest a different rationale for the Canadian government wishing to shut down the program, at least in Colombia. The conflict in Colombia has fundamentally shifted under government crackdowns over the past

⁷² CCR delegation interview, X, *ibid.* See also Rico Martinez "The Future of Colombian Refugees in Canada" *supra* note 64 at 27.

⁷³ Citizenship and Immigration Canada, *Gazette*, *supra* note 21.

⁷⁴ *Ibid.*

⁷⁵ Ravier, interview, *supra* note 67.

⁷⁶ Peter Stucky quoted in Nicholas Keung, "Ottawa Eyes Axing 'Life-Saving' Asylum Program" *The Toronto Star* (12 April 2011).

decade and the lines have blurred between ideological revolutionaries and those engaged in generalized crime and drug trafficking.⁷⁷ Within this new environment, the Political Counsellor at the Canadian Embassy in Bogota acknowledged that alliances are now being made between paramilitaries and guerillas who would have previously been enemies.⁷⁸ Both the messaging from the Colombian government that there is no longer a persecution risk in Colombia,⁷⁹ and the increasing inability to establish an individual's alliances complicates Canada's ability to credibly identify those in need of resettlement.

As well, fraudulent applications plagued the program while the referral system was still in operation. There have been instances in Quebec of refugees identifying paramilitaries amongst those resettled.⁸⁰ The ICRC indicated that individuals had used fraudulent referrals allegedly from the ICRC at the Canadian Embassy.⁸¹ In 2004, a scheme was discovered by Colombian authorities in which substantial bribes were paid to civil servants employed by the Colombian National Senate for documents identifying individuals as victims of death or abduction threats from either the guerillas or paramilitaries. The documents were used at the Canadian Embassy in Bogota to achieve Source Country Class resettlement for at least a reported 50 people.⁸² Having consequently eliminated referrals, the Canadian Embassy was inundated with direct access applications and inquiries with an

⁷⁷ Shauna Labman, "CCR Visit Finds Colombia Not Safe for Some" (2010) 69 *Refugee Update* 5; Rico Martinez, "The Future of Colombian Refugees in Canada" *supra* note 64 at 7-11.

⁷⁸ Sara Cohen, Political Counsellor, Canadian Embassy in Bogota, CCR delegation interview, 10 November 2010. See also Rico Martinez "The Future of Colombian Refugees" *supra* note 64 at 11.

⁷⁹ The CCR fact finding mission to Colombia found strong evidence to contradict this claim. Rico Martinez "The Future of Colombian Refugees" *supra* note 64; Labman, "CCR Visit Finds Colombia Not Safe for Some" *supra* note 77.

⁸⁰ Rico Martinez, "The Future of Colombian Refugees in Canada" *supra* note 64 at 28.

⁸¹ Ravier, interview, *supra* note 67. See also Rico Martinez, "The Future of Colombian Refugees in Canada" *supra* note 64 at 26.

⁸² Oakland Ross, "Canada Is Conned into Taking Rebels; Colombians Given Refugee Status Bogota Arrests 3 Civil Servants" *The Toronto Star* (8 September 2004) A1; Oakland Ross, "Colombian Immigrants Fear Fallout from Scam" *The Toronto Star* (10 September 2004) A15.

average of approximately 4,700 applications per year between 2005 and 2009.⁸³ The headaches and processing costs of source country resettlement seemed to be outweighing the benefits. The need however still clearly exists.

Group Resettlement

As source country resettlement dwindled and ultimately came to an end, group resettlement has been gaining in momentum and support. Advocacy for the resettlement of refugee groups in Canada dates back to the consultations that preceded the 1976 *Immigration Act*. Commenting on the White Paper on Immigration in 1967, Dr. Joseph Kage of JIAS pushed not only for private sponsorship but for the “sponsorship of groups, who may not necessarily come within the outlined provisions for admission.”⁸⁴

Despite this early push, group processing is a relatively new and growing form of resettlement recognized by the international community. The “Group Processing Methodology” came out of Goal 5 of the *Agenda for Protection* in which the fifth objective is “Expansion of resettlement opportunities.”⁸⁵ It is therefore a component of the strategic use of resettlement. The international MFU, resulting from a UN process co-chaired by Canada in 2004 following the *Agenda for Protection*, likewise encourages states to pursue the use of group resettlement.⁸⁶ Within the first two years of the implementation of the

⁸³ Citizenship and Immigration Canada, Gazette, *supra* note 21.

⁸⁴ Joseph Kage, “Re-Appraising the Canadian Immigration Policy: An Analysis and Comments on the White Paper on Immigration” (Montreal, January 1967) at 18 (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

⁸⁵ UNHCR, *Agenda for Protection*, A/AC. 96/965/Add. 1, General Assembly, Executive Committee of the High Commissioner’s Programme (26 June 2002) 3rd ed., (October 2003) Goal 5, Objective 5.

⁸⁶ High Commissioner’s Forum, “Multilateral Framework of Understandings on Resettlement” FORUM/2004/6, 16 September 2004, at 17-19; online: <<http://www.unhcr.org/doclist/protect/408d17494.html>>.

group processing methodology by UNHCR, 13 refugee groups totaling approximately 43,000 refugees were submitted for consideration globally.⁸⁷

As the program commenced in Canada, it was described by the Canadian government as a “fundamental shift in our policy approach to refugee identification and selection.”⁸⁸ The 2005 Annual Report to Parliament on Immigration described Canada as “at the forefront of using group resettlement strategically.”⁸⁹ Group resettlement enables Canada to address protracted situations in a strategic manner by removing a large and cohesive group from the protraction. Whereas refugee status is by definition an individual status, group processing challenges this through a simplified referral and processing system. Instead of the traditional case-by-case processing, UNHCR submits for resettlement a large group with a uniform refugee claim, clearly defined membership and particular vulnerabilities or protection needs.⁹⁰ While source country resettlement was a refugee “class,” meaning those resettled under this program were required to meet the specified definition set out in the regulations,⁹¹ group resettlement is considered an “administrative arrangement” to efficiently move refugees from a particular camp.⁹² To date, there have been three group resettlement projects in Canada: Somali-Sudanese, Karen, and Bhutanese.⁹³

⁸⁷ UNHCR, “Progress Report on Resettlement” (2007) 26:1 *Refugee Survey Quarterly* 150 at 150.

⁸⁸ Monte Solberg, Minister of Citizenship and Immigration, “Speaking Notes” 10th Biennial Conference of the International Association for the Study of Forced Migration and the International Refugee Rights Conference of the Canadian Council for Refugees, Toronto, Ontario (18 June 2006).

⁸⁹ Citizenship and Immigration Canada, “2005 Annual Report to Parliament on Immigration” (Canada, 2005) at Section 4.

⁹⁰ Citizenship and Immigration Canada, “Backgrounder - Group Resettlement to Canada: Karen Refugees in Mae La Oon Camp, Thailand” (2006); online: <<http://www.cic.gc.ca/English/department/media/backgrounders/2006/2006-06-20.asp#tphp%20idtphp>>.

⁹¹ *IRPR*, *supra* note 15.

⁹² Pressé, Evidence, *supra* note 19.

⁹³ 154 Acehnese were strategically settled as a group in Metro Vancouver between 2004-2006 but they were individually processed and did not enter under the group processing methodology. See Jennifer Hyndman & James McLean, “Settling Like a State: Acehnese Refugees in Vancouver” (2006) 19:3 *Journal of Refugee*

Whereas individualized state resettlement still struggles to achieve international cooperation, group processing appears to offer more simplified and successful cooperation between states by virtue of the ability to concentrate on a large group and achieve visible success. The first Canadian pilot project in 2003 involved group processing of Sudanese and Somali refugees in Kenya. Canada and Australia in cooperation decided to jointly resettle the two smallest minority groups being persecuted in the Dadaab refugee camps.⁹⁴ To overcome the legislative requirement for individual refugee assessments, the Minister's discretion in section 25 of *IRPA* to grant an exemption from the Act was used to declare the Sudanese and Somalis as *prima facie* refugees and vulnerable.⁹⁵ This permitted CIC to use a singular claim for each group and exempted the refugees from the "ability to establish" requirement.⁹⁶

Canada next requested that UNHCR identify a group of Burmese refugees in Thailand for 2006-2007 which led to the resettlement of 806 Karen refugees.⁹⁷ A second wave of Karen group resettlement was announced in 2007 with the intention of bringing over 2,000 refugees.⁹⁸ 3,900 Karen were ultimately resettled to Canada.⁹⁹ Other countries to resettle

Studies 345; James McLean, et al., "The First 365 Days: Acehese Refugees in Vancouver, British Columbia" (2006) RIIM Working Paper Series 06-07, Vancouver/Burnaby, BC Centre for Excellence; Lisa Ruth Brunner, et al., "Post-IRPA GARs from Aceh: An Analysis of Refugee Integration Five Years On" (2011) 8 *Our Diverse Cities* 106.

⁹⁴ Pressé, interview, *supra* note 59.

⁹⁵ This is the same section, *IRPA* s.25(1), mentioned above in the discussion of source country resettlement. Here though it is the Minister's ability to exempt a foreign national from an aspect of the Act rather than granting permanent residence that is being applied. The revised s.25(1) still permits the Minister to exempt a foreign national from any applicable criteria or obligations of the Act.

⁹⁶ Pressé, interview, *supra* note 59. The "successful establishment" requirement is set out in *IRPR*, *supra* note 13, s.139 and discussed in detail in Chapter 3.

⁹⁷ Citizenship and Immigration Canada, "Backgrounder - Bill C-11: The *Balanced Refugee Reform Act*" (2010); online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-06-29.asp>>.

⁹⁸ *Ibid.*

⁹⁹ Citizenship and Immigration Canada, "Canada's Resettlement Programs" *News Release* (18 March 2011).

Karen refugees using the group methodology included the United States, Australia, the United Kingdom, Finland, the Netherlands, New Zealand, Sweden, Norway and Ireland.¹⁰⁰

In 2007, Canada also committed to the resettlement of 5,000 Bhutanese from Nepal over 3-5 years. Known as “Lhotsampas” in Bhutan, the refugees are Bhutanese of Nepalese origin who were stripped of their Bhutanese citizenship in the 1990s and fled to Nepal. Canadian officials traveled to Nepal in September 2008, October 2009, October 2010 and April 2011.¹⁰¹ As of October 2011 all 5,000 Bhutanese had been selected and almost 4,500 had arrived; in June 2012, the government announced the resettlement of an additional 500 Bhutanese refugees.¹⁰² Resettlement has occurred to more than 21 communities across Canada, including Charlottetown, Fredericton, St. John’s, Saint-Jérôme, Ottawa, London, Windsor, Hamilton, Winnipeg, Saskatoon, Lethbridge and Vancouver, with large numbers being resettled to Quebec.¹⁰³

The resettlement is part of an operation with other countries to address the protraction of Bhutanese in Nepal dating back almost two decades.¹⁰⁴ Originally nine states, the United States, Australia, New Zealand, Finland, Denmark, Norway, Sweden, the United Kingdom and the Netherlands were involved¹⁰⁵ with resettlement ultimately occurring to all but

¹⁰⁰ Steven O’Brien, “It’s a Long Way from Myanmar for Karen Refugees” *UNHCR News Stories* (28 January 2008).

¹⁰¹ Citizenship and Immigration Canada, “Resettling Bhutanese Refugees - Update on Canada’s Commitment” (2010); online: <<http://www.cic.gc.ca/English/refugees/outside/bhutanese.asp#tphp%20idtphp>>.

¹⁰² Citizenship and Immigration Canada, “Canada Announces Plan to Resettle More Bhutanese Refugees” *News Release* (20 June 2012); online: <<http://www.cic.gc.ca/english/department/media/releases/2012/2012-06-20a.asp>>.

¹⁰³ Citizenship and Immigration Canada, “Resettling Bhutanese Refugees” *supra* note 101.

¹⁰⁴ *Ibid.*

¹⁰⁵ Citizenship and Immigration Canada, “Backgrounder - Group Resettlement to Canada” *supra* note 90.

Finland.¹⁰⁶ An agreement was entered into between the eight countries and UNHCR to resettle approximately 70,000 of the 100,000 Bhutanese refugees in Nepal.¹⁰⁷ By December 2010, 40,000 Bhutanese refugee had been resettled across the eight countries.¹⁰⁸

In Canada, the Bhutanese resettlement process differed from the Somali-Sudanese resettlement. Unlike the singular form used with the Somali and Sudanese refugees, shortened forms for each applicant were used and interviews were organized so that large numbers could be done during the same visit:

Rather than asking them to give us 5,000 forms of 30 pages each, because we knew the 5,000 were part of a complete, comprehensive census and we had received the complete census, we asked for a shorter form.

Instead of going to the camps in Nepal two to four times a year to do a few at a time, Canada goes in once a year to interview 1,000 people at a time with these shorter forms. The arrivals are staggered. It's not faster; it's just a way to use our resources more effectively. Eight countries are in the camp, and we can't all use the generators at the same time, so we take turns going in.¹⁰⁹

The Bhutanese resettlement also represented a more multilateral endeavour with agreement and sharing between the numerous states involved. A health centre was built in Nepal to be used as a cultural orientation and transit centre as well. Costs for the centre were shared between Canada, Australia and the United States.¹¹⁰ A common protocol and doctors were shared between states for tuberculosis testing and 7 states joined in a diplomatic demarche to the Nepali government to obtain exit permits from Nepal and development assistance for

¹⁰⁶ Pratibedan Baidya & Nini Gurung, "Resettlement Programme for Refugees in Nepal Passes 40,000 Mark" UNHCR (13 December 2010); online: <<http://www.unhcr.org/refworld/docid/4d07286e2.html>>.

¹⁰⁷ Pressé, Evidence, *supra* note 19.

¹⁰⁸ Baidya & Gurung, "Resettlement Programme for Refugees in Nepal" *supra* note 106. The majority of these refugees, 34,129, have been resettled to the United States.

¹⁰⁹ Pressé, Evidence, *supra* note 19.

¹¹⁰ Pressé, interview, *supra* note 59.

the residual population.¹¹¹ As a global whole, the Bhutanese resettlement has had the highest success rate in the world, with an acceptance rate of 99% of submissions.¹¹² Similar to Colombians, the Bhutanese can be regarded as “desirable” refugees. CIC’s website describes them as speaking a “variety of languages” and possessing a “range of employment skills.”¹¹³ More importantly, “many speak English and it is not uncommon for the young adults to have secondary, and even post-secondary education.”¹¹⁴

As appears to be the growing trend in all of Canada’s resettlement initiatives, private sponsors are encouraged to take part in group resettlement. The information update on the Bhutanese resettlement concludes with the link “Interested parties can sponsor and help integrate Bhutanese refugees into our communities through the Private Sponsorship of Refugees Program.”¹¹⁵ Citizens for Public Justice note that group resettlement is an ideal partnership between government and sponsoring groups: “Sponsoring groups have the resources and motivation to help resettle and integrate newcomers that the public sector finds hard to gather. As was the case with the Indochinese in the 1970s, there is tremendous potential for a meeting of mutual need from either side in the group processing exercise.”¹¹⁶ In this way, a program which shows growing potential for international cooperation while meeting UNHCR needs is also conducive to public-private partnerships. This is again a move toward encouraging the private sponsorship of strangers.

¹¹¹ Canada, Australia, the United States, New Zealand, Denmark, Switzerland and Finland participated in the demarche. Norway was initially also involved but pulled out. Pressé, interview, *supra* note 59.

¹¹² Baidya & Gurung, “Resettlement Programme for Refugees in Nepal” *supra* note 106.

¹¹³ Citizenship and Immigration Canada, “Resettling Bhutanese Refugees” *supra* note 101.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Citizens for Public Justice, “Group Processing of Refugees” Policy Notes (Septemeber 2006); online: <<http://www.cpj.ca/files/docs/CPJ-Group-processing-of-Refugees.pdf>>.

Demonstrating the increasing Canadian public awareness of group resettlement in Canada, in 2010 Pride Uganda Alliance International approached the House of Commons Subcommittee on International Human Rights with a proposal that the government use group processing to address the persecution of homosexual Ugandans.¹¹⁷ The request was in fact a request for both source country and group resettlement for the Ugandans. While nothing has been announced on this front, Rainbow Refugee Committee has contacted Pride Uganda to participate in its blended private sponsorship project to sponsor LGBTQ refugees.¹¹⁸

Group resettlement presents many benefits over traditional individualized resettlement. It is more efficient and less costly to process groups over individuals. The transplant of families and social networks eases integration in a new community:

Relationships with people in the receiving society are difficult to establish because of the feelings of strangeness they produce. This is related to cultural differences, but also to distrust around relationships with unknown people that refugees bring with them.¹¹⁹

At the same time, the populations selected for group resettlement tend to be “new and few” meaning they are small ethnic groups with little or no established community in Canada.¹²⁰ This, in turn, raises its own settlement challenges.

While refugees undoubtedly benefit from the collective support group resettlement offers, bringing over significant numbers of refugees from a specific population to a Canadian

¹¹⁷ Dale Smith, “Queer Ugandans Ask Parliament for Refugee Assistance” *X-tra* (5 November 2010).

¹¹⁸ Sharalyn Jordan, Rainbow Refugee Committee, e-mail correspondence with author, 1 April 2011.

¹¹⁹ Alcalá, et al., *Forced Migration of Colombians: Colombia, Ecuador, Canada*, *supra* note 60 at 90.

¹²⁰ Lisa Ruth Brunner & Chris Friesen, “Changing Faces, Changing Neighbourhoods: Government-Assisted Refugee Resettlement Patterns in Metro Vancouver 2005-2009” (2011) 8 *Our Diverse Cities* 93 at 94. See also Kathy Sherrell, Chris Friesen, Jennifer Hyndman, and Subrath Shrestha, “From ‘One Nation, One People’ to ‘Operation Swaagatem’: Bhutanese Refugees in Coquitlam, BC” Metropolis British Columbia Working Paper 11-11 (2011); online: <http://mbc.metropolis.net/wp_2011.html>. Jennifer Hyndman and James McLean coined the term “new and few” in their article on the settlement of Acehnese refugees in Vancouver, “Settling Like a State” *supra* note 93 at 351.

community requires that community to be receptive and prepared for the group. In anticipation of the arrival of the first group of Bhutanese refugees in British Columbia, the Immigrant Services Society of British Columbia (ISSBC) launched a comprehensive community based pre-arrival planning process in Coquitlam where close to a thousand Bhutanese were expected to be settled.¹²¹ A reporter from the *Globe and Mail* was contacted by ISSBC and convinced to travel to Nepal to cover the resettlement.¹²² As a result, on 18 July 2009 the front page of the *Globe and Mail* featured large photographs of the Kattel family both in the Nepalese refugee camp and after arriving in Vancouver on 16 July 2009.¹²³ Two articles in the paper covered the tragic fate of the Bhutanese of ethnic Nepalese descent who were driven into Nepal in the early 1990s and languished in refugee camps for almost two decades. The reporters detailed the immense challenges of coming to Canada and transitioning from a primitive rural existence to life in a large city with limited English. The articles were sympathetic and understanding, designed to promote the welcoming of the refugees into the community.

While necessary to the successful integration of the Bhutanese refugees, this promotion of the image of needy camp-based refugees fuels the rhetorical divide between these refugees and others who come to Canada to claim asylum on their own. At the same time the Bhutanese began their journey to Canada, the Canadian government re-introduced visa requirements for Czech and Mexican citizens entering Canada in reaction to rising refugee

¹²¹ Chris Friesen, Director of Settlement Services, Immigrant Services Society of British Columbia, interview with author, 26 February 2010.

¹²² *Ibid.*

¹²³ Jane Armstrong, "From Refugees to Pioneers" *The Globe and Mail* (18 July 2009) A1; Matthew Kruchak, "Family's Journey to Canada Started Years Ago" *The Globe and Mail* (18 July 2009) A5.; see also Jane Armstrong, "A New Set of Challenges" *The Globe and Mail* (17 October 2009) A15.

claim numbers from these countries.¹²⁴ The day before the Kattel family arrived, the *Globe and Mail* quoted the Minister of Citizenship and Immigration, Jason Kenney, stating:

It's not lost on economic migrants who want to jump the queue that we have a system that's fairly easy to abuse. And where people can settle in Canada, sometimes for several years, with a mixture of a work permit and/or social benefits, and if they're determined to, they can game our system and abuse our generosity.¹²⁵

The welcomed arrival of the Bhutanese in British Columbia also preceded by three months the very unwelcomed arrival in October 2009 of the first of the two boatloads of Tamil migrants off the coast of British Columbia. In the midst of the government's queue-jumping rhetoric and the repeated assertions that respectable refugees wait patiently in camps for resettlement,¹²⁶ group resettlement further skews the invalidity of this image. The necessity to ensure that the incoming group is welcomed and integrated incidentally fuels the perceived divide between the deservingness of these camp origin refugees and those who independently claim asylum. This divide is also supported by the law as will be discussed in the next section.

Group resettlement may also effect the global reach of resettlement. Canada's resettlement program has traditionally been global in its application. In 2010, visa officers traveled to more than 40 countries and interviewed refugees from over 60 nationalities.¹²⁷ Until 2003 when the U.S. initiated a global program, Canada's was the only global resettlement

¹²⁴ Citizenship and Immigration Canada, "Backgrounder- the Visa Requirement for the Czech Republic" (13 July 2009); online: <<http://www.cic.gc.ca/english/departement/media/backgrounders/2009/2009-07-13a.asp>>; Citizenship and Immigration Canada, "Backgrounder - the Visa Requirement for Mexico" (13 July 2009); online: <<http://www.cic.gc.ca/english/departement/media/backgrounders/2009/2009-07-13.asp>>; see also Shauna Labman, "Refocus Concern for Refugees" *Winnipeg Free Press* (12 August 2009) A11.

¹²⁵ Jason Kenney quoted in Campbell Clark, "Minister Calls for Overhaul of Canada's Refugee System" *The Globe and Mail* (15 July 2009) A1.

¹²⁶ See discussion in Chapter 3.

¹²⁷ Pressé, Evidence, *supra* note 19

program in the world.¹²⁸ In contrast, group resettlement means that refugees from specific groups in identified camps will be targeted for resettlement. This selection seems to focus on small, resolvable situations of protraction that garner international attention and agreement. Refugees in other camps, or not in camps, may be increasingly excluded from the resettlement program as group resettlement gains momentum. For these refugees, waiting patiently will get them nowhere. They are left with no option but to claim asylum on their own.

There are also criticisms of group resettlement that counter not only the selection of group refugees but the benefits of efficiency and increased settlement success. An internal UNHCR report on the group resettlement out of the Dadaab camps of the Somali-Sudanese minority noted the tensions created amongst groups in the camp:

the resettlement process for Somali-Sudanese has created a lot of bad blood, misunderstanding and false expectations amongst the refugee population. These reactions are neither a surprise, nor difficult to comprehend... Many fail to understand how this group was selected for group resettlement. They believe that this group has the least right for consideration as they spent only a little time in Dadaab... The rest of the community is restricted to the option of individual screening, which is a slow process and benefits a few. We have started receiving many letters from different communities in the refugee camp, including some groups of whom nobody has ever heard, claiming persecution and hoping for consideration for group resettlement.¹²⁹

From the perspective of UNHCR staff working on resettlement in the camps, the group resettlement was problematic:

Although the Somali-Sudanese have faced problems, presently it is not of such a nature that mere membership of the Somali-Sudanese community warrants resettlement. Our

¹²⁸ Pressé, interview, *supra* note 59.

¹²⁹ Internal UNHCR Report, (5 July 1998) quoted in Jeff Crisp, "A State of Insecurity: The Political Economy of Violence in Refugee-Populated Areas of Kenya" (*New Issues in Refugee Research* (Evaluation and Policy Analysis Unit, UNHCR, 1999) at 27.

attempts to develop the resettlement referral system at the camp level into a credible and transparent procedure are jeopardized by these disruptive initiatives.¹³⁰

The reality is that resettlement of any kind involves the selection of some refugees but never the selection of all. Tensions arise, often with competition and desperation for the limited spaces. Protection, from the perspective on the ground, sometimes appears to be more compromised than effected through resettlement programs. Group resettlement simply multiplies these issues by the high profile that comes with resettling large groups from a camp over a distinct period of time.

The Bhutanese resettlement likewise faced criticism that this refugee population was not the most in need.¹³¹ Moreover, it was not a refugee group entirely or necessarily wanting resettlement. CIC's website promoting the program boasts that "The Bhutanese refugees are very enthusiastic and optimistic about resettling in Canada."¹³² The reality is that the Bhutanese are ethnic Nepali and many wished to remain in Nepal still hoping for a solution permitting their return to Bhutan. In 2009, a repatriation campaign was commenced by a Senior Citizens Group resistant to resettlement and wishing only to return to Bhutan. The group registered over 8,000 refugees.¹³³ In April 2011 talks resumed between Bhutan and Nepal on the repatriation of the remaining refugees following the resettlement program.¹³⁴

CIC's information bulletins that were distributed to the Bhutanese in advance of resettlement further betray the reality of rumours and hesitations surrounding the resettlement. The second bulletin directly addresses the misinformation:

¹³⁰ Internal UNHCR Report, (March 1998) *ibid.* at 27.

¹³¹ Pressé, interview, *supra* note 59.

¹³² Citizenship and Immigration Canada, "Resettling Bhutanese Refugees" *supra* note 101.

¹³³ Integrated Regional Information Networks "Nepal: Repatriation or Resettlement for Bhutanese Refugees?" (22 June 2009); online: <<http://www.unhcr.org/refworld/docid/4a433cf5c.html>>.

¹³⁴ "Bhutan PM Coming: Nepal to Seek Dialogue on Refugees' Return" *The Katmandu Post* (11 April 2011).

Rumours that you will be “sold” for slave labour or forced to fight in Iraq are false. It is also false that you will be forced to live in a refugee camp. There are no refugee camps in Canada.¹³⁵

The third information bulletin contains a heading “Stories that are false.”¹³⁶ In addition to again dismissing the above rumours more forcefully, it adds: “Cold weather does NOT prevent people in Canada from having children. There are families of all sizes in Canada. It is up to individuals to decide how many children they will have.”¹³⁷ This was not a group uncomplicatedly keen on resettlement. Counter to the images of refugees waiting in long queues, hoping to win the resettlement lottery, or sneaking in through a backdoor, Canada was actively pursuing and convincing the Bhutanese to resettle.

The critiques of group resettlement speak to the fear that the benefits of efficiency, lessened expense, cooperative international burden-sharing, and the potential resolution of certain camp populations get privileged in the strategic use of resettlement over protection of the neediest refugees. The Bhutanese were considered a small, forgotten and growing refugee population where no other resolution was possible. With their resettlement, the international community could congratulate itself on the effective achievement of a durable solution for a refugee population.

Where the Law Is

The answer to the question of where the law is, repeated in each chapter, is clearest here. The law is far away and moving further afield. Both the Source Country Class and group resettlement are intentional manoeuvres away from law. They move beyond the refugee

¹³⁵ Citizenship and Immigration Canada, “Refugee Resettlement in Canada Information Bulletin No.2” (2010); online: <<http://www.cic.gc.ca/English/resources/publications/bhutanese2.asp>>.

¹³⁶ Citizenship and Immigration Canada, “Refugee Resettlement in Canada Information Bulletin No.3” (2010); online: <<http://www.cic.gc.ca/English/resources/publications/bhutanese3.asp>>.

¹³⁷ *Ibid.*

definition and Canada's protection commitments and therefore distance the program from law.

Going beyond the law has always been legislated into the law in Canada. The government uses law to grant itself broad discretion and in doing so generates confusion as to what is law. Canada's international legal obligations are expanded through voluntary and discretionary routes to protection. This has been the case since the first refugee legislation was introduced in the 1970s. As with the original willingness by states to legalize asylum, humanitarianism clearly underlies this expansion but so too does the consequent ability to blend law and discretion. Refugee numbers set out in CIC statistics combine convention refugees and other protection classes. A politically discretionary settlement program is thus established with the label of refugee and humanitarian protection. Essentially the law itself, through its expanded classes, is able to create enhanced discretion.

Discretion is particularly primary with source and group resettlement. General discretion influences the decision-making on which countries were placed within the Source Country Class schedule and the choice of where to target group resettlement. These decisions often determine what "type" of refugee is resettled. With both the Bhutanese and the Colombians, this has tended to mean educated, English-speaking refugees. Refugee lawyer David Matas long ago lamented:

Refugee policy, generally, in the Government of Canada suffers from its coming out of the Immigration Department. No element of refugee admission is examined solely from the angle of protection. Because it is the Immigration Department that decides on refugee admission, immigration and refugee policy become inextricably intertwined.¹³⁸

¹³⁸ Matas, "Political Prisoners and Oppressed Persons Class" *supra* note 9 at 5.

With the move to eliminate the Source Country Class and the increasing designation of groups for group processing, there is also a shift to broad discretionary power set out in section 25 of *IRPA*. This power has been described as “a concession to the fact that no system of migration rules could possibly account for all the variables, all the exigencies, and all the mitigating circumstances that would render the operation of the rules harsh, unjust, or even contrary to Canada’s own interests.”¹³⁹ It is thus created for the benefit of the applicant. The exemption component of section 25 has been used in group resettlement to by-pass individual assessments. CIC has indicated that permanent resident visas through section 25 could be granted to individuals who would otherwise have received protection through the Source Country Class.

While potentially broad in scope, section 25 is more likely of limited practical application in replacing the Source Country Class. The guidance and structure of the regulatory framework of the source country route to admission will be lost in the non-protection specific power of section 25. It is a move from specific access set out in the regulatory scheme by the creation of a class, to the broad discretion of section 25 that lacks any direction. Section 25 discretion is dually vague in its optional application by the Minister and the vagueness of the meaning behind the “humanitarian and compassionate” terminology.¹⁴⁰ Moreover, CIC’s manual of policy and procedural guidance for processing H&C applications notes at the outset the limited intended use of the discretion:

The H&C decision-making process is a highly discretionary one that considers whether a special grant of an exemption from a requirement of the Act is warranted. It is widely

¹³⁹ Emily F. Carasco, et al., *Immigration and Refugee Law: Cases, Materials and Commentary* (Toronto: Emond Montgomery Publications, 2007) at 177.

¹⁴⁰ *Ibid.* at 177.

understood that invoking Subsection 25(1) is an exceptional measure and not simply an alternate means of applying for permanent resident status in Canada.¹⁴¹

In no way can this discretionary power be perceived as replacing the Source Country Class. A further consequence of this transition will be that those attaining permanent residence status through section 25 rather than the Source Country Class provisions will not be attached to the refugee scheme or the resulting rights and benefits that attach to entrance through this route, including transportation loans, resettlement services and revenue support.¹⁴² Applicants must also now pay fees to have their claim considered.¹⁴³

This shift in the legislation, even from one form of voluntary action to a discretionary scheme, further highlights the fragility of the legal framework. While the legalized framework of resettlement classes implies concrete obligation, with the repeal of the Source Country Class it is shown to be a fragile regulation that can be easily discarded with little real consultation and minimum uproar. Within the month that the proposed repeal was announced, during which there was a 30 day opportunity to submit comments on the proposal to CIC, only two Canadian journalists covered the story with their articles appearing in only a handful of papers.¹⁴⁴ Neither national Canadian newspaper, the Globe and Mail or the National Post covered the story.

Opting for the solution of repeal to the problems of the Source Country Class also betrays the government's stated commitment to bring resettlement closer to the law and the legal refugee definition. The reality is that the repeal will likely cause increased human

¹⁴¹ Citizenship and Immigration Canada, "IP5 Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds" Manual (1 April 2011) at 7; online: <<http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf>>.

¹⁴² Canadian Council for Refugees, "Comments on Proposed Elimination" *supra* note 49.

¹⁴³ *IRPA*, *supra* note 42, s.25(1.1), s.25.1(2).

¹⁴⁴ Keung, "Ottawa Eyes Axing 'Life-Saving' Asylum Program" *supra* note 76; Elizabeth Thompson, "Finding Refuge in Canada Could Get Tougher" *Vancouver Sun* (22 March 2011) B3.

smuggling. While the previous chapters demonstrated the government's convoluted melding of laws leading to allegations of queue-jumping and so forth, here the government is blinding itself to the immigration law consequences of its intended repeal. In countries such as Colombia where the need for protection continues and as noted by Pastor Peter Stucky, Canadian source country resettlement was the "last option,"¹⁴⁵ the removal of this option leaves the illegal crossing of borders, often through the assistance of smugglers, as the ultimate last option.

Beyond the increasing use of broad, generalized discretion, this chapter illustrates the administrative and management influences on resettlement decisions that operate outside of the law. These considerations determine in which countries the Source Country Class operated, the decision to eliminate referrals for the Source Country Class, and the repeal of the class when the subsequent direct access approach overwhelmed the program. Similarly with the resettlement of groups, considerations of efficiency, lessened expense, and the resolution of certain camp populations gets privileged over protection when the focus is on the strategic use of resettlement. Ease of management ultimately overrides protection concerns.

The government's justification for the repeal of the Source Country Class is couched in many references to returning resettlement to its legal origins. Statements emphasize placing resettlement selection more in line with UNHCR referrals and the international refugee definition. This is a move, at least rhetorically, toward the firm notion of law. The proposal emphasizes CIC's expressed desire to return resettlement to the original protection intentions set out in international law. At the same time, however, the stated desire to work

¹⁴⁵ Peter Stucky quoted in Keung, "Ottawa Eyes Axing 'Life-Saving' Asylum Program" *supra* note 76.

with private sponsors and increase private sponsorship achieves the opposite. This is a move away from these very laws, to more family-centric resettlement with less resemblance to refugee law. Law may be invoked to achieve other political objectives, narrowing the government's protection obligations.

Turning however to the increased use of group resettlement, the emphasis on private sponsorship can be seen through a different lens. While not stated anywhere as CIC's intention, the use of private sponsorship for group resettlement does suggest the potential to move private sponsorship away from named sponsorship. As these groups tend to represent the "new and few" there is not a strong familial sponsorship base in Canada. The group sponsorship encourages private sponsorship similar to that which occurred with the Indochinese. It is a sponsorship of strangers. Here then, the government can be seen to be attempting to regain control of sponsorship by redirecting its focus through group resettlement, as it has similarly done with blended projects.

It is therefore not clear where the law currently stands and whether ultimately the obvious shifts that are occurring will bring Canadian resettlement closer to law or deeper into a discretionary realm of decision-making that has as much to do with international cooperation, management, and efficiency as it does with humanitarian protection. What does seem clear is that private Canadian citizens are being granted an increasing role in protection. But as their role shifts through the increased use of both blended initiatives and group resettlement and the loss of source country resettlement, the question is whether sponsors will continue with the level of support they currently offer to named referrals often with familial links. The continuance of resettlement as a mechanism of protection is

vulnerable in this foundational shifting, even if the underlying intent does prove to be a return to the international origins and definitions.

Conclusion

This chapter, in both the novelty of group resettlement and the recent fate of the Source Country Class, ends with more hesitant conclusions than previous chapters. It does, however, conclude with a clear awareness of a changing and vulnerable resettlement program. A program that is often guided by decision-making with little to do with protection. A program that is turning more to discretion than a regulated selection process. A program that increasingly turns to private sponsors to carry the responsibility. A program that can easily be repealed, or simply fall into disuse without any legal change whatsoever.

Despite its issues and the foundational shifts afoot, Canada remains one of the three leading resettlement countries in the world, while other countries slowly take on small numbers of resettlement refugees. The next chapter reviews all the modes of resettlement that have been examined – government-assisted, private sponsorship, source country and group processing – and considers how other countries, particularly the other two resettlement leaders, Australia and the U.S., approach resettlement. The similarities, differences, successes and failures of resettlement in other parts of the world put the Canadian program into context.

CHAPTER SIX

FURTHER AFIELD: AUSTRALIA AND THE UNITED STATES

Introduction

*No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.*¹

The first chapter located this dissertation in the “fields beyond.”² The second chapter provided an analysis of the global reality and response to refugee flows. The middle chapters (3-5) delved into the particulars of the Canadian resettlement program. This comparative chapter concludes the substantive work of the dissertation by looking beyond Canada. While Canada has served as the dominant state in this study to examine the threading of law throughout a voluntary scheme of resettlement and the consequences of resettlement’s use on the legal obligation of *non-refoulement*, 26 states now offer resettlement to varying degrees.³ Being both voluntary and discretionary, each state may resettle refugees in any manner that it pleases. UNHCR provides guidance and referrals only. While it is neither possible nor necessary⁴ to succinctly examine the operation of resettlement in every state where it is offered, Canada is accompanied by two other resettlement states, the U.S. and Australia, in offering the largest long-standing resettlement programs. In addition to their collective dominance in resettlement numbers, all three states

¹ Rudolph v. Jehring (*Geist des römischen Rechts*, Part I (9th ed, 1955) 8f quoted in Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 3rd ed., 1987) at 16.

² Desmond Manderson, “Apocryphal Jurisprudence” (2001) 23 *Studies in Law, Politics and Society* 81; online: <<http://www.mcgill.ca/files/crlaw-discourse/manderson-apocryphal.pdf>> at 22.

³ Nine states have long-standing resettlement programs: Australia, Canada, Denmark, Finland, New Zealand, the Netherlands, Norway, Sweden and the United States. The other current resettlement states as of 2012 are Argentina, Brazil, Bulgaria, Chile, the Czech Republic, France, Germany, Hungary, Iceland, Ireland, Japan, Paraguay, Portugal, Romania, Spain, the United Kingdom, and Uruguay. UNHCR, “Frequently Asked Questions About Resettlement”; online: <<http://www.unhcr.org/4ac0873d6.html>> at 2.

⁴ Some states, such as Bulgaria, Hungary, Spain, Romania, Paraguay and Japan have only recently commenced resettlement programs or offer *ad hoc* resettlement to only a handful of refugees a year. UNHCR, “UNHCR Projected Resettlement Needs 2012” (Geneva: Division of International Protection, 2011) at 4-5. In September 2010 the first 18 resettlement refugees arrived in Japan. UNHCR, “UNHCR Projected Resettlement Needs 2012” *ibid.* at 34.

acknowledge their immigrant origins and identities. This chapter will provide an overview of how resettlement operates in both Australia and U.S. in order to point out the differences, weaknesses and strengths in these programs in contrast to Canada and examine how these differing models effect the law's place and influence on the programs.

To facilitate the easy navigation between this chapter and the earlier chapters which were divided between resettlement models, this chapter maintains that structure by discussing in turn those same models as approached by the U.S. and Australia. The focus will be on key comparative points of interest, and is not intended to provide the same depth of historical or contextual review.

Table 7: Top Ten UNHCR* Resettlement Departures by Country of Resettlement 2010-2011⁵

Country of Resettlement	Departures 2010	Departures 2011
United States	54,077	43,215
Canada	6,706	6,827
Australia	5,636	5,597
Sweden	1,789	1,900
Norway	1,088	939
United Kingdom	695	430
Finland	543	543
New Zealand	535	457
Germany	457	/
Netherlands	430	479
Denmark	/	598
All others	958	232
Grand Total	72,914	61,231

* These numbers represent only resettlement departures assisted by UNHCR. Certain resettlement states including Canada, Australia and the United States offer non-UNHCR assisted resettlement as well.

⁵ Table compiled using UNHCR, "UNHCR Projected Resettlement Needs 2012" *ibid.* at 64 for 2010 numbers and UNHCR, "Frequently Asked Questions" *supra* note 3 at 2 for 2011 numbers.

Government Resettlement

The United States

*US resettlement policy has been generous but not humanitarian, while asylum policy has been humanitarian but not generous.*⁶

The U.S. is the global leader in resettlement. More than 3 million refugees have been resettled since 1975 with a yearly average of 98,000 since 1980. Annual admission figures range from a 207,000 high in 1980 to a low of 27,110 in 2002.⁷ While the U.S. resettlement numbers are the largest in the world and on a yearly basis amount to more resettled refugees than admitted in the rest of the world combined, on a per capita basis Canada, Australia and the U.S. admit similar numbers.⁸

Refugee issues in the U.S. are governed by the *Immigration and Nationality Act*, 1954 (*INA*) and the *Refugee Act*, 1980.⁹ The *Refugee Act* defines a refugee for the purposes of the *INA* s.101(a)(42)(A) as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

⁶ Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004) at 156.

⁷ Refugee Council USA, "History of the U.S. Refugee Resettlement Program"; online: <<http://www.rcusa.org/index.php?page=history>>.

⁸ UNHCR Regional Office Washington, "UNHCR Global Resettlement Statistical Report 2010" (Washington DC, 2011) at 16. Looking at resettled refugees per capita, in 2010 the U.S. resettled 5,874; Canada resettled 5,054 and Australia resettled 3,817.

⁹ *Refugee Act of 1980*, Public Law No. 96-212, 94 Stat. 102 (8 U.S.C. §§ 1157-1159) (1980) [*Refugee Act*, 1980]; *Immigration and Nationality Act of 1952*, Public Law No. 82-414, 66 Stat. 163 (8 U.S.C. §§ 1101-1157) (1952) [*INA*].

As is the case in Canada, the provision essentially repeats the phrasing of Article 1A of the 1951 Convention. The U.S never signed the 1951 Convention but did sign the subsequent 1967 Protocol.¹⁰

Like Canada, the U.S. operates both an in-country refugee processing program and a “Overseas Refugee Program”; which constitutes its resettlement program. While Canada conceives of *refugees* as coming either by way of resettlement or through an in-Canada claim, the U.S. makes a semantic distinction between resettlement *refugees* coming from overseas and *asylum* seekers who claim protection in the U.S.¹¹ This distinction serves to highlight the separation of the programs and may prevent the type of conceptual conflation increasingly evident in Canada.

The American President, in consultation with Congress, makes an annual determination on resettlement numbers and regional focuses for admission in the coming year.¹² Congressional consultations permit state and local officials and NGOs to testify as to resettlement needs. The Executive branch proposes nationalities for resettlement focus following which the presidential announcement is made.¹³ In this respect, the American system is more transparent than the Canadian process in the acknowledged lobbying for

¹⁰ *Protocol relating to the Status of Refugees*, 1967, 606 UNTS 267 (entered into force 4 October 1967). The U.S. signed on 1 November 1968. UNHCR, “States Parties to the Convention and to the Protocol”; online: <<http://www.unhcr.org/pages/49da0e466.html>>.

¹¹ Erin Patrick, “The US Refugee Resettlement Program” *Migration Information Source* (Migration Policy Institute: 2004).

¹² *INA*, *supra* note 9, s.207.

¹³ Refugee Council USA, “Refugee Admission Levels”; online: <<http://www.rcusa.org/index.php?page=refugee-admission-levels>>. Admission levels tend to be unofficially decided during the Congressional budget and appropriation process in advance of the consultation process.

refugee places. Politics are publicly at play. The consequence is often that priority goes to refugee groups with vocal and influential advocates.¹⁴

Similar to the ranges set out in Canada, the American allocation represents a ceiling and not a mandatory quota. From 2002-2007 the ceiling was set at 70,000; since 2008, the ceiling has held at 80,000.¹⁵ Actual yearly resettlement varies in how close it comes to the ceiling with resettlement reaching 69%, 97% and 86% of the ceiling in 2006, 2007 and 2008 respectively.¹⁶ Allocation changes can be made over the course of the year in consultation with Congress.¹⁷ The *Refugee Act*, 1980 authorized permanent funding for resettlement.¹⁸

Table 8: U.S. Refugee Ceilings & Admissions 2002-2012¹⁹

Year	Refugee Admissions Ceiling	FY Total Admitted into U.S. as of RPT
2002	36,500	27,119
2003	70,000	28,423
2004	70,000	52,873
2005	70,000	53,813
2006	70,000	41,279
2007	70,000	48,282
2008	80,000	60,191
2009	80,000	74,654
2010	80,000	73,311
2011	80,000	56,424
2012	80,000	21,836

¹⁴ Heidi H. Boas, “The New Face of America’s Refugees: African Refugee Resettlement to the United States” (2006-2007) 21 *Georgetown Immigration Law Journal* 431 at 448.

¹⁵ Office of Admissions, Bureau of Population, Refugees, and Migration; U.S. Department of State, “Fiscal Year 2012 as of 31 Mar 2012” (Prepared by Refugee Processing Center, 2012).

¹⁶ Kate Brick, et al., “Refugee Resettlement in the United States: An Examination of Challenges and Proposed Solutions” (Columbia University School of International and Public Affairs, 2010) at 9.

¹⁷ UNHCR Regional Office Washington, Resettlement Section “US Resettlement Overview” (2008); online: <http://www.unrefugees.org/site/c.lfIQKSOWFqG/b.5067919/k.A437/UNHCR_Washington.htm>.

¹⁸ Edward M. Kennedy, “Refugee Act of 1980” (1981) 15 *International Migration Review* 141 at 142-143. Interestingly, the *Refugee Act*, 1980 originally foresaw only 50,000 resettlement refugees entering the U.S. each year. Ricardo Inzunza, “The Refugee Act of 1980 Ten Years After - Still the Way to Go” (1990) 2 *International Journal of Refugee Law* 413 at 415.

¹⁹ Office of Admissions, “Fiscal Year 2012” *supra* note 15.

Resettlement to the U.S. can be divided into refugees that are referred for resettlement and those within designated classes. Designated groups are those that have been determined by the U.S. government to be of particular focus for resettlement; referrals from UNHCR or other referrals agencies are not required. Refugees from non-designated groups require a referral from UNHCR, a U.S. Embassy or NGO to be considered for resettlement at a designated U.S. processing post.²⁰ Three priority categories are established that individuals must fall within to be considered for resettlement. Priority One is the individual referrals. Priority Two is the designated groups of concern identified by the Department of State and defined by nationality or other characteristic. Priority Three is family reunification. If an individual falls within one of these priority categories, he or she may be approved for an interview with a representative of the Department of Homeland Security who will make the resettlement decision.²¹ The majority of admissions tend to fall under the second priority which are less labour intensive than individual referrals but not as narrowly contained as the family reunification.²²

Prior to the *Refugee Act*, 1980 a statutory requirement limited refugees to individuals fleeing the Middle East or communist countries.²³ As Ricardo Inzunza argues “Until 1980, refugees were defined more by where they came from than by the circumstances and persecution which might have precipitated their flight.”²⁴ Stimulated by the Indochinese crisis and the America sense of obligation to refugees created by the war in Vietnam,

²⁰ UNHCR Washington, “US Resettlement Overview” *supra* note 17.

²¹ Paul Kenny & Kate Lockwood-Kenny, “A Mixed Blessing: Karen Resettlement to the United States” (2011) 24 *Journal of Refugee Studies* 217 at 225.

²² Boas, “The New Face of America’s Refugees” *supra* note 14 at 446.

²³ Under the *INA*, 1965, the “Seventh Preference” dictated that 6% of immigration was for “conditional entrants” defined as refugees fleeing persecution with a “communist-dominated country” or “any country within the general area of the Middle East.” 8 U.S.C. § 1153(a) (7) added to the *INA*, *supra* note 9, by the Act of October 3, 1965 (79 Stat. 911).

²⁴ Inzunza, “The Refugee Act of 1980 Ten Years After” *supra* note 17 at 516.

resettlement became the response. The *Refugee Act*, 1980 balanced the desire for a more coherent, efficient and rational approach to refugee issues while maintaining the flexibility to respond to emergency situations.²⁵ While the neutral language of the 1980 definition was intended to remove the geographical and ideological preferences, the preferences have now been imbedded in the designation of groups under the second priority.²⁶ There remains significant discretion in the designation and selection of resettlement refugees.²⁷ In 1989, a *New York Times* article addressing the increasing demands for protection from varying world regions noted: “In 1980, [Congress] abolished the presumption that anyone fleeing Communism was a refugee. But experience in the last few months shows that it is much easier to write an evenhanded law than to carry it out in the face of political pressures reflecting special concern for particular groups of emigres.”²⁸ The law simply cannot solve all issues. As the article goes on to acknowledge: “...in deciding how many refugees to admit from each part of the world, the United States must compare the merits of their claims because neither the Federal budget nor public opinion would permit an unlimited increase in the number of refugees admitted to this country.”²⁹ This goes back to the basic challenge of burden-sharing when states are unwilling to simply divide the total of needy refugees for resettlement and discretionary choice is consequently inevitable.³⁰

²⁵ Kennedy, “Refugee Act of 1980” *supra* note 17 at 146.

²⁶ Karen Musalo, et al., *Refugee Law and Policy: A Comparative and International Approach* (Durham, N.C.: Carolina Academic Press, 3rd ed., 2007) at 75.

²⁷ David Steinbock, “The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement” (2003) 36 *University of Michigan Journal of Law Reform* 951 at 961.

²⁸ Robert Pear, “Should Every Emigre Really Be Equal under the Law?” *The New York Times* (1989) quoted in Inzunza, “The Refugee Act of 1980 Ten Years After” *supra* note 18 at 420.

²⁹ Pear, “Should Every Emigre Really Be Equal under the Law?” *ibid.*

³⁰ Christian Joppke notes that any restriction on numbers entails selection and therefore a degree of discrimination: “immigration (and citizenship) policy is exclusionary, exclusion implies differentiation, and hence such policy cannot but ‘discriminate.’” Christian Joppke, “Exclusion in the Liberal State: The Case of Immigration and Citizenship Policy” (2005) 8:1 *European Journal of Social Theory* 43 at 46.

More overtly than is the case in Canada, American resettlement selection aligns with foreign policy preferences. In 1975 the U.S. government created an *ad hoc* Indochinese Refugee Task Force to address through resettlement the displacement caused by the Vietnam War.³¹ David Steinbock argues that since the creation of a permanent U.S. resettlement program in 1980, three purposes have contended for the program's basis: removal of people from danger, furtherance of foreign policy objectives, and the facilitation of traditional immigration aims of family reunification or cultural connection to U.S.³² Steinbock suggests that burden-sharing is a component of foreign-policy: "Valuable in itself for its positive influence on refugee protection, burden-sharing has also become a U.S. foreign policy means of preserving asylum outside the U.S., particularly for favored groups."³³ Essentially, the argument places a foreign-policy label on what has otherwise, elsewhere and less politically, been referred to as the strategic use of resettlement.

Recent statements, however, indicate a movement in the U.S. program to a greater focus on both compassionate resettlement and a global reach. A comprehensive report on U.S. resettlement reform was conducted at the request of the U.S. Department of State in 2003.³⁴ The report recommended that the U.S. resettlement program should not be "...limited to rescue from grave life-threatening dangers but will work actively to rescue displaced individuals and groups who face a wider range of harms, including the wastage of human potential that can result from protracted stay in a refugee camp."³⁵ In 2007 testimony by the Deputy Assistant Secretary of the Bureau of Population, Refugees and Migration before

³¹ Audrey Singer & Jill H. Wilson, "From 'There' to 'Here': Refugee Resettlement in Metropolitan America" (2006) *The Brookings Institution Living Cities Census Series* at 3.

³² Steinbock, "The Qualities of Mercy" *supra* note 27 at 951.

³³ *Ibid.* at 988.

³⁴ David A. Martin, *The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement* (Washington, DC: Migration Policy Institute, 2005).

³⁵ *Ibid.* at 119.

the U.S. Senate it was indicated that “the Refugee Admissions program is a critical humanitarian undertaking demonstrating America’s compassion for some of the world’s most vulnerable people” and that “the program is more geographically diverse and operationally complicated than ever before.”³⁶ In the 2011 Report to Congress on Refugee Admissions this dual focus was noted with attention directed at both “a broader representation of the world’s refugee population” and “the most desperate populations.”³⁷ The resettlement of the Somali Bantu and the Sudanese Lost Boys are pointed to as early examples of the American move from foreign policy objectives to humanitarian selections.³⁸ These groups however also encapsulate the public notion of a refugee “worthy” of resettlement.³⁹

As has been the case in Canada, the rhetorical movement is also a move away from suggestions that resettlement selection is skimming off the top or cherry-picking the most desirable refugees. None of these statements mean, however, that the realities of selective choice in resettlement have been abandoned. The 2003 report to the Department of State notes “...the program can still be prudent and selective in choosing among them, with full attention to countervailing factors such as possible magnet effects, other political impacts, and near term prospects for voluntary repatriation.”⁴⁰ Without saying so specifically, the report still embraces a ‘strategic’ use of resettlement: “...the world community should think

³⁶ Kelly Ryan, Deputy Assistant Secretary Bureau of Population, Refugees, and Migration, Department of State, Testimony before the Senate Special Committee on Aging Hearing on Health and Welfare Needs of Elderly Refugees and Asylees (December 5, 2007) at 3-4; online: <<http://aging.senate.gov/events/hr184kr.pdf>>.

³⁷ U.S. Department of State; U.S. Department of Homeland Security; U.S. Department of Health and Human Services, “Proposed Refugee Admissions for Fiscal Year 2011: Report to Congress” (2011) at ii-iii.

³⁸ Boas, “The New Face of America’s Refugees” *supra* note 14 at 447-448. Boas, however, provides a more detailed analysis of the multiple factors that arguably led to increased African resettlement.

³⁹ *Ibid.* at 451.

⁴⁰ Martin, *The United States Refugee Admissions Program*, *supra* note 34 at 119.

about using resettlement offers to help encourage receiving states to maintain first asylum, to break up negotiation stalemates that keep refugees stuck in camps, and especially to use resettlement as one component in a comprehensive solution.”⁴¹ Interestingly, the report, like most Canadian discourse on resettlement, makes no mention of international responsibility or burden-sharing as the underlying basis for resettlement.

The 2003 report examined all international aspects of the American program from admission decisions, overseas screening, and arrival, but intentionally did not look beyond arrival to domestic integration. Yet, as with *IRPA*’s shift to the resettlement of greater numbers of vulnerable and needy refugees, the American move to compassion brings with it settlement consequences. A 2010 report by a team from Columbia University’s School of International and Public Affairs (SIPA Report) at the request of the International Rescue Committee notes that the president of one voluntary agency facilitating resettlement questioned the practicality of focusing on diverse and vulnerable refugees.⁴² Others have noted the global reach complicates receptiveness to refugees by both legislators and the public as the conflicts are less widely known or understood.⁴³ While Canada has recently moved to the resettlement of the “new and few”⁴⁴ the cultural diversity of incoming refugees itself seems to present as much more of a challenge in American literature on resettlement than appears to be the case in Canadian articulations of settlement issues.⁴⁵

⁴¹ *Ibid.* at 11, see also 98 where the strategic use of resettlement is specifically referenced.

⁴² Brick, et al., “Refugee Resettlement in the United States” *supra* note 16 at 7.

⁴³ Donald Kerwin, “The Faltering US Refugee Protection System: Legal and Policy Responses to Refugees, Asylum-Seekers, and Others in Need of Protection” (2012) 31 *Refugee Survey Quarterly* 1 at 9.

⁴⁴ Jennifer Hyndman & James McLean, “Settling Like a State: Acehnese Refugees in Vancouver” (2006) 19:3 *Journal of Refugee Studies* 345 at 351; Lisa Ruth Brunner & Chris Friesen, “Changing Faces, Changing Neighbourhoods: Government-Assisted Refugee Resettlement Patterns in Metro Vancouver 2005-2009” (2011) 8 *Our Diverse Cities* 93 at 94.

⁴⁵ Compare American discussions such as D.W. Haines, *Safe Haven?: A History of Refugees in America* (Kumarian Press, 2010) at 8; Kerwin, “The Faltering US Refugee Protection System” *supra* note 43; and

As noted in the previous chapter, following the terrorist attacks of 11 September 2001, the U.S. Resettlement Program was frozen for three months after which acceptance rates slowed. No attempt was made to recover these numbers in future years meaning tens of thousands of refugees lost the opportunity to be resettled.⁴⁶ Resettlement numbers in 2002, totaling 27,119 admissions, were the lowest since 1980.⁴⁷ It is difficult to place any confidence in a program that is so vulnerable and unprotected. This is the fragility of all state resettlement programs.

No significant changes have been made to the American resettlement program since its creation in 1980. The National Security Council is currently pursuing a dialogue on the reform of the resettlement system although public information is scarce.⁴⁸ The National Security Council is chaired by the President and serves as a forum for considering national security and foreign affairs.⁴⁹ Both the *Domestic Refugee Resettlement Reform and Modernization Act*⁵⁰ and the *Refugee Protection Act*⁵¹ were introduced in Congress in April 2011. The intent of the resettlement bill is to address resettlement refugees' self-sufficiency and integration by increasing the profile of resettlement services, collecting data

Brick, et al., "Refugee Resettlement in the United States" *supra* note 16, to Canadian examinations including Hyndman & McLean, "Settling Like a State" *supra* note 44; N.K. Lamba & H. Krahn, "Social Capital and Refugee Resettlement: The Social Networks of Refugees in Canada" (2003) 4:3 *Journal of International Migration and Integration* 335; Kathy Sherrell, et al., "Sharing the Wealth, Spreading The "Burden"? The Settlement of Kosovar Refugees in Smaller British Columbia Cities" (2005) 37 *Canadian Ethnic Studies* 76; Kathy Sherrell, et al., "From 'One Nation, One People' to 'Operation Swagatam': Bhutanese Refugees in Coquitlam, BC" Metropolis British Columbia Working Paper 11-11 (2011); online: <http://mbc.metropolis.net/wp_2011.html>; Debra Pressé & Jessie Thomson, "The Resettlement Challenge: Integration of Refugees from Protracted Refugee Situations" (2007) 24 *Refuge* 48-53; and Brunner & Friesen, "Changing Faces" *ibid.*

⁴⁶ Andrew Schoenholtz, "Refugee Protection in the United States Post-September 11" (2005) 36 *Columbia Human Rights Law Review* 323 at 324.

⁴⁷ Refugee Council USA, "History of the U.S. Refugee Resettlement Program" *supra* note 7.

⁴⁸ Andorra Bruno, "U.S. Refugee Resettlement Assistance" Congressional Research Service Report for Congress (4 January 2011) at 1.

⁴⁹ National Security Council; online: <<http://www.whitehouse.gov/administration/eop/nsc>>.

⁵⁰ *Domestic Refugee Resettlement Reform and Modernization Act of 2011* (H.R. 1475 - 112th Congress).

⁵¹ *Refugee Protection Act of 2011* (S. 1202 - 112th Congress).

on resettlement refugee needs, mandating a comprehensive review of the program and improving upon the reimbursement of state governments for refugee assistance.⁵² The protection bill is a more substantive piece of legislation to strengthen the state's commitment to refugee protection by eliminating the one-year filing deadline, decreasing the detention of asylum seekers, expanding access to legal information, and limiting overbroad exclusions as well as other increased protections.⁵³ Neither bill is expected to pass.⁵⁴ The bills do however represent the tension in U.S. refugee policies between protection of the neediest and successful integration into American society.⁵⁵

Australia

*Australia is at the periphery of most people's quest for protection.*⁵⁶

Australia's resettlement program is regulated by the *Migration Act, 1958*.⁵⁷ As the sixth country to ratify the 1951 Convention on 22 January 1954, it was Australia's signature that made the Convention a binding international treaty.⁵⁸ The Indochinese crisis of the 1970s spurred Australia to design a policy to respond to refugee and humanitarian issues in 1977.⁵⁹ There are now five classes of visas within Australia's resettlement program. The program is subdivided into a Refugee Program and a Special Humanitarian Program (SHP). Within the Refugee Program there are four sub-classes: "Refugee" for applicants who meet

⁵² Alexandra Hardina, "Working Across the Aisle to Welcome Refugees" *Voices from the Field - The IRC Blog* (12 April 2011); online: <<http://www.rescue.org/blog/working-across-aisle-welcome-refugees>>.

⁵³ Human Rights First, "Support the Refugee Protection Act of 2011 (S.1202/H.R.2185)" (2011).

⁵⁴ Govtrack.us gives the *Domestic Refugee Resettlement Reform and Modernization Act of 2011* a 5% likelihood of being enacted and the *Refugee Protection Act* a 4% likelihood of enactment as of 8 June 2012 based on the party membership and ranking of the sponsors and cosponsors. The website further notes that only 4% of House Bills and 3% of Senate Bills in 2009-2010 were enacted.

⁵⁵ Kerwin, "The Faltering US Refugee Protection System" *supra* note 43 at 2.

⁵⁶ John Menadue, et al., "A New Approach. Breaking the Stalemate on Refugees and Asylum Seekers" (Centre for Policy Development, 2011) at 11.

⁵⁷ *Migration Act, 1958* (Cth).

⁵⁸ UNHCR, "States Parties" *supra* note 10.

⁵⁹ Elbritten Karlsen, et al., "Seeking Asylum: Australia's Humanitarian Program" Background Note, Law and Bills Digest Section; Social Policy Section, Department of Parliamentary Services (21 January 2011) at 2-3.

the Convention refugee definition; “In-country Special Humanitarian” for applicants still in their home country and subject to persecution; “Emergency Rescue” for applicants either in or outside their home country who are in urgent need of protection because there is an immediate threat to their life and security; and “Woman at Risk” for female applicants and their dependants who are subject to persecution or are people of concern to UNHCR, are living outside their home country without the protection of a male relative and are in danger of victimization, harassment or serious abuse.⁶⁰ The SHP visa applies to applicants who have been subject to substantial discrimination amounting to gross violation of their human rights and requires an Australian “proposer” to sponsor the applicant.⁶¹ Australia’s numeric and regional selection of refugees for resettlement is decided by the Minister of Immigration following stakeholder consultations.⁶² Australian resettlement numbers have ranged from a high of 20,795 in 1980-1981 to a low of 1,238 in 1989-1990.⁶³ In 2010-2011 8,971 visas were granted under Australia’s offshore program composing both Refugee and SHP visas.⁶⁴

Like the U.S., Australia makes an intentional distinction between on-shore *asylum* seekers and off-shore *refugees*. Australia however goes further by formally linking the intake from the two categories. It is the only country in the world that formally does so. Refugee numbers are balanced such that the resettlement is reduced when on-shore claimants

⁶⁰ Department of Immigration and Citizenship (Australia), “Refugee and Humanitarian Issues: Australia’s Response” (June 2009) at 37; online: <<http://www.immi.gov.au/media/publications/refugee/ref-hum-issues/ref-hum-issues-june09.htm>>.

⁶¹ The SHP will be covered in more detail below under the “Private Sponsorship” heading.

⁶² The Refugee Council of Australia receives annual funding to operate a national consultation and prepare a submission to the government. Refugee Council of Australia, “Annual Submission on Refugee Program”; online: <<http://www.refugeecouncil.org.au/resources/consultations.html>>.

⁶³ Elbritt Karlsen, “Refugee Resettlement to Australia: What Are the Facts” Background Note, Law and Bills Digest Section, Department of Parliamentary Services (2011).

⁶⁴ Department of Immigration and Citizenship (Australia), “Annual Report 2010-11” (2011) at 111; online: <<http://www.immi.gov.au/about/reports/annual/2010-11/>>.

increase. For each asylum seeker that is recognized in Australia, one position is deducted from the Special Humanitarian Program.⁶⁵ The policy was introduced in 1996 and has been in effect ever since.⁶⁶ It is justified by the Australian government as a means of improving program management.⁶⁷ With this model, Australia privileges the burden-sharing act of controlled resettlement and, essentially asserts “that encouraging asylum seekers by offering them protection undermines ‘orderly’ international resettlement programs.”⁶⁸

This scheme permits Australia a more accurate although nevertheless misleading allegation of queue-jumping against those who compromise Australia’s ability to help the “neediest” refugees still overseas.⁶⁹ The essence of the argument, as put forth by Robert Illingworth, when he was Assistant Secretary Onshore Protection Branch of the Refugee Humanitarian and International Division of Australia’s Department of Immigration and Multicultural Affairs, is as follows: “Do we really want Australia’s finite capacity to resettle those in need to be taken up on the basis of decisions of organized criminals about who they will ship to Australia? Or would we want to use as many places as possible to resettle those people identified as in greatest need of resettlement through coordinated international efforts under the UNHCR?”⁷⁰ The counter truth is that by reducing resettlement places, those desperate for protection will, if able, elect to come as asylum seekers rather than wait for the possibility of resettlement. Again, the limitations of burden-sharing are forefront.

⁶⁵ Karlsen, et al., “Seeking Asylum” *supra* note 59 at 11.

⁶⁶ Karlsen, “Refugee Resettlement to Australia” *supra* note 63.

⁶⁷ Department of Immigration and Citizenship (Australia), “Refugee and Humanitarian Issues” *supra* note 60 at 23.

⁶⁸ Mary Crock, et al., *Future Seekers II: Refugees and Irregular Migration in Australia* (Sydney: Federation Press, 2006) at 8.

⁶⁹ Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005) at 92, fn.31; see also William Maley, “Receiving Afghanistan’s Asylum Seekers: Australia, the Tampa ‘Crisis’ and Refugee Protection” (2002) 13 *Forced Migration Review* 19 at 20.

⁷⁰ Robert Illingworth, “Durable Solutions: Refugee Status Determination and the Framework of International Protection” in Susan Kneebone, *The Refugees Convention 50 Years On: Globalisation and International Law* (Aldershot: Ashgate, 2003) 91 at 105.

As appears to be increasingly occurring in Canada, the Refugee Council of Australia reports that its community consultations reveal that the linking of the programs is “pitting communities against each other.”⁷¹ Refugees themselves are making distinctions between those of them that enter by way of resettlement and those that enter as asylum seekers.

The argument is as attractive as it is misleading. Australia is privileging resettlement over its obligation under the 1951 Convention of *non-refoulement*.⁷² Human Rights Watch has described Australia’s system as an attempt to grant asylum “by invitation only.”⁷³ While Canada and the U.S. may be using resettlement as a means of migrant selection under a humanitarian guise,⁷⁴ they are doing so in conjunction with the continued granting of in-country asylum. Australia is attempting to do so in lieu of in-country asylum. This may be the result of the different myth-making in Australia as opposed to Canada and the U.S. Katherine Cronin has argued that while American mythology revolves around sheltering the poor and oppressed and the Canadian mythology is one of generosity, “Australia’s immigration mythology is redolent with fear.”⁷⁵ Catherine Dauvergne has similarly noted

⁷¹ Refugee Council of Australia, “Australia’s Refugee and Humanitarian Program: Community Views on Current Challenges and Future Directions” (2010) 2010 Intake Submission at 10. See also Crock, et al., *Future Seekers II*, *supra* note 68 at 18.

⁷² Australia ratified the 1951 Convention in 1954 and the 1967 Protocol in 1973. UNHCR, “States Parties”, *supra* note 10.

⁷³ Human Rights Watch, “By Invitation Only: Australian Asylum Policy” (2002) 14:10(C) Human Rights Watch; online: <<http://hrw.org/reports/2002/australia/>>.

⁷⁴ While comparing Canadian and Australian refugee policies, Dauvergne, who earlier refers to humanitarianism as a “self-serving ruse,” goes on to write: “Canada’s law is filled with humanitarianism...demonstrating...that being perceived as humanitarian is vital” Dauvergne, *Humanitarianism, Identity, and Nation*, *supra* note 69 at 74 and 218.

⁷⁵ Katherine Cronin, “A Culture of Control: An Overview of Immigration Policy-Making” in James Jupp & Marie Kabala (eds.) *The Politics of Australian Immigration* (Australian Government Public Service, 1993) 83 at 87.

Canada's concern with being perceived as humanitarian compared to Australia's dominating concerns of control and efficiency.⁷⁶

Nor does the Australian scheme necessarily import order to the process. The Refugee Council of Australia found the Australian program to offer not "a place in a queue but a ticket in a lottery."⁷⁷ It further leads to misleading numbers, particularly because Australia cites its humanitarian numbers without distinguishing between on-shore and off-shore.⁷⁸ The Australian Centre for Policy Development has argued: "We must be honest about our resettlement efforts. We do not resettle 14 750 each year. We resettle as few as 7 000 from overseas through the UNHCR program, depending on asylum trends."⁷⁹

One interesting consequence of this pronounced rhetoric on genuineness is a consequent shift in the resettlement focus. Mary Crock, Ben Saul and Azadeh Dastyari argued in 2006 that heightened awareness of camp-based refugees and rejection of asylum seekers as genuine refugees led to a shift in the regions where Australia was selecting refugees for resettlement:

At the height of the influx of boat people at the end of the 1990s, complaints were made repeatedly that the unauthorized arrivals were taking the place of 'genuine refugees' who were languishing in UNHCR refugee camps. The rhetoric heightened awareness of the neglect of long-term refugees in African and Middle Eastern camps. In response, the intervening years have seen a dramatic rise in the intake of UNHCR recognized refugees from Africa.⁸⁰

⁷⁶ Dauvergne, *Humanitarianism, Identity, and Nation*, *supra* note 69 at 218.

⁷⁷ Refugee Council of Australia, *The Size and Composition of the 2000-2001 Humanitarian Program: Views from the Community Sector* (Refugee Council of Australia, 2000) at 53 quoted in Maley, "Receiving Afghanistan's Asylum Seekers" *supra* note 69 at 20. The idea of a "lottery" was reinforced in a 2011 report by the Australian Centre for Policy Development; Menadue, et al., "A New Approach" *supra* note 56 at 18.

⁷⁸ Karlsen, et al., "Seeking Asylum" *supra* note 59 at 1.

⁷⁹ Menadue, et al., "A New Approach" *supra* note 56 at 29.

⁸⁰ African resettlement jumped from 1,473 (14% of the offshore program) in 1997-1998 to 8,486 (70% of the offshore program) in 2004-2005. Crock, et al., *Future Seekers II*, *supra* note 68 at 15-16.

This awareness of the plight of camp based refugees, while a positive in itself, remains troubling when parceled with the complete rejection of the genuine plight of asylum seekers.

In May 2011, Australian Prime Minister Julia Gillard announced the government was close to signing a bilateral agreement with Malaysia that would effectively trade 800 off-shore asylum seekers for an increased 4,000 “genuine” refugees transferred to Australia for resettlement over 4 years.⁸¹ While a clear trade-off, the resettlement was nonetheless presented as a burden-sharing effort by Australia: “In exchange, Australia will expand its humanitarian program and take on a greater burden-sharing responsibility for resettling refugees currently residing in Malaysia.”⁸² Indeed, the promised resettlement marked a large increase to Australia’s annual resettlement quota.⁸³ The Agreement was signed on 25 July 2011.⁸⁴ The joint media release from the Australian Prime Minister and Minister for Immigration and Citizenship made the intentions of the agreement clear:

After today, 800 people arriving in Australia by boat will not be processed in Australia. They will instead be taken to Malaysia where they will have to wait alongside more than 90 000 other asylum seekers for their claims to be assessed. Meanwhile, an additional 4000 people considered by UNHCR to be most in need of resettlement will be given the opportunity to start new lives in Australia.⁸⁵

With the acknowledgement that “more than 90 000 other asylum seekers” await processing in Malaysia, the 800 boat arrivals were clearly being placed at the end of very long queue.

⁸¹ “Joint Statements by the Prime Ministers of Australia and Malaysia on a Regional Cooperation Framework” *Media Release* (7 May 2011); Paige Taylor, “Prime Minister Gillard Announces Australia, Malaysia Working on Deal to Trade Asylum-Seekers” *The Australian* (7 May 2011).

⁸² “Joint Statements” *ibid*.

⁸³ Karlsen, “Refugee Resettlement to Australia” *supra* note 63.

⁸⁴ “Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement”; online: <<http://www.minister.immi.gov.au/media/cb/2011/cb168739.htm>>.

⁸⁵ Prime Minister of Australia Julia Gillard & Minister for Immigration and Citizenship Chris Bowen, “Australia and Malaysia Sign Transfer Deal” *Joint Media Release* (25 July 2011).

If anything, the numeric reality of the tens of thousands of asylum seekers in Malaysia in comparison to Australia's concern with 800 arrivals is absurd and speaks yet again to Gibney's concept of the "tyranny of geography" and the inundation of migrant flows in certain states as opposed to others.⁸⁶ A report by Australia's Parliamentary Library notes that "Australia ranks in the top three resettlement countries in the world but sometimes also contributes to the numbers of refugees awaiting resettlement."⁸⁷ While the Malaysian Agreement was presented as burden-sharing, Australia was actually proposing to contribute to Malaysia's burden with 800 additional asylum claimants even as it agreed to resettle 4,000. This is burden-trading, not sharing.

The Agreement was challenged by 16 of the asylum seekers who were to be transferred to Malaysia. On 31 August 2011, in *Plaintiff M70/Plaintiff M106 v. Minister for Immigration*, the High Court of Australia issued a permanent injunction preventing the transfer of the asylum seekers to Malaysia.⁸⁸ Malaysia is not a state party to the 1951 Convention and has no domestic legislation recognizing refugees. As a result, the High Court held that Australia could not designate Malaysia as a safe third country for refugee processing. The

⁸⁶ Gibney, *The Ethics and Politics of Asylum*, *supra* note 6 at 195. Even compared to other industrialized countries, Australia's receipt of asylum applications is small. In 2010, Australia ranked 46th in the world for the number of refugees per capita. UNHCR, "Asylum Levels and Trends in Industrialized Countries 2010" Division of Programme Support and Management (28 March 2011) at 40. Prime Minister Gillard, herself, acknowledged Australia's low numbers in 2010:

Last year, Australia received 0.6 per cent of the world's asylum seekers. Refugees, including those referred for resettlement by the United Nations High Commission on Refugees, make up less than 8 per cent of migrants accepted in Australia. Even if all those who arrived in unauthorised boats were found to be refugees—which they will not—they would still be only 1.6 per cent of all migrants to Australia.

Julia Gillard, *Moving Australia forward*, speech to the Lowy Institute, (6 July 2010).

⁸⁷ Karlsen, "Refugee Resettlement to Australia" *supra* note 63.

⁸⁸ *Plaintiff M70/Plaintiff M106 v. Minister for Immigration* [2011] HCA 32.

ruling of the ultimate appellate Court settled the issue and the Australian government temporarily abandoned attempts to introduce further legislation.⁸⁹

The High Court's judgment revolves around Australia's power to remove asylum seekers from its territory – the 800 people to be sent to Malaysia. The question of the 4,000 resettlement refugees Australia was to take in exchange did not arise. Australia's obligations under the 1951 Convention and its own legislation determined the state's responsibility to the asylum seekers. Whether Australia offered resettlement in exchange for sending the asylum seekers to Malaysia was legally irrelevant. While Australia has indicated its continued willingness to resettle the 4,000 refugees from Malaysia, this resettlement will take place within the current quota and not mark a numeric addition to the quota.⁹⁰

The Malaysian agreement was intended as a one time pilot project.⁹¹ As is increasingly the case in Canada, pilot projects enable governments greater flexibility while maintaining greater ultimate control. The project enabled Australia to play with its refugee numbers while writing its own narrative of generosity through the resettlement of 4,000 and the assertion of the unfair queue-jumping by the 800 individuals to be sent to Malaysia to wait for their turn. With the Court preventing the transport to Malaysia, Australia was free to take any action it desired with respect to the resettlement component of the agreement.

⁸⁹ Chris Bowen, Minister of Citizenship and Immigration stated on 25 November 2011: "It became clear a month or so ago that legislation to allow for offshore processing of asylum seekers would not pass the Parliament due to the reckless approach of Mr. Abbott and the Liberal Party. As a result, the only lawful alternative is to process asylum seekers who arrive in Australia by boat onshore." Minister for Immigration and Citizenship Chris Bowen, "Bridging Visas for Boat Arrivals, Asylum Seeker Processing, Malaysia Arrangement" *Doorstop Interview, Sydney* (25 November 2011).

⁹⁰ Julia Gillard, Transcript of Joint Press Conference, Canberra, (13 October 2011); online: <<http://www.pm.gov.au/press-office/transcript-joint-press-conference-canberra-17>>.

⁹¹ Sasha Lowes, "The Legality of Extraterritorial Processing of Asylum Claims: The Judgment of the High Court of Australia in the 'Malaysian Solution' Case" (2012) 12 *Human Rights Law Review* 168 at 173.

A new offshore processing regime targeting asylum seekers arriving irregularly by boat was successfully passed in August 2012 authorizing the transfer of these asylum seekers to Nauru or to Manus Island off of Papua New Guinea. A legislative amendment removed section 198A of the *Migration Act, 1958* thus circumventing the High Court's ruling in the Malaysian case.⁹² The Australian Government has made clear that the offshore processing regime is not connected to any resettlement, indicating "Asylum seekers who arrive by boat after August 13 [2012] will still have their claims for protection assessed. However, there is no guarantee, that should they be found to be owed protection, they will be resettled in Australia."⁹³ The Government has also indicated that it will again be pursuing its agreement with Malaysia "once further protections are in place."⁹⁴ Ultimately, the law protecting asylum-seekers could not withstand legislative amendment and the availability of resettlement is as limited and precarious as ever.

Private Sponsorship

The United States

*The US resettlement programme is used to give a strong level of management, or the appearance thereof, to the arrival and situation of refugees in the United States.*⁹⁵

While the U.S. does not offer the option of privately sponsoring refugees to its citizens, resettlement in the U.S. is dependent on private support. The American public-private partnership is designed around a very different model from Canada. Private voluntary

⁹² The Migration Legislation Amendment (Offshore Processing and Other Measures), Bill 2011, was passed by the Australian Senate on August 16, 2012.

⁹³ Department of Immigration and Citizenship (Australia), Fact Sheet "No to People Smuggling – No Advantage"; online: < http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/no-people-smuggling/_pdf/fact-sheet-english.pdf >.

⁹⁴ *Ibid.*

⁹⁵ Joanne van Selms, "Refugee Protection Policies and Security Issues" in Edward Newman & Joanne van Selms, *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo: United Nations University Press, 2003) 66 at 69.

agencies (Volags) have assisted in refugee integration in the U.S. since the end of the Second World War. As was the case in Canada, religious groups such as the Church World Service and the Catholic Relief Services lobbied both the President and the Intergovernmental Committee on Refugees to resettle refugees from Europe predating the 1951 Convention.⁹⁶

While religious groups initially operated out of their own budgets, the influx of Cuban refugees in the 1960s and early 1970s caused the government to begin contracting with voluntary agencies for their services.⁹⁷ The movement of the Vietnamese from army bases to American cities in the 1970s was likewise facilitated through private citizen sponsors who took on financial and personal responsibility for the families for up to two years.⁹⁸ The first contracts between nine Volags and the State Department were for a payment of \$500 for each refugee resettled.⁹⁹ As of 2010 there were ten Volags in the U.S. that have cooperative agreements with the Department of State to provide reception and placement services to refugees: Church World Service, Domestic & Foreign Missionary Society, Ethiopian Community Development Council, Hebrew Immigrant Aid Society, International Rescue Committee, Kurdish Human Rights Watch, Lutheran Immigration & Refugee Service, U.S. Committee for Refugees and Immigrants, U.S. Conference of Catholic

⁹⁶ Jessica Eby, et al., "The Faith Community's Role in Refugee Resettlement in the United States" (2011) 24 *Journal of Refugee Studies* 586 at 589.

⁹⁷ W. Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (London, New York: Zed Books Ltd., 1998) at 130. Catholic Relief Services and the Church World Service were created much earlier, in 1943 and 1946 respectively, with an early focus on refugee resettlement Eby, et al., "The Faith Community's Role" *ibid.* at 588.

⁹⁸ Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* (New York, London: Free Press; Collier Macmillan, 1986) at 115.

⁹⁹ Robinson, *Terms of Refuge*, *supra* note 97 at 130. The nine voluntary agencies were the American Council for Nationalities Service, American Fund for Czechoslovak Refugees, Church World Service, Hebrew Immigrant Aid Society, International Rescue Committee, Lutheran Immigration and Refugee Service, Tolstoy Foundation, Travelers Aid-International Service and, US Catholic Conference.

Bishops, and World Relief.¹⁰⁰ Each Volag holds a standard cooperative agreement with the Department of State that outlines the agency's responsibilities including airport pick-up, establishing the refugee family in an apartment equipped with furnishings, appliances, clothing and food, assisting in the application for a Social Security card, school registration, grocery shopping and arranging medical appointments and necessary social and language services.¹⁰¹ Family or friends of the refugee may apply to work with the Volag on the refugee's settlement. In the absence of pre-existing networks, the Volag will arrange for individuals or a religious group to sponsor the settlement or otherwise do so itself.¹⁰²

The Volags oversee hundreds of affiliate organizations spread across the country to whom individual refugees are assigned.¹⁰³ The program diverges here from the Canadian model as the Department of State supplies the Volags with a lump-sum payment now amounting to \$1,800.00 per refugee for the initial settlement expenses.¹⁰⁴ This amount was doubled from \$900.00 in January 2010 following a successful campaign led by faith-based groups involved in resettlement.¹⁰⁵ Counter to what is occurring in Canada, with the government placing increasing reliance on private sponsorship to fund refugee resettlement, the moves

¹⁰⁰ Bureau of Population, Refugees and Migration, U.S. Department of State, "U.S. Refugee Admissions Program Reception and Placement Program Agencies FY 2010" Fact Sheet (20 August 2010); online: <<http://www.state.gov/g/prm/rls/146403.htm>>.

¹⁰¹ Bureau of Population, Refugees and Migration, U.S. Department of State, "Refugee Resettlement in the United States" Fact Sheet (16 Septemeber 2010); online: <<http://www.state.gov/g/prm/rls/147254.htm>>; U.S. Department of State, U.S. Department of Homeland Security, U.S. Department of Health and Human Services, "Proposed Refugee Admissions for Fiscal Year 2010, Report to the Congress" Submitted on Behalf of the President of the United States, at 17. A sample collective agreement is available on the Bureau of Population, Refugees and Migration website: <<http://www.state.gov/g/prm/rls/text/119408.htm>>.

¹⁰² UNHCR Washington, "US Resettlement Overview" *supra* note 17 at 10.

¹⁰³ Kenny & Lockwood-Kenny, "A Mixed Blessing" *supra* note 21 at 225.

¹⁰⁴ Bureau of Population, "Refugee Resettlement in the United States" *supra* note 101.

¹⁰⁵ Eby, et al., "The Faith Community's Role" *supra* note 96 at 601.

in the U.S. signify a move away from private sector financial responsibility for resettlement.¹⁰⁶

Yet, while taking less direct financial responsibility, over the course of their development the Volags have become increasingly powerful and influential:

The US abounds with voluntary agencies, primarily, but not exclusively, faith-based (the most prominent being Catholic, Lutheran, Jewish, and Episcopalian, along with the nonfaith-based Immigration and Refugee Services of America). The voluntary agencies are involved in implementing every part of the resettlement program from the moment refugees arrive...¹⁰⁷

While the structure of their support suggests much less refugee selection power than in Canada, Volags possess immense lobbying power and exert significant control over resettlement decision-making. Resettlement from the former Soviet Union and Eastern Europe continued to dominate U.S. selection well into the mid-1990s. Efforts by immigration officials to reduce entries following the fall of the Berlin Wall in 1989 were resisted by “well-developed and influential lobby-groups.”¹⁰⁸ Gibney notes that: “American Jewish groups and evangelical Christian organizations actively campaigned for a continuation of the Cold War admission policies despite the move to democratic governance across the former Soviet Union.”¹⁰⁹ Faith-based agencies still dominate U.S. resettlement. In 2010, 70% of resettlement in the U.S. was handled by faith-based organizations.¹¹⁰

¹⁰⁶ *Ibid.* at 603.

¹⁰⁷ Joanne van Selm, “Public-Private Partnerships in Refugee Resettlement: Europe and the US” (2003) 4 *Journal of International Migration & Integration* 157 at 169.

¹⁰⁸ Doris M. Meissner “The Refugee Act of 1980: What Have We Learned?” 6 *Revue Européenne de Migrations Internationales* 129 at 136.

¹⁰⁹ Gibney, *The Ethics and Politics of Asylum*, *supra* note 6 at 159.

¹¹⁰ Eby, et al., “The Faith Community’s Role” *supra* note 96 at 591.

The 2010 SIPA Report highlights the public-private partnership as a benefit for resettlement refugees.¹¹¹ Yet, an ethnographic study of Karen resettlement to the U.S. found that local agencies contracted to aid in refugee settlement were “conspicuously absent” while individual volunteers and unofficial, often religious, organizations took on primary responsibility.¹¹² The authors note that the U.S. reliance on volunteer support “has proven valuable to refugees and communities and is a money-saving device for the relevant Federal and State-level public authorities.”¹¹³ There were, however, indications that access to services often appeared dependent on church membership as it was Church volunteers who provided the most support.¹¹⁴ This, combined with differing state support leads to a “lottery effect” in terms of access to services.¹¹⁵ The recognition here is that there are two layers of private assistance operating in U.S. resettlement. Despite the Volag structure, the same organizations that tend to direct private sponsorship in Canada, smaller religious and community groups, ultimately and voluntarily take on much of the settlement services in the U.S. These groups, however, lack the Canadian private sector’s selection influence that is instead controlled by the Volags. Moreover, absent the private sponsorship scheme, agencies active in resettlement in the U.S. must contend against public perceptions that it is a government program and not a community based effort.¹¹⁶

Australia

As is the case in both Canada and the U.S., religion played an early role in Australian resettlement with the Australian Jewish Welfare Society creating the first refugee

¹¹¹ Brick, et al., “Refugee Resettlement in the United States” *supra* note 16 at iii.

¹¹² Kenny & Lockwood-Kenny, “A Mixed Blessing” *supra* note 21 at 219; see also Eby, et al., “The Faith Community’s Role” *supra* note 96 at 587.

¹¹³ Kenny & Lockwood-Kenny, “A Mixed Blessing” *ibid.* at 219-220.

¹¹⁴ *Ibid.* at 233.

¹¹⁵ Brick, et al., “Refugee Resettlement in the United States” *supra* note 16 at 12.

¹¹⁶ Eby, et al., “The Faith Community’s Role” *supra* note 96 at 603.

settlement support service in Australia in 1937.¹¹⁷ Today, religious groups do not appear to have the same active involvement in resettlement as they do through either the American Volags or Canadian private sponsorship. As noted above, however, Australia's offshore resettlement program consists of both a "Refugee Program" and a "Special Humanitarian Program" (SHP).¹¹⁸ The SHP has a wider breadth than the refugee program and includes people who are outside their home country and subject to substantial persecution and/or discrimination in their home country amounting to a gross violation of their human rights. The SHP was introduced in 1981 to provide broader resettlement possibilities.¹¹⁹ Unlike the refugee class, this visa class requires a "proposer" who can be an Australian citizen, permanent resident or community organization who assists with settlement support and airfare.¹²⁰ An initial aim of the program was to support NGO involvement and community based sponsorship by enabling these groups to act as proposers.¹²¹ In practice, proposers tend to be family members. It is the SHP program that has been numerically linked to the on-shore asylum acceptance since 1996.

¹¹⁷ Refugee Council of Australia, 2010 Intake Submission, *supra* note 71 at 11.

¹¹⁸ Global Special Humanitarian Visa (subclass 202); online:
<<http://www.immi.gov.au/visas/humanitarian/offshore/202/>>.

¹¹⁹ Department of Immigration and Citizenship (Australia), "Refugee and Humanitarian Issues" *supra* note 60 at 22.

¹²⁰ Canadian private sponsors do not cover airfare and privately sponsored refugees, like GARs, tend to rely on government loans for their transportation to Canada. Loans often end up covering SHP applicants in Australia as well; see Refugee Council of Australia, *Who Bears the Cost of Australia's Special Humanitarian Program?* (2008); online:
<http://www.refugeecouncil.org.au/docs/resources/reports/Travel_Costs_report.pdf>.

¹²¹ Menadue, et al., "A New Approach" *supra* note 56 at 27.

Table 9: Australia Offshore Admissions 1999-2009¹²²

Year	Refugee Program	Special Humanitarian Program
1999-2000	3,800	3,050
2000-2001	4,000	3,120
2001-2002	4,160	4,260
2002-2003	4,376	7,280
2003-2004	4,134	8,927
2004-2005	5,511	6,755
2005-2006	6,022	6,836
2006-2007	6,003	5,275
2007-2008	5,962	5,026
2008-2009	6,499	4,511

The Refugee Council of Australia has examined the country of origin of off-shore resettlement entrants according to entry via the refugee program or the SHP and has shown a linkage between the two streams over time. They note that after a certain time lapse communities in the refugee program start to appear in significant numbers in the SHP as earlier entrants begin to “sponsor” family and community members.¹²³ The SHP program also contains an overt family reunification component. There is a “split-family” provision within the SHP visa where the entrant is not his or herself directly subject to discrimination but is a “member of the immediate family” of a proposer who entered Australia on either a SHP or other protection visa.¹²⁴ The provision only applies to immediate family, the proposer’s partner, dependant child or, if the proposer is not 18 or more years of age, the proposer’s parent, and the applicant’s relationship to the proposer must have been declared

¹²² Table compiled using data 2003 onward from Department of Immigration and Citizenship, *Fact Sheet 60: Australia’s Refugee and Humanitarian Program*, Commonwealth of Australia (2009); online: <<http://www.immi.gov.au/media/fact-sheets/60refugee.htm>>. Data prior to 2003- 2004 is from Department of Immigration and Multicultural and Indigenous Affairs, *Population Flows: Immigration Aspects 2002-03*, Commonwealth of Australia (2004); online: <<http://www.immi.gov.au/media/publications/statistics/popflows2002-3/>>.

¹²³ Refugee Council of Australia, 2010 Intake Submission, *supra* note 71 at 16.

¹²⁴ *Ibid.* at 17.

when the proposer's visa was originally granted.¹²⁵ Although the visa requires that the applicant meet compelling reasons criteria,¹²⁶ the Department of Immigration and Citizenship's current policy is that the criteria is satisfied without further enquiry in most cases as the existence of close family ties in Australia is considered to be sufficiently compelling.¹²⁷

A separate Special Assistance Category, beginning in 1991 allowed for the resettlement of designated groups through community sponsorship and settlement support arrangements. A proposer would submit a written undertaking to provide assistance to the applicant and his or her dependants for at least six months after arrival. The Special Assistance Category was progressively shut down after the change in government in 1996 and discontinued in 2002.¹²⁸ It was designed as a response to the Soviet Union's collapse and predominantly used by families from the former Yugoslavia.¹²⁹

¹²⁵ Department of Immigration and Citizenship (Australia), "Refugee and Humanitarian Entry to Australia"; online: <<http://www.immi.gov.au/visas/humanitarian/offshore/immediate-family.htm>>.

¹²⁶ Migration Regulations, 1994, Schedule 2:

The Minister is satisfied that there are compelling reasons for giving special consideration to granting to the applicant a permanent visa, having regard to:

- (a) the degree of discrimination to which the applicant is subject in the applicant's home country; and
- (b) the extent of the applicant's connection with Australia; and
- (c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant settlement and protection from discrimination; and
- (d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

¹²⁷ Refugee Council of Australia, 2010 Intake Submission, *supra* note 71 at 17.

¹²⁸ Refugee Council of Australia, "Australian Statistics"; online: <<http://www.refugeecouncil.org.au/arp/stats-02.html>>.

¹²⁹ James Jupp, "Australia's Refugee and Humanitarian Policies" in Christian Reus-Smit (ed.) *Refugees and the Myth of the Borderless World* (Canberra: Department of International Relations, Australia National University, 2002) at 35.

In recent years the Australian government has made a concerted push to promote regional and rural resettlement for incoming refugees with no pre-existing ties.¹³⁰ While a state initiative, there has been support from social justice and faith-based groups.¹³¹ Overall, however, the Refugee Council of Australia has expressed concern with a shift away from community involvement in resettlement and has pointed to Canada's private sponsorship program as a means of increasing the resettlement quota.¹³² While the SHP program already resembles Canadian private sponsorship, participants in RCOA's 2009 consultations commented that responsibility for refugee resettlement should not rest solely on the Commonwealth Government, although its willingness to take on greater private responsibility was tied to an expansion of the program.¹³³ The assurance fund established by the City of Winnipeg to encourage private sponsorship, and an impetus for regional resettlement, is specifically pointed to as a means of local government support of private resettlement.¹³⁴

Source Country Resettlement

The United States

As reviewed above, resettlement to the U.S. is organized along defined priority categories. Within the first priority of individual referrals, referrals may be made for persons still in their country of origin. Priority Two designations have always included individuals still in their country of origin.

¹³⁰ Brooke McDonald-Wilmsen, et al., "Resettling Refugees in Rural and Regional Australia: Learning from Recent Policy and Program Initiatives" (2009) 68 *Australian Journal of Public Administration* 97.

¹³¹ *Ibid.* at 99.

¹³² Refugee Council of Australia, 2010 Intake Submission, *supra* note 71 at 3.

¹³³ *Ibid.* at 37.

¹³⁴ *Ibid.* at 43.

The idea of resettlement from source countries was debated between the House and the Senate preceding the enactment of the *Refugee Act*, 1980. The Senate bill defined a refugee to include internally displaced persons whereas the eventually accepted House bill provided the more limited option of presidential designations in particular situations.¹³⁵ Under *INA* s.101(a)(42)(B) the President may specify certain countries where country of origin resettlement is considered:

(B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Current country of origin resettlement is considered for individuals from Cuba, Eurasia and the Baltics, Iraq, and other exceptional circumstances identified by a U.S. Embassy in any location.¹³⁶ In addition, direct Priority One referrals from a U.S. Ambassador in any part of the world will be considered.¹³⁷ Resettlement from the former Soviet Union is also authorized through the Lautenberg Amendment¹³⁸ and applies to Jews, Evangelical Christians, and Ukrainian Catholic and Orthodox religious activists. The Cuban program applies to human rights activists, members of persecuted religious minorities, former political prisoners, forced-labor conscripts (1965-68), persons deprived of their professional credentials or subjected to other disproportionately harsh or discriminatory treatment

¹³⁵ Kennedy, "Refugee Act of 1980" *supra* note 18 at 149.

¹³⁶ The White House, Office of the Press Secretary, "Presidential Memorandum--Fiscal Year 2012 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status" Presidential Determination No. 2011-17; online: <[http://www.whitehouse.gov/the-press-office/2011/09/30/presidential-memorandum-fiscal-year-2012-refugee-admissions-numbers-and->](http://www.whitehouse.gov/the-press-office/2011/09/30/presidential-memorandum-fiscal-year-2012-refugee-admissions-numbers-and-).

¹³⁷ Department of State, "Proposed Refugee Admissions for Fiscal Year 2010" *supra* note 101 at 5.; The White House, "Presidential Memorandum" *ibid*.

¹³⁸ Public Law No. 101-167, § 599D, 103 Stat. 1261 (1989), as amended (Lautenberg Amendment). The Lautenberg Amendment made to the 1990 Foreign Operations Appropriations Bill, established a presumption of refugee eligibility for certain categories of persons from the former Soviet Union and Southeast Asia.

resulting from their perceived or actual political or religious beliefs or activities, and persons who have experienced or fear harm because of their relationship – family or social – to someone who falls under one of the preceding categories. A variety of Priority Two designations include Iraqis employed by the US government, media or NGOs.¹³⁹ Intended as an extraordinary remedy,¹⁴⁰ in-country processing became increasingly popular in the U.S. in the 1980s with both the Vietnamese and those from the Soviet Union.¹⁴¹

The concept of, and recommended need for, source country resettlement preceded the *Refugee Act*, 1980. The acceptance of Ugandan Asians expelled by Idi Amin in 1972 and the rescue of political prisoners from Chile after the overthrow of President Allende in 1973, for example, were enabled through the “parole authority” in the *INA*.¹⁴² The evacuation of Vietnamese in 1975 could be regarded as resettlement although presented as a rescue operation rather than refugee protection.¹⁴³ The first use of the *Refugee Act*, 1980’s in-country processing provisions were triggered by the Cuban crisis that occurred that very same year. An Executive Order signed by President Carter on 14 April 1980 permitted 3,500 Cubans within the Peruvian Embassy in Havana to enter the U.S. for special humanitarian reasons.¹⁴⁴

Bill Frelick has argued that in the case of in-country processing for Haitians in the 1990s, the program was used to justify corresponding interdiction policies.¹⁴⁵ Despite the risks

¹³⁹ Department of State, “Proposed Refugee Admissions for Fiscal Year 2010” *supra* note 101 at 10.

¹⁴⁰ Inzunza, “The Refugee Act of 1980” *supra* note 18 at 422.

¹⁴¹ Haines, *Safe Haven?*, *supra* note 45 at 21.

¹⁴² Section 212(d)(5) *INA*, 1952, *supra* note 9 enabled the Attorney General the discretion to temporarily permit aliens to enter into the U.S. for emergency or public interest reasons.

¹⁴³ Loescher & Scanlan, *Calculated Kindness*, *supra* note 98 at 109, 113.

¹⁴⁴ Ira J. Kurzban, “A Critical Analysis of Refugee Law” (1981-1982) 36 *Miami Law Review* 865 at 865-866; Kennedy, “Refugee Act of 1980” *supra* note 17 at 153.

¹⁴⁵ Bill Frelick, “In-Country Refugee Processing of Haitians: The Case Against” (2003) 21 *Refuge* 66.

associated with making a claim from within the country,¹⁴⁶ in 1992 when the program was introduced 9,389 cases, representing 15,580 persons, applied for the in-country processing program in Haiti. Of these applications, 61 cases, 136 people, were admitted to the United States.¹⁴⁷ Frelick's assessment that "the number admitted was paltry and amounted to little more than false hope for most,"¹⁴⁸ could equally be used to describe resettlement policies in general. These programs are not problematic on their own but can be troublesome when used as a contrast to justify actions preventing the entrance of asylum seekers. It is the idea of exclusivity rather than complementarity that presents the problem.

Protesting the re-instatement of in-country processing in Haiti in 2003, Amnesty International USA, Lawyers Committee for Human Rights, TransAfrica Forum, Immigration and Refugee Services of America, and the U.S. Committee for Refugees endorsed the following statement:

The very existence of a small aperture through which only a relatively few selected individuals will be able to pass for legal admission to the United States under the U.S. refugee admissions program is too likely to erode the rights of many more Haitian asylum seekers seeking to leave spontaneously and, in particular, to serve to rationalize migration control measures that seriously compromise the right to seek asylum itself.¹⁴⁹

Pointing to the Freedom Flights that brought Cubans to the U.S. in the 1960s and constituting the state's largest in-country processing program, Frelick notes the program's exclusion of political prisoners and draft age men was "designed to exclude the most vulnerable people at highest risk of persecution."¹⁵⁰ Ira Kurzban critiqued the program at

¹⁴⁶ Testimony before Congress suggested such an act to be "suicide" *ibid.* at 67.

¹⁴⁷ *Ibid.* at 67. In the same year, the Coast Guard interdicted 37,618 Haitian boat people, most of whom were summarily repatriated.

¹⁴⁸ *Ibid.* at 67.

¹⁴⁹ *Ibid.* at 72.

¹⁵⁰ *Ibid.* at 70.

the time for its embodiment of “executive choice.”¹⁵¹ Evaluating the entire program more generally in 1989, Inzunza warned that in-country processing risked compromising the attention paid to those in most need of protection.¹⁵² While Canadian source country resettlement, particularly in Colombia, did suggest a strategic regional burden-sharing benefit and selection of desirable resettlement refugees, the American counterpart has been more clearly dictated by foreign policy concerns.

Australia

Australia enables source country resettlement through both its “In-country Special Humanitarian” visa class for applicants subject to persecution in their home country and the “Emergency Rescue” for applicants living either inside or outside their home country and who are in urgent need of protection because there is an immediate threat to their life and security.¹⁵³ The SHP program commenced in the 1980s with the source country protection of individuals from Chile and El Salvador.¹⁵⁴ There have been calls in Australia to “refocus” the SHP program to more directly address the growing challenge of IDPs.¹⁵⁵ In 2009-2010 only 24 visas were issued under the In-Country Special Humanitarian Class.¹⁵⁶

Group Resettlement

Group processing is a methodology that derives from the international community and the *Agenda for Protection*.¹⁵⁷ Unlike the other forms of resettlement discussed, it focuses

¹⁵¹ Kurzban, “A Critical Analysis of Refugee Law” *supra* note 144 at 867.

¹⁵² Inzunza, “The Refugee Act of 1980” *supra* note 18 at 422.

¹⁵³ Department of Immigration and Citizenship (Australia), “Refugee and Humanitarian Issues” *supra* note 60 at 37.

¹⁵⁴ Menadue, et al., “A New Approach” *supra* note 56 at 30.

¹⁵⁵ *Ibid.* at 30.

¹⁵⁶ Refugee Council of Australia, “Australia’s Refugee and Humanitarian Program 2011-12: Community Views on Current Challenges and Future Directions” (2011) 2011 Intake Submission at 13.

¹⁵⁷ UNHCR, *Agenda for Protection*, A/AC. 96/965/Add. 1, General Assembly, Executive Committee of the High Commissioner’s Programme (26 June 2002) 3rd ed., (October 2003) Goal 5, Objective 5.

directly on cooperation between states. As noted in the previous chapter, Australia partnered with Canada to resettle the two smallest minority groups out of the refugee camps in Dadaab. The resettlement of Karen refugees from Burma and Bhutanese refugees from Nepal outlined in the previous chapter both involved international co-operation in which Australia, the U.S. and Canada worked together and with additional countries on the resettlement. What is interesting given the close alignment between states on this form of resettlement is the divergence in their public promotion of group processing. While Canada publicly promotes its use of the group resettlement methodology with updates on the CIC website,¹⁵⁸ information on the use of the methodology in refugee selection is much less publicly available in the U.S. and Australia.¹⁵⁹ One resettlement worker in Australia commented that she could not imagine the Australian government ever promoting resettlement as it is “very taboo politically.”¹⁶⁰ In the U.S. and Australia the group

¹⁵⁸ “Backgrounder Group resettlement to Canada: Karen refugees in Mae La Oon Camp, Thailand”; online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2006/2006-06-20.asp>>; “Resettling Bhutanese Refugees – Update on Canada’s Commitment”; online: <<http://www.cic.gc.ca/english/refugees/outside/bhutanese.asp>>; “Backgrounder Karen Refugees”; online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2007/2007-02-09.asp>>; “Refugee Resettlement in Canada Information Bulletin No. 1 (Bhutan)”; online: <<http://www.cic.gc.ca/english/resources/publications/bhutanese.asp>>; “Refugee Resettlement in Canada Information Bulletin No. 2 Refugee Resettlement in Canada (Bhutan)”; online: <<http://www.cic.gc.ca/english/resources/publications/bhutanese2.asp>>; “Information Bulletin No. 3 (Bhutan)”; online: <<http://www.cic.gc.ca/english/resources/publications/bhutanese3.asp>>; “Refugee Resettlement in Canada Information Bulletin No. 4 (Bhutan)”; online: <<http://www.cic.gc.ca/english/resources/publications/bhutanese4.asp>>; “Canada to Welcome 2,000 More Karen Refugees”; online: <<http://www.cic.gc.ca/english/department/media/releases/2007/2007-02-09.asp>>; “Canada’s New Government to Accept 5,000 Bhutanese Refugees”; online: <<http://www.cic.gc.ca/english/department/media/releases/2007/2007-05-22.asp>>; “Government of Canada and the Anglican Church of Canada Encourage Canadians to Sponsor Refugees”; online: <<http://www.cic.gc.ca/english/department/media/releases/2009/2009-04-16.asp>>; “Bhutanese Refugees”; online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2007/2007-05-22.asp>>.

¹⁵⁹ A search of the terms “group resettlement”; “group processing methodology” and “group processing” on 11 May 2012 resulted in no matches on the Australian Government’s Department of Immigration and Citizenship website <www.immi.gov.au> and no relevant matches on the U.S. Government’s Bureau of Population, Refugees and Migration <<http://www.state.gov/j/prm/>>.

¹⁶⁰ Personal e-mail correspondence, on file with author.

processing appears to simply be absorbed into their resettlement programs whereas Canada, as seen in the previous chapter, is keen to promote its efforts on this front.

Despite this absence of direct reference, group processing continues to gain favour in resettlement countries. Identifying the progress and challenges of resettlement in 2010-2011, UNHCR noted “the frequent submission of refugees lacking local integration prospects reflects intensified efforts to find durable solutions for refugees in protracted refugee situations, in particular through active use of the group resettlement methodology.”¹⁶¹

A major draw of the group resettlement model is the speed and efficiency it permits in facilitating resettlement. In the 2003 comprehensive report on U.S. resettlement, group resettlement is considered the “key” to “enhancing the pace” of U.S. resettlement expansion.¹⁶² And even with this model, the U.S. appears to outpace Canada. Kenny and Lockwood-Kenny report that in their interviews with Karen refugees waiting for resettlement in Thailand, many expressed the opinion that Canada and Australia were preferable destinations to the U.S. but that these countries took up to three years to process an application.¹⁶³ The U.S. Department of State gave resettlement times of between eight months and a year but the interviewed refugees suggested resettlement often occurred within three months.¹⁶⁴

¹⁶¹ UNHCR, “UNHCR Projected Resettlement Needs 2012” *supra* note 4 at 3.

¹⁶² Martin, *The United States Refugee Admissions Program*, *supra* note 34 at 26.

¹⁶³ Kenny & Lockwood-Kenny, “A Mixed Blessing” *supra* note 21 at 227.

¹⁶⁴ *Ibid.* at 227.

Comparative Counterpoints

Canada, Australia and the U.S. are states formed by immigration, relatively removed from refugee flows, and all three shifted from *ad hoc* responses to specific crises to formal resettlement policies mainly in response to the refugee flows out of Indochina in the 1970s. This latter point may have much to do with the resettlement mentality that each state consequently assumed. The American role in the Vietnam War created a direct sense of responsibility for the refugee outflows it produced. The U.S. Government thus took on this responsibility as well as linking resettlement to a sense of foreign policy. Geographically closer to the crisis and also contributing ground troops, Australia could not avoid a response and had a consequent desire to control the refugee flows. Canada, meanwhile, was far away and uninvolved. Government response resulted from the compelling reality of the crisis and the push for compassion by the Canadian people who ultimately took on much of the responsibility themselves. Of the three states, the U.S. has remained the most unapologetically foreign policy oriented. Australia, meanwhile, is the most overtly pushing against its Convention obligations and using law in an effort to better control its intake. Canada, in contrast, has always defined its resettlement efforts through the same humanitarian lens it applies to in-Canada protection.

What can be seen from this is a desire in Canada to profile and celebrate its resettlement activities while they are pursued more as a matter of fact in Australia and the U.S. Canada is also clearly more creative in its resettlement activities than either the U.S. or Australia. While some aspects of the Canadian program appear in both Australia and the U.S. as well, they merge and blur with the general programs and are not highlighted as distinct programs on their own.

Both Australia and the U.S. embrace a degree of source country resettlement. Canada's cancellation of its distinct stream now places it closer to Australia's discretionary admissions, although ironically the push in Australia is for increased and more upfront protection afforded to IDPs. The use of source country resettlement in the U.S. meanwhile, has been highly criticized and regarded with suspicion. One possibility is that the flexibility and efficiency of the American model, lacking in the rigidity of the Canadian scheme, is what prevented similar concerns of political abuse in Canada. Again, neither Australia nor the U.S. seem burdened by the same considerations as Canada in terms of connecting its resettlement to refugee protection. Australia's push for IDP protection is a blunt recognition that these are internally displaced persons and does not demonstrate the need to couch this protection in refugee resembling language. The U.S. program, while criticized for obstructing protection, nonetheless enables the government to offer protection as it sees fit without the hurdles the Canadian government faced.

Private Sponsorship is the most unique aspect of the Canadian program. And yet, private influence and support can be found in both the American and Australian programs. While the unique origins of private sponsorship in Canada are understandable, it is surprising that neither state has since embraced sponsorship. From a government perspective, it offers increased resettlement numbers with limited additional expense. In contrast, the American Volag system gives these agencies enormous influence on resettlement selection although the state finances the resettlement. In the American system, the smaller church and community organizations do much of the settlement work that falls on private sponsors in Canada but wield much less selection influence. There is, moreover, a sense in the U.S. through the legal contracts between the government and the Volags that the Volags are

performing a service for the government, whereas in Canada, private sponsorship is often portrayed as something the government *permits* private citizens to do, almost as a favour.

Australian developments in private resettlement look reflectively at the Canadian program as a model. The realities of the tensions in Canadian sponsorship, particularly regarding its use as a tool for family reunification, do not carry the same weight in Australia or the U.S. where the third priority is family reunification. While the Canadian government is making attempts to streamline the familial orientation of much sponsorship, the Australian Refugee Council is actively pushing for an expanded definition in Australia's Refugee and Humanitarian Program, arguing the importance of family in facilitating integration.¹⁶⁵

Private sponsors have a vested interest in not just the settlement but the selection of refugees for resettlement in Canada in a way that does not come across in the U.S. or Australia. The interest of private sponsors is often familial and clearly humanitarian and in many ways obliges the Canadian government to continue with a humanitarian rhetoric. As a result, Canadian resettlement is more inward looking, tied into the legal obligations Canada owes to in-Canada asylum seekers and lacks the overt foreign policy and international burden-sharing considerations that guide resettlement in the other states.

Where the Law Is

Fittingly, this comparative chapter brings us back to the global context of Chapter 2's discussion of burden-sharing. Burden-sharing is at the rhetorical forefront of refugee discourse in the U.S. and Australia in a way that it is not in Canada. A consequence of this is the intentional division between in-country asylum seekers and overseas resettlement

¹⁶⁵ Refugee Council of Australia, "Humanitarian Family Reunion: The Building Block of Good Settlement" (April 2012); online: <<http://www.refugeecouncil.org.au/r/rpt/2012-Family.pdf>>.

refugees. The semantic distinction makes clear the divide between the protection obligation to asylum seekers in contrast to the burden-sharing context of resettlement. Resettlement in these states does not appear to blur into discourse on the state's legal commitment to refugees as it does in Canada.

The law still plays a role though in the approaches to and understanding of resettlement in all three states. The suggested link made by Crock, Saul and Dastyari that Australian resettlement refocused on camp based refugees from Africa alongside heightened rhetoric of queue-jumping by illegitimate asylum-seekers offers insight into similar actions in Canada and the U.S. In the U.S., statements have indicated a move toward a more global program focused on desperate populations and increased African resettlement. In Canada *IRPA* shifted to more need based resettlement and the government has suggested that the resettlement program must move closer to the original intentions of refugee protection for those meeting the Convention refugee definition. While in many ways these are positive returns to the legal refugee definition and containment of refugee protection as precisely that, *refugee* protection, there is the risk that these shifts also work against the law of asylum. By ensuring that resettlement refugees do indeed fit the "genuine" image the public holds of the desperate, needy, camp-based refugee, these governments solidify the misleading dichotomy between on-shore asylum seekers and off-shore resettlement refugees. In doing so, the law of asylum, that asylum seekers are entitled to enter without legal authorization to make an asylum claim, is further diminished.

At the same time, neither Australia nor the U.S. is focused on Convention refugees in its actual resettlement scheme. In the U.S., the designated classes do not rely on a UNHCR referral and the SHP visas in Australia are likewise broader than the refugee definition. As

is the case in Canada, resettlement policy embraces a wider range of individuals. Much more overtly than Canada, however, both Australia and the U.S. intentionally incorporate family reunification into their resettlement schemes – Priority Three in the U.S. scheme and the split family provision of the SHP visa in Australia. Resettlement thus bears less of a resemblance to refugee protection and the legal refugee definition. It also, ironically, builds up the resettlement numbers with what would otherwise be considered family reunification. But in many ways, the schemes are more *legal* in their regulated structures of visa subclasses, priorities and designations. The regimes themselves are more legally entrenched. This entrenchment adds to the impression that resettlement refugees are taking the *legal* route to entry into the state.

In the U.S. the law appears as a tool to contour and control resettlement. The *Refugee Act*, 1980 was itself an attempt to neutralize the law. Preferences, however, remain embedded in the U.S. system and demonstrate the inability to legislate political neutrality in a system that necessitates discretionary selection. The introduction of recent bills on refugee protection and resettlement reform again show the hope and potential that law can bolster resettlement.

In Australia, resettlement becomes more legally relevant because it is effected by successful on-shore claims. Migrant decision-making, to the extent that choice exists, operates in the “shadow of law,” conscious of each route’s influence on the other.¹⁶⁶ For the state, this use of the law to tie the schemes together imparts control and order to the system of asylum that is, in itself, not within Australia’s ability to control. The failed

¹⁶⁶ Robert H Mnookin & Lewis Kornhauser, “Bargaining in the Shadow or the Law: The Case of Divorce” (1978-1979) 88 *Yale Law Journal* 950.

asylum-seeker/resettlement refugee trading agreement with Malaysia is a different example of Australia connecting the two streams and using resettlement to directly avoid asylum obligations. While the ratio was not 1:1, Australia was nonetheless taking the voluntary action of resettlement in lieu of meeting its legal obligations to the asylum seekers. The absence of any reference to the resettlement aspect of the agreement in the High Court's ruling and the consequent development of an off-shore processing regime intentionally disconnected to any guarantee of resettlement highlights resettlement's actual irrelevance in law despite its intersections with the law.

Ultimately, in examining where the law is in Australian and American resettlement, it is clear that its presence and relevance is not unique to Canada. It is inevitable given resettlement's placement as a complement to the grant of asylum that law will play a shadowed role and must be considered. Law's presence need not be problematic. It has the potential to bolster resettlement as the new bill attempts in the U.S. However, the law can also take resettlement outside of and beyond asylum, tie it to asylum, and effect asylum while still remaining voluntary and vulnerable, subject to cancellation on a whim, and of negligible relevance in judicial decisions. The need is to see the law clearly and understand its influence.

Conclusion

The previous chapter concluded with a wariness of changes and vulnerability in the Canadian system, particularly given the increased infusion of discretion into the decision-making. The review of how similar yet distinct programs operate in Australia and the U.S. confirms the challenge of discretion in resettlement selection. The hesitations and criticisms of in-country processing in the U.S. are entirely separate from the concerns that plagued

Canada's source country resettlement. Programs similar in concept may differ vastly in operation and particularly with resettlement, in its contrast to asylum, the danger is this use may be manipulative and damaging to asylum.

Of the three states, Canada has tied its resettlement most closely to its domestic refugee protection. Having always considered the two programs to intertwine, the current blurring rhetoric to confuse the law succeeds more easily. The converse though is that advocates are better situated to argue for continued complementarity. Resettlement in Canada is not about foreign policy or international burden-sharing. Particularly given the ever-growing support of and dependence on private sponsors, resettlement is about refugee protection.

However, there is potential danger in the convergence of resettlement policy between the three states. While refugee protections originally arose out of international solidarity in the 1950s, these states may also align to move away from protection. This is a realization of the global dimensions of the law.¹⁶⁷ In the past, Canada set the bar in refugee protection and advocates in other states often turned to Canadian models to argue for emulation.¹⁶⁸ The

¹⁶⁷ Howard Erlanger, et al., "New Legal Realism Symposium: Is It Time for a New Legal Realism?: Foreword: Is It Time for a New Legal Realism?" (2005) *Wisconsin Law Review* 335 at 343.

¹⁶⁸ Even in 2011 a report by Australia's Centre for Policy Development, pointed to Canada as a "positive international example" with *IRPA*'s objectives compared to the aims in the *Migration Act*:

Refugee protection is covered in a distinct division of the [Canadian] Act with a strong values-based preamble that states its aims:

- (a) to recognise that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
- (b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
- (c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

By contrast, the objectives of Australia's Migration Act (1958) are:

- (1)... to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.
- (2)... provides for visas permitting non-citizens to enter or remain in Australia and... this Act... is.... the only source of the right of non-citizens to so enter or remain.
- (3)... requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.

converse risk is that as states limit the ambit of their protections, their actions find support and gain momentum through the actions of other states. Convolution is already occurring. The *Canada-US Safe Third Country Agreement* which came into force in December 2004 requires asylum seekers to make their refugee claims in the first country of arrival.¹⁶⁹ The Agreement has been described as contributing to the “erosion of the idea that people who seek asylum may actually be refugees.”¹⁷⁰ Canada has more recently turned to Australia as a model for its human smuggling legislation. In 2010 Canada’s Minister of Citizenship and Immigration visited Australia to meet with his Australian counterpart and visit detention centres. A media release by the Australian Minister for Immigration and Citizenship announced “Australia and Canada Unite Against People Smuggling.”¹⁷¹ Indeed, the visit preceded the announcement of Bill C-49 *Preventing Human Smugglers from Abusing Canada’s Immigration System Act* in March 2010.¹⁷² Australia’s refugee organizations meanwhile directly contacted the Canadian Prime Minister to dissuade Canada from

(4)... provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act. Menadue, et al., “A New Approach” *supra* note 54 at 19-20.

¹⁶⁹ *Canada-U.S. Safe Third Country Agreement*, 5 December 2002; online:

<<http://www.cic.gc.ca/english/policy/safe-third.html>>. Asylum seekers arriving in the U.S., as the majority inevitably do as a result of the greater number of American embassies worldwide and international flight routing through the United States, are be denied entry into Canada. The clear objective of the agreement, instigated by Canada, is to decrease the number of asylum seekers able to gain access to the refugee determination process within Canada.

¹⁷⁰ Audrey Macklin, “Disappearing Refugees: Reflections of the Canada-U.S. Safe Third Country Agreement” (2005) 36 *Columbia Human Rights Law Review* 365 at 365. The designation of the U.S. as a safe third country was challenged at the Federal Court by the Canadian Council for Refugees, Amnesty International, the Canadian Council of Churches and a Colombian asylum seeker in the U.S. The challenge was successful at the Federal Court with Justice Phelan ruling the designation would be quashed. This ruling was overturned on appeal at the Federal Court of Appeal and leave to the Supreme Court of Canada was denied. *Canadian Council for Refugees v. Canada*, 2007 F.C. 1262, [2008] 3 F.C.R. 606 (F.C.); rev’d 2008 F.C.A 299, [2009] 3 F.C.R. 136.

¹⁷¹ Minister for Immigration and Citizenship Chris Bowen, “Australia and Canada Unite against People Smuggling” *Media Release* (20 September 2010).

¹⁷² First introduced in March 2010, Bill C-49, the *Preventing Human Smugglers from Abusing Canada’s Immigration System Act* was reintroduced on 16 June 2011 as Bill C-4 and then brought into the omnibus Bill C-31 *Protecting Canada’s Immigration System Act* introduced on 16 February 2012 (assented to 28 June 2012).

following in the Australian path¹⁷³ Speaking to proposed new regulations on marriage sponsorships, the Canada's Minister of Citizenship and Immigration, Jason Kenney, stated "This is what every other immigrant receiving country — Australia, New Zealand, Britain and the U.S. do, and the only question is why we didn't do it a while ago?"¹⁷⁴ Actions are justified, not on their fairness or correctness but on the basis of the behaviour of other states.

Canada, Australia and the U.S., as well as other states, are learning from each other. How they position themselves and interpret their responsibilities and obligations effects how other states see them and how they in turn choose to address similar issues. While the origins of each state's policies may differ – foreign-policy, control, or humanitarianism – each state is now operating with an underlying fear of the foreigner and desire to regain greater control of its borders. The "tyranny of geography"¹⁷⁵ also means that no state wants to be the state with the softest policies drawing asylum seekers to its shores. Canada's Minister of Citizenship and Immigration has made clear that Canada is not "the world's doormat."¹⁷⁶

Rather than partaking on a race to the bottom to curtail unwanted immigration and slow asylum flows, Canada should reclaim its resettlement program as a positive complement to asylum. Understanding law's role in this program, and its positive potential rather than its use as collusion is key to this recovery. The concluding chapter thus returns the apocryphal

¹⁷³ Nicholas Keung, "Tough Approach to Refugees Criticized; Australian Coalition Urges Ottawa to Rethink New Anti-Smuggling Bill" *The Toronto Star* (5 January 2012) A3.

¹⁷⁴ Jason Kenney quoted in Gloria Elayadathusseril, "Immigrant Intake Will Remain at 250,000 Says Minister Kenney" *canadianimmigrant.ca* (1 November 2011).

¹⁷⁵ Gibney, *The Ethics and Politics of Asylum*, *supra* note 6 at 195.

¹⁷⁶ Jason Kenney quoted in Steven Chase, "Ottawa Helps Block Another Batch of Smuggled Sri Lankans" *The Globe and Mail* (14 June 2012).

to the forefront of discussion. The dissertation has shown law's presence, influence and power. The task now is to take the inevitable intersections of law, the categorizations of legality and illegality, and, seeing them clearly, use them to regain complementarity between asylum and resettlement.

CHAPTER SEVEN

UNSETTLING REFUGEE RESETTLEMENT

Law Distilled, Resettlement Unsettled

The idea of resettlement is simple. States voluntarily bring refugees to their territory who have fled elsewhere but not received adequate protection. It is complicated by its multiple purposes, offering not only a solution but working as a tool of protection and expression of international burden-sharing. Both as protection and solution, resettlement is meant as a complement to the laws of asylum and the obligation of *non-refoulement*. Too often, and too easily, it has served as the opposite – a justification for limiting access to asylum and a challenge to the right of refugees to seek asylum. Rather than burden-sharing, it has become a means of burden-trading and burden evasion. The legality of the controlled entrance of refugees across an international border that resettlement offers is at the forefront of this convolution.

All of this places resettlement at the nexus of issues of rights, responsibility and obligation. While the discussion occurs in the absence of a legal scheme for refugee resettlement, an apocryphal temperament reveals that law is nonetheless present. Resettlement is not simply a voluntary act that states may or may not opt to pursue. The analytical work on the place of law within resettlement has shown that resettlement is more legally influenced and influential to the legal scheme than assumed. It is an act of international protection and burden-sharing that is influenced by law and that, through its voluntary nature, influences the international refugee law of *non-refoulement*.

This recognition brings with it a new understanding of resettlement but also a broader appreciation of law. Law is more than rules and decision-making. Its apocryphal power

expands beyond its stated objectives. Resettlement is regulated by law but it is also categorized as legal and contrasted to the illegality of the entrance of asylum-seekers.

While there has been a recent reorientation of the refugee regime and resurgence in resettlement discourse over the past decade at the national and the international level, it has been stuck at the “strategic” policy level and has lacked a comprehensive examination or in-depth consideration, particularly of the legal consequences. Canada has taken the lead on much of the resettlement reform internationally, leading the core group that drafted the MFU, and prefacing the recent reform of Canadian refugee law with announcements of increased resettlement numbers. This dissertation is thus increasingly relevant and significant, at a time when there is an outstanding gap in knowledge and a growing sense of need amongst refugee advocates, Canadian policy-makers, and UNHCR for scholarly work on this issue.¹

This project has sought to remedy the absence of knowledge. Its argument has been that law is relevant to resettlement. While the idea proposed in the Introduction is that law is intertwined and ever-present and cannot be examined in isolation, the aim of the dissertation has been, to the extent that it is possible, distill the law from the politics, policies and rhetoric attached to resettlement. Seeing the law more clearly enables a better understanding of its use and intentional misuse. It also enables a better understanding of resettlement, an understanding that could not even be approached from the position that resettlement is voluntary and law irrelevant.

¹ See Debra Pressé & Jessie Thomson, “The Resettlement Challenge: Integration of Refugees from Protracted Refugee Situations” (2007) 24 *Refuge* 48; Alexander Betts & Jean-François Durieux, *Convention Plus as a Norm-Setting Exercise* (Oxford: OUP, 2007).

In examining the basic models of resettlement used by Canada, the dissertation traversed across decades and regions looking at the origins and reworkings of resettlement policies, the resettlement of specific refugee groups, and the rare instances of judicial intervention. With an apocryphal orientation it has exploded a basic program in multiple directions and extracted a clearer yet more complicated appreciation of the power of both law and resettlement outside the constraints of their own defined terms. In closing it is useful to review the key realizations from each chapter and reflect on the apocryphal understanding of law. From there, and as a final offering, recommendations will be made using the revelations gained from the project to move resettlement forward in a manner better aligned to its complementary intent to provide for the protection of refugees.

Chapter by Chapter Review

The substantive chapters of the dissertation began with the global refugee regime, narrowed to an examination of each distinct mode of resettlement applied by Canada, and finally compared Canadian resettlement with the resettlement programs in the U.S. and Australia. Here the breadth of that examination is condensed into the main arguments and conclusions with observations on the interweaving relevancy between the chapters for a completed picture of the project.

Chapter 2 demonstrated the significant distinction between acquiring international legal status as a Convention refugee and actually acquiring refuge and protection. It revealed the dichotomous relationship between refugee protection and resettlement and early tensions between protection and immigration incentives that resettlement brings to the fore. Claudena Skran has noted that “[t]he notion that the contemporary refugee crisis is unique

lacks a historical perspective,”² and this chapter set the understanding of Canadian resettlement that followed. The “myth of difference” articulated by B.S. Chimni to explain the paradigm shift in protection that occurred at the end of the Cold War³ has repeated with the arrival of boat people in the 1990s and 2000s and policies justifying restrictive measures. The chapter framed the recent resurgence of resettlement in the context of restatements of state interest. The historical review illustrated that while states appear to change their approaches to refugees, arguably it is the refugee realities that change and state approaches only change to remain consistently state-centered. Convention Plus clearly signaled the abandonment of humanitarian rhetoric and a focus on state enticements.

Chapter 2 also provided an analysis of the role of both human rights and burden-sharing in refugee advocacy. Their obvious relevance was contrasted with their conspicuous absence in the chapters that followed. The discussion of human rights spoke to the power of law and the accountability attached to a concrete assertion of legal obligation. Yet the inadequacy of human rights lies in the challenge of attainment. The absence of this assertion in the resettlement policies discussed demonstrates the distance between the theoretical and the practical. The Australian High Court’s decision on refugee trading with Malaysia clearly shows the distinction between the power of law to protect the rights of asylum seekers drawing heavily on the 1951 Convention, and the irrelevance of law to resettlement. Preservation of the refugee definition and the right to asylum are of necessary import. Expansion to broader universal human rights challenges the maintenance of these already fragile core protections rather than enforcing them.

² Claudena M. Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995) at 4.

³ B. S. Chimni, *The Geopolitics of Refugee Studies and the Practice of International Institutions: A View from the South* (Oxford: Refugee Studies Programme, 1998) at 351.

Burden-sharing defined early resettlement efforts predating the 1951 Convention when resettlement existed within an international legal framework. It only reappeared in Chapter 6's discussion of resettlement policy in Australia and the U.S. Its relevance in these states, but not in Canada, illustrated the distinctions in Canada's approach to resettlement and its linkage of the program to the humanitarianism of refugee protection rather than international burden-sharing. The idea of an international or regional burden-sharing regime is not advocated for in this dissertation as it seems impossible to preserve the refugee definition and achieve the commitment of states. The burden-sharing models reviewed move resettlement from legal arguments to practical political bargaining. Essentially, the discussion of both human rights and burden-sharing demonstrated how the imposition of law and with it, obligation, put refugee protection at risk, either by over-expansion through universal rights or the reduction of the refugee through commodification. The concluding messages of the chapter were that international law in itself is inadequate to achieve refugee protection and that law is increasingly replaced with incentive based arguments for resettlement. This failing and abandonment of law is contrasted to its increasing presence in the rhetoric of Canada's resettlement policies.

Chapter 3 showed Canadian resettlement tugged at by both its parallels to immigrant selection and in-Canada asylum and reflective of both programs combining compassion and strategic interests. This is reinforced by the maintenance of a single piece of legislation, *IRPA*, addressing both immigration and refugee protection. Situated between undesired and uncontrolled asylum entrants and the desired and controlled selection of immigrants, resettlement's position is precarious and vulnerable to actual and rhetorical manipulation. The manipulation plays on the law and the idea of legal entry through resettlement. Yet the

international legal obligation of *non-refoulement* has no application in resettlement, and Canadian courts have made clear that an asylum seeker present in Canada possesses greater rights than a refugee seeking resettlement. The review of resettlement cases before the Federal Court hinted at the difficulty of access to the court system and a high degree of concern with visa officer decision-making in resettlement. These cases further highlighted the tenuous connection between UNHCR's determination of refugee status and visa officer decisions on resettlement applications that often fail to even mention this mandate refugee status. Law's role in resettlement means little more than the controlled entry. The Canadian government exercises a selective assertion of law and resettlement is legally framed rather than legally imposed.

It is discretion that is at the core of resettlement. The discretionary basis of resettlement distinguishes it from the state's legal obligations to refugees. The intentional arguments for interchangeability between resettlement refugees and in-land refugee claimants is based on this divide. There is no discretion with *non-refoulement* and the law is strong. Resettlement, with weak law and high discretion is much more amenable to the state's interests.

Chapter 4 considered how the private sponsorship of refugees influences both the resettlement program and refugee protection. In addition to the government interests covered in Chapter 3, this chapter added the interests of private citizens. Private interests are often in conflict with the state interests even as private sponsorship is meant to complement government resettlement. This is yet another level of failed complementarity just as the resettlement program in general is meant as a complement to the grant of asylum but instead is in contrast. The history of the development of private sponsorship within the

context of the ever-growing promise of Indochinese resettlement demonstrated the line between politics and law when faced with broad laws and malleable policy. Private sponsorship moved from a complementary addition to the government's program to the private sector taking on primary responsibility for the resettlement. This shift has again begun to repeat with recent announcements curtailing asylum access, enabling broader sponsorship at greater rates of increase than the government program, and the shift of 1,000 spaces from the government program to private sponsorship. Yet, with sponsors' growing responsibility for resettlement came a change in the nature of that resettlement with less and less resettlement of strangers and the increasing use of the program as a tool for family reunification.

At the same time, however, more than ever before, the actions of private sponsors are being celebrated by the government under the rubric of its own humanitarianism. Just as Chapter 3 revealed the contrast between government resettlement and in-country asylum, Chapter 4 added the additional division between resettlement by the government and resettlement by private citizens. Each layer of complementarity is replaced with competition with refugees loosing out and private sponsors bearing the majority of the burden. The intersection of law and politics is at its height here. Their commitment to refugees and facilitating resettlement traps private sponsors into enabling the government's aversion of the law with increasingly restrictive legislation limiting asylum and increased resettlement through the sponsors. Reliant on private sponsors, the government is left to struggle against the movement of the program into family reunification.

Chapter 5 brought the issues of the previous chapters to the fore by demonstrating the complete fragility of the resettlement program and its legal framing through the repeal of

the Source Country Class and the enhanced focus on discretion to both replace this program and in the move toward increased group resettlement. The repeal of the Source Country Class further indicated greater dependency on private sponsorship but with greater government control. The chapter represented intentional maneuvers away from law and the blending of law and discretion.

Chapter 6 looked comparatively at resettlement policies in Australia and the U.S., the similarity of challenges with discretion and convolution of the use of law. It also showed Canada to be unique in the link it makes between its in-Canada protection and resettlement efforts. While Australia links its numeric intake, Canada's linkage is in the intent of the two distinct programs – at least rhetorically it is a humanitarian desire to protect. The chapter ended with the recognition that states do not exist in isolation. Each state is aware of and influenced by the actions of other states. For legal realists, this is the global dimension of the law.⁴ While the dissertation has focused on Canada, its observations, recommendations, and conclusions are relevant to each state's resettlement program as well as UNHCR's efforts to coordinate and promote resettlement. Before laying out these final comments, however, I must return to the apocryphal beginnings of the project and assess where the law is left following the dissertation's exploration of law's role in resettlement.

Law in the Fields Beyond

For the dissertation's doubters questioning law's relevance to resettlement, the chapters have sought to move their gaze from law's resting place at the border to its reach beyond. The intent has been to look differently at law, approaching it from outside of itself, in the

⁴ Howard Erlanger, et al., "New Legal Realism Symposium: Is It Time for a New Legal Realism?: Foreword: Is It Time for a New Legal Realism?" (2005) *Wisconsin Law Review* 335 at 343.

fields beyond the state's border and in the act of resettlement. This perspective reveals a mingling of contradictory laws and the fictional force of doors, queues, and a sense of legal order manipulated by state interests. Rather than the typical canonical controversy between a legal system of rules and one swayed by politics,⁵ the understanding of law here has used the system of rules as a springboard to an analysis of law's influence and abilities. This is not a *moment* of law but rather the *movement* of law. This movement reveals what is absent in the traditional stagnant debate. It challenges the traditional understanding of law's ordering ability.⁶ The argument is not that law does not possess this categorizing potential. Rather, while law's power is typically thought to lie in its authoritative labeling of legal and illegal, right and wrong, the apocryphal analysis reveals law's hidden power – the representation of authoritative pronouncements obscuring an underlying flexibility, discretion, and contradiction. The obscuration results from more than law's shadow⁷ or impact,⁸ as often there is intention attached, although the influence of both are also there. While this has been the argument of the entire project, a final example will secure the point.

In taking an apocryphal approach, a concern with narrative has been infused into the legal analysis. Layers of myth have guided the Canadian resettlement approach. Historically, and still entrenched in the legislative recital, is a grounding in humanitarianism.⁹ Increasingly however, this myth is being layered with a myth of legal worship.¹⁰ Law that

⁵ This is a basic generalization of the debate between legal positivism and critical legal studies.

⁶ Margaret Davies, *Asking the Law Question* 2nd ed. (Sydney: Law Book Co., 2002) at 5.

⁷ Robert Mnookin & Lewis Kornhauser, "Bargaining in the Shadow or the Law: The Case of Divorce" (1978-1979) 88 *Yale Law Journal* 950 at 997.

⁸ Erlanger, "New Legal Realism" *supra* note 4 at 339.

⁹ See Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005).

¹⁰ This image of legal worship comes from Dauvergne's work on the rule of law in which she argues "[L]aw is becoming an act of faith. When law is held up in this way, it becomes an object of secular idolatry." Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008) at 188.

is definitive. Law as an absolute. Law imbued with an uncompromising morality. In a single media release on increases to Canada's resettlement program in 2011, CIC emphasizes the legality of resettlement in four of the seven paragraphs.¹¹ The first paragraph sets the scene that "refugees often spend many years – sometimes decades – in squalid refugee camps or urban slums. They wait patiently for the chance to immigrate to Canada or other countries *legally*." The second paragraph indicates "Canada's program for refugees to resettle here *legally* went from being one of the most generous in the world, to being even more generous." The sixth paragraph repeats again "All of these individuals who immigrated to Canada through our resettlement programs waited patiently in the queue for the chance to come to Canada *legally*. They followed the *rules*." The seventh and final paragraph of the document is a single sentence that makes clear, "The Government will stand up for these refugees' *rights* to be processed in a *fair* and *orderly* fashion, consistent with our *laws* and *values* — and not allow human smuggling operations to result in people jumping to the front of our immigration queue." In one page, and in just over 500 words, the mythical layering inundates the reader with a story of the benevolent and generous Canadian state and the patient, law-respecting, nearly-martyred refugee battling against the depraved human smugglers who enable undeserving others to cut the queue like naughty school children.

It is not incorrect to indicate that resettled refugees enter Canada legally. It verges on the absurd, however, to imagine these refugees are waiting "patiently" in squalid camps and slums for decades for their unlikely chance at resettlement. It is misleading to suggest there

¹¹ Citizenship and Immigration Canada, "Canada's Resettlement Programs" *News Release* (18 March 2011); online: <<http://www.cic.gc.ca/english/departement/media/backgrounders/2011/2011-03-18b.asp>> [emphasis added].

is a queue for asylum in Canada, particularly when the system regulating resettlement and that processing in-land claims for asylum are independent. And while human smuggling can be a nasty, dangerous and exploitative criminal enterprise,¹² the implication that those using human smugglers to access asylum are undeserving of protection fails to appreciate the fear and desperation of those fleeing persecution. Moreover, the statement completely ignores the *rights* of refugees who enter Canada as asylum-claimants on their own, particularly their *right to non-refoulement*.

Despite the Government of Canada's firm commitment to law oozing out of the media release, the actual announcement was simply an increase to resettlement ranges, predominantly on the private sponsorship side. Since that time the Government has shifted even more of its resettlement to the private sponsorship side, not through law but through cuts to CIC's operations in its 2012 budget. This is the mythical force of law in its ability to silence and exclude. It mutes the voice of the very refugees that have been resettled by celebrating a patience and respect for the law that more realistically was a desperation and inability to do anything other than wait and hope. It mutes the voice of the refugees that remain in the camps and slums by leaving them with this same law that is meaningless to them unless resettlement is chanced upon and this legal right of entry bestowed upon them. And it unfairly places this law as a fictional but convincing blockade against refugees seeking asylum who by necessity may enter illegally but who cannot be penalized for this entry and possess the right to *non-refoulement* in both Canadian and international law.

¹² The reality is that human smuggling both costs and saves lives. Moreover, curtailing smuggling operations further limits a refugee's access to asylum. See Susan Kneebone, "The Refugee-Trafficking Nexus: Making (Good) the Connections" (2010) 29:1 *Refugee Survey Quarterly* 137.

Stepping beyond legal doctrine contributes to this greater understanding of law's actual power of exclusion beyond mere categorization. Even the resettlement refugees that fit within the Government's vision of fairness, order, rules, and law, landing on the correct side of the legal/illegal dichotomy in the above narrative, are marginalized and excluded by this false descriptive. It is an example of Margaret Davies' argument that legal categorization creates an "artificial distinction between law and non-law."¹³ The reality is that resettlement refugees possess no legal right to resettlement and remain dependent on the benevolent generosity of the state, a generosity the media release is not shy to highlight. For all refugees then, both those who enter on their own to claim asylum and those who enter through resettlement, the law blurs and challenges their access to protection. For asylum refugees, one layer of law, that of illegal entrance, is used to counter their legal right to *non-refoulement*, access to which is further challenged by layered legality preventing initial access to asylum.¹⁴ For resettlement refugees, law offers them no access to the state and, in Canada, limited ability to challenge an eligibility determination through judicial review. That the government permits their controlled and legal entry is an exercise of law that has been bequeathed by the state. There is no right to entry prior to the state's determination of eligibility for resettlement. The celebration of this respect for the law in the media release is merely self-congratulation by the Canadian Government on the successful management of its border.

The example helps to illustrate law's power. No answer is offered to the question of *what* law is. No attempt has been made to answer such a question. The project uses an

¹³ Davies, *Asking the Law Question*, *supra* note 6 at 7.

¹⁴ In particular see the *Protecting Canada's Immigration System Act*, S.C. 2012 c.17 which incorporated the earlier Bill C-4 *Preventing Human Smugglers from Abusing Canada's Immigration System Act*.

examination of resettlement to demonstrate a singular instance of law's fluidity. Rather than a *what*, the chapters have examined *where* the law is and offered a multitude of answers. What comes out of the analysis is a deeper understanding of law's power to silence, exclude and marginalize and how the intersections of layered legality determine the operation and circumvention of refugee protection.

Recommendations

The dual intentions of the dissertation were to look at law's role in the non-legal act of resettlement and using this newfound awareness, gain an understanding of resettlement to not only encourage resettlement but maintain a commitment to the notion of refugee protection. The body of the dissertation has taken up the former task and demonstrated the multitude of legal influences in resettlement and how refugees are influenced by the law, from outside of the law, often to the detriment or dismantlement of in-land protection. The following recommendations take up the latter task of rebalancing resettlement and asylum through the restructuring of the resettlement program.

This restructuring is not grounded in law. The dissertation has canvassed law's intersections with resettlement and the layered legality of this analysis makes clear that law in itself is not an adequate answer to the challenges of resettlement, and too often the cause of resettlement's tangled positioning. For the same reasons that the dissertation as a whole required reaching beyond law to grasp the relationship between law and resettlement, the recommendations exist outside of the law to seek out means to reign in law's silencing power.

I acknowledge that these recommendations come at a time of unlikely receptiveness. A time when the veil of humanitarianism that cloaks Canada's actions toward refugees is virtually transparent and there is an increasingly clear taint of meanness to the almost constant flow of legislation and policies affecting refugees that is being introduced.¹⁵ The recommendations are not however simply a counter to government actions that are considered distasteful. They align with neither the interests of the state nor necessarily resettlement advocates. Indeed, at points where the analysis has noted the corruption of the legal status of refugeehood through the use of resettlement, the dissertation may be considered counter productive by those advocating for increased resettlement numbers.¹⁶ The recommendations reflect the interests of refugees, respect for the refugee definition and the legal obligation of *non-refoulement*, and a desire to preserve and increase refugee protection through both in-land asylum and resettlement.

Recommendation 1: End Divisive Discourse

The first recommendation is a call for the return of complementarity between the law of asylum and resettlement. For this to occur, the divisive discourse employed by states and saturating into the media, public opinion and even to the refugees divided by the discourse

¹⁵ At the time of writing, changes to the Interim Federal Health Program (IFHP) were announced in a Ministerial Order by Minister Jason Kenney, published 25 April 2012 to take effect on 30 June 2012. The IFHP provides temporary health insurance to refugees, protected persons and refugee claimants, as well as to their dependants, in Canada who are not yet covered by a provincial or territorial health insurance plan. Under the changes, responsibility for the healthcare of refugees, asylum seekers and rejected claimants will shift to either provincial services (if they agree to take this responsibility), private sponsors or the refugees themselves. The one group that will still receive coverage is GARs although this appears to be a change from the original intent of the Order following vigorous campaigns against the changes. Louisa Taylor, "Groups Claim Partial Win In Refugee Health Benefits; Tories Deny Backtracking, Claim Wording Of Policy Has Just Been Clarified" *Ottawa Citizen* (4 July 2012) A3; see also Canadian Council for Refugees, "Changes to Healthcare for Refugee Claimants and Protected Persons Inhuman" *Media Release* (27 April 2012).

¹⁶ While I support, in concept, significant increases in resettlement numbers in Canada, and globally, I have not made any recommendation to this effect. My reasoning for this is twofold. First, the misuse and manipulation of resettlement outlined in the dissertation must be brought under control before such increases would be advisable. Second, the integration of resettlement refugees is beyond the scope of this project but an essential aspect for a successful plan to resettle more refugees.

must end. There is no refugee queue and only one door. Images and allusions to queue-cutting and entrance through the back door are misleading and detrimental to responsible protection. Both resettlement and *non-refoulement* are imperfect but necessary protection tools. Any increased focus on resettlement must not be in exchange for reduced access to asylum or an abandonment of the commitment to *non-refoulement*.

Recommendation 2: Better Align Resettlement and Refugee Status

While resettlement refugees are continually presented as “genuine” or “real” refugees as compared to those seeking asylum, Canadian resettlement tends to pay little attention to an individual’s actual status as a refugee. The Federal Court decision in *Ghirmatsion v. Canada* highlights that UNHCR mandate status is not determinative and Canadian law guides visa officer decision-making on eligibility for resettlement.¹⁷ Although Justice Snider found the applicant’s status as a UNHCR refugee to be a relevant factor that should have been taken into consideration in the visa officer’s decision-making, a disjuncture remains between the Canadian and international systems of protection. The idea of refugee resettlement as a complementary mechanism to the internationally agreed upon refugee protection through asylum cannot be fully supported when these connections appear so tenuous.

The government has since proposed regulatory changes to private sponsorship to include documented proof from UNHCR or a foreign state that the proposed sponsorship applicant is a recognized refugee.¹⁸ The requirement only applies to Group of Five and Community

¹⁷ *Ghirmatsion v. Canada (Minister Of Citizenship And Immigration)* 2011 FC 519 (*Ghirmatsion*) at paras 57-58.

¹⁸ Citizenship and Immigration Canada, “Regulations Amending the Immigration and Refugee Protection Regulations” 146:23 Canada Gazette (9 June 2012); online: <<http://www.gazette.gc.ca/rp-pr/p1/2012/2012->

Sponsors, but not Sponsorship Agreement Holders, thus affecting less than 50% of private sponsorship applications.¹⁹ The intended goal is to increase sponsorship acceptance rates by ensuring applications meet Canadian requirements for resettlement. The changes have been criticized as going too far by requiring a recognition that is more rigid than Canadian protection and eligibility for resettlement, therefore risking the exclusion of certain individuals and groups in need of protection.²⁰

Law's challenge here is in finding the appropriate line between overly broad discretion and overly stringent requirements. Given the huge levels of refugee protraction and the need for the efficient processing of applications, the government is right to seek a means of ensuring applications are likely to be successful.²¹ In not making this a blanket requirement on all sponsorship applications, there remains a capacity to resettle those who might otherwise be excluded. This is a positive step toward the better alignment of resettlement with refugee protection. It should be supported by the grant of greater deference to these refugee status decisions by UNHCR or a foreign state. CIC's Overseas Processing Manual currently lists "a decision by the UNHCR or a signatory country with regard to an applicant's refugee status" as merely one of the "other factors" for a visa officer to consider

06-09/html/reg1-eng.html>. The change would be to paragraph 153(1)(b) of *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

¹⁹ SAHs account for approximately 60% of private sponsorship applications and G5s 40%. Community sponsorship is minimal. *Ibid.*

²⁰ Canadian Council for Refugees, "Comments on Notice of Intent - Changes to the Private Sponsorship of Refugees Program" (9 January 2012); online: <http://ccrweb.ca/files/g5_comments_jan2012.pdf>. Canadian law goes beyond the strict refugee definition for both inland claims, *Immigration and Refugee Protection Act*, S.C. 2001 c.27 [IRPA] s.97, and resettlement, *IRPR*, *supra* note 18, s.147.

²¹ From 2006-2010 private sponsorship approval rates averaged 57% compared to a GAR approval rating closer to 90%. At the close of 2011, the private sponsorship backlog sat at 29,125 persons. Citizenship and Immigration Canada, "Regulations Amending the Immigration and Refugee Protection Regulations" *supra* note 18 at II.

in determining eligibility.²² If this proof of refugee status is being made a requirement on sponsorship applications, it should be presumptive of eligibility in visa officer decision-making subject to evidence to the contrary.

Recommendation 3: Limit Discretionary Decision-Making

Discretion is inherent and unavoidable in resettlement selection. Its presence should not be enhanced or relied upon by legislating broad discretionary powers into the resettlement program. The above recommendation for refugee status to be presumptive of resettlement eligibility is an example of limiting discretion. With each increase of discretion, the commitment to protection becomes more tenuous. Discretion can act as a safety valve when the application of law would lead to an injustice. This is where section 25's humanitarian and compassionate exemption in *IRPA* is at its best. The repeal of the Source Country Class with the justification that section 25 can assume a protection role when necessary pushes discretion to an extreme where it is more likely to create than remedy injustice. Legislating discretion does not infuse it with legal strength or obligation. It moves the resettlement program further from the law.

Recommendation 4: Reinforce Joint Assistance Sponsorship and Formalize Pilot Projects

Although conceived as a "partnership comprised of government and nongovernment personnel,"²³ private sponsorship has played out more as a tug of war between the government and sponsors. The few exceptions of actual collaboration and cooperation have been with the JAS program and blended support projects. By its very conception, JAS reorients selection toward protection over ability to establish. This non-financial

²² Citizenship and Immigration Canada, "OP5: Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-Protected Persons Abroad Classes" Manual (2006) at 13.3; online: <<http://www.cic.gc.ca/manuals-guides/english/op/index.html>>.

²³ Employment and Immigration Canada, "Private Sponsorship of Refugee Program" (1992) 12 *Refuge* 2 at 3.

sponsorship support enables more special needs resettlement. Sponsoring groups frustrated by the high administrative costs associated with processing multiple applications to counter the high refusal rate,²⁴ could be further relieved by greater reliance on visa office-referrals through the JAS program.

Non-committal in design, pilot projects grant the government enhanced discretion in how it structures its actions. As has repeatedly been evidenced, discretion is inevitable with the selection of refugees for resettlement. Minimizing the scope of this discretion is key for the fair and efficient operation of the program. Blended pilot projects have tied ethnic support to protection needs thereby taking advantage of the support and integration benefits of family/community reunification without the disadvantages of shifting focus away from the groups with the greatest protection needs. If a pilot project is successful as the blended initiatives have been, it should be formalized and brought into Canada's standard approach to resettlement.

Blended initiatives and JAS enable private citizens to fulfill their sense of moral duty by providing assistance²⁵ without the state relinquishing an aspect of control or ultimate responsibility. In CCR's retort to the Summative Evaluation they point to the failure to acknowledge either sponsors' contributions to the JAS program or the Kosovar evacuation.²⁶ In highlighting these two programs, the NGO community is confirming its support for cooperative blended measures with the government.

²⁴ Thomas R. Denton, "Understanding Private Refugee Sponsorship in Manitoba" (2003) 4 *Journal of International Migration & Integration* 257 at 267-268.

²⁵ Donald Galloway, "Liberalism, Globalism, and Immigration" (1993) 18 *Queen's Law Journal* 266 at 295.

²⁶ Canadian Council for Refugees & Elected Sponsorship Agreement Holder Representatives, "Comments on Private Sponsorship Evaluation" (Montreal: Canadian Council for Refugees, 2007) at 7.

Recommendation 5: Connect Private Sponsorship and Government Assisted Resettlement

Two key issues face the private sponsorship program: the shifting of resettlement responsibility onto private sponsors and the movement of the program away from stranger sponsorship to a form of family reunification. It is a concern that in their willingness to bring in the greatest number of resettlement cases, sponsors unwittingly permit the government's maneuvers to have private sponsorship supplant government assisted resettlement. This concern is heightened if private sponsorship tends toward family reunification. Yet, if such sponsorship is curtailed, the counter risk is that the willingness of private sponsors to continue resettlement will diminish.

The issue of family reunification will be addressed separately in Recommendation 6. Here the recommendation addresses remedying the shifting of responsibility while maintaining incentives for private sponsors. As was a motivating force with the Indochinese resettlement, private sponsorship is at its best when a true complement to government resettlement. While tying the numbers 1:1, similar to what was done with the Indochinese matching program risks putting too much pressure on sponsors and ultimately reducing government numbers, my proposal is to link successful private sponsorship to future increases in government resettlement. For each private sponsorship beyond the lower numeric range, the government should promise an increase in its admissions of at least half that number the following year. This is preferable to current range increases that carry with them no actual guarantee of increased resettlement numbers.

For example in 2010, the lower range for private sponsorship was 3,300 and actual sponsorship reached 4,833.²⁷ This amounted to 1,533 sponsorships beyond the lower range. Under the proposed linkage, this would have required the government to increase its 2010 resettlement by at least 766 admissions in 2011. Sponsors would thus be motivated to continue and increase their resettlement activities but these increases could not come in exchange for continued government resettlement and would instead also ensure government increases in resettlement.

Such a linkage would also re-align private sponsors and the government in a shared pursuit that would bring with it additional co-operative benefits. For example, long-term sponsors are well connected to refugee communities in Canada who in turn maintain ties to their home communities. Sponsors tend to have a good pulse on protection needs. As such they are an untapped resource for the government. In terms of returning the program to its complementary origins, finding other means of complementarity such as sharing protection knowledge could be a helpful start.

Recommendation 6: Clarify Place of Family Reunification

The use of private sponsorship as a tool for family reunification has been one of the major challenges of the sponsorship program. While the government attempts to curtail this use and return the program to stranger based protection, it must be cognizant of the effect this could have on support for the program and the willingness of sponsors to continue their sponsorships. And, as the Sierra Leonean JAS demonstrated, family reunification and refugee protection can overlap and the former does not preclude the latter.

²⁷ Citizenship and Immigration Canada, “Annual Report to Parliament on Immigration” (Canada, 2011).

It is also clear, however, that family networks and social capital are beneficial to successful integration in a resettlement state. Both the U.S. and Australia have a specific family reunification stream within their resettlement programs. Rather than curtailing this mode of sponsorship, the recommendation is to separate it out as a separate form of private sponsorship resembling the split family provision in Australia's SHP visa. The stream could complement the general family class provisions in *IRPA* that permit the sponsorship of immediate family²⁸ by enabling sponsoring groups to assist with this process, but preferably it would reach more broadly than the family class limit of immediate family given the sponsorship support. By clarifying this stream of sponsorship and separating it from the sponsorship of refugees in need of protection, the reality of Canada's protection offerings would be made more clear. This recommendation speaks to the recognition that resettlement need not be limited to refugee protection and such a program would enable private citizens to provide assistance as they see fit; which is essentially the original premise of private sponsorship. While such a program would likely diminish some sponsorship support for refugees, it is not recommended that the family stream be connected to the government obligation in Recommendation 5. Thus the incentive for refugee protection by private sponsors would still exist.

Recommendation 7: Re-establish Some Level of IDP Protection

The repeal of the Source Country Class was a broad and capricious solution to a troubled program that required reform, not erasure. The dissertation has repeatedly asserted the importance of commitment to the refugee definition for the maintenance of refugee protection. Source country resettlement of IDPs, however, recognizes that offering

²⁸ *IRPA*, *supra* note 20, s.12.

protection before an international border is crossed alleviates the heightened dangers of such crossings and the reliance on human smugglers. Such programs thus align in reducing both refugee numbers and smuggling operations. These programs should not be as static as the previous unchanging list in Canada nor as open-ended and susceptible to political maneuvering as the American source country resettlement. Rather, just as the Canadian government is doing with the group processing methodology, particular source country groups could be identified for focused resettlement attention where necessary and feasible.

Recommendation 8: Encourage International Cooperation

Chapter 6 reviewed the double-edged sword of international alliances. On the one hand states can cooperate and coordinate their policies to increase efficiencies and reduce expenses. On the other hand, the risk is that states play off of each other to justify limits and reductions to their protection offerings. Cultivating the former and limiting the latter depends on political will. Following the recommendations above could be steps toward promoting positive emulation.

Chapter 2 offered specific insight on promoting international cooperation through joint protection criterion, unified referrals, and shared medical examination and processing. It illustrated UNHCR's progress on this front including upgrading to a Resettlement Service and revision of the Handbook to improve resettlement delivery. The chapter emphasized the need for state actions beyond the generalized statements of cooperation and consultation expressed in the MFU. Chapters 5 and 6 reviewed state efforts on this front through the use of the group processing methodology that have proven quite successful in terms of state receptiveness and integration success.

The recommendation here is simply for states and UNHCR to continue the pursuit for cooperation. While group processing has been successful, its success should not lead it to dominate resettlement initiatives as it risks reducing the global reach of resettlement through pinpointed selection of easily resettled groups rather than refugees most in need. Thus, as is the recurrent theme of the dissertation, group resettlement's success rests in its ability to complement other resettlement initiatives which can likewise benefit from international cooperation, particularly given the networks established through group resettlement.

Rather than states angling to reduce responsibility and limit refugee flows, international cooperation recognizes the global reach of the refugee crisis and the reality that it is in every state's interest to seek solutions.

Open Doors

*Dreamed I saw a building with a thousand floors,
A thousand windows and a thousand doors:
Not one of them was ours, my dear, not one of them was ours.*²⁹

In the end it must be remembered that refugee resettlement is a small piece in a complicated puzzle, a failing regime where protraction grows and hope wanes. Nor does resettlement alone offer settlement and solution. It is but the start and the chance of a life free from fear and full of possibility. This dissertation has shed new light on resettlement and brought it forward for examination on its own rather than as a secondary consideration or trade-off. It has shown resettlement to be complicated, malleable and easily manipulated. It is also an incredibly fragile door to protection that is too small to begin with and can easily close. At its best, it is a complement to the promise of asylum and recognition that not all refugees

²⁹ W.H. Auden, "Refugee Blues", *Collected Shorter Poems 1927-1957* (New York: Random House, 1967).

can integrate locally, repatriate or seek asylum on their own. At its worst, it is offered to obscure the cruel intent of restrictions to asylum access and used as a tool of selection often of those not most in need.

Law meanwhile is a powerful concept that instills a sense of authority and justice that belies its underlying nuances and layered reality. There is no legal obligation on a state to resettle refugees. Nothing about resettlement necessitates reference to refugees whatsoever. And yet law is there, present and powerful in resettlement. Resettlement cannot be fully understood without acknowledging this legal influence.

The dissertation has concerned itself with the selection of resettlement refugees. While touched upon, their arrival and integration into the resettlement state has been of secondary concern. Upon arrival, law's role in terms of the resettlement refugees' rights and access becomes clearer. Law here still differs however from the rights of in-Canada asylum seekers and recognized refugees and between sponsored refugees and government assisted refugees. A comparison of law's presence upon arrival would be a fitting starting point for future research building on the work of the dissertation.³⁰ With the shifting of political preference toward resettlement, research systematically separating these refugee groups would provide a documented response to the increasing tendency to conflate these protection categories and present them as interchangeable.

Seeking refuge is a journey that no-one pursues willingly or if there is any alternative option. Whether a refugee walks across a border, boards a boat, or flies across the world is

³⁰ Changes to the IFHP, *supra* note 14, have already triggered legal action. The Anglican Church of Canada's Diocese and Hospitality House have commenced a lawsuit arguing that as SAHs an aspect of their agreement with the Canadian government was that the IFHP would be covering supplemental health benefits to the sponsored refugees. Carol Sanders, "Health-Benefit Cut for Refugees Spurs Lawsuit" *Winnipeg Free Press* (23 June 2012) A12.

more a matter of circumstance than choice. It is not a marker of legitimacy or genuine fear. No-one willingly leaves her home, her family, her friends, her country for an uncertain and often dangerous journey to start with nothing in a different country with an unfamiliar language and culture where her skills, education and training may be worthless. In the continuation of Kafka's parable, the man from the country "forgets the other doorkeepers, and this first one seems to him the sole obstacle preventing access..."³¹ Resettlement is only the beginning of the journey. Refuge is not the golden ticket it is often considered to be by those casting suspicion and judgment from the comfort and familiarity of home. Both the law of asylum and resettlement arose out of a disgust with the horrors of humankind and an international desire to be and to do better and to protect those in need. Since the signing of the 1951 Convention, the horrors of the world, or at least our awareness of them, has only increased and refugee numbers continue to grow.³² The immensity of the problem should not lead to the barracking of borders and closing of doors. At law's border, asylum and resettlement should be doors that remain open.

³¹ Franz Kafka, "Before the Law" in Nahum N. Glazer, *Kafka: The Complete Stories and Parables*, Willa Muir & Edwin Muir (trans.), Quality Paperback Book Club (New York: Schocken Books Inc., 1971) at 3.

³² UNHCR reported that a record 800,000 people were forced to flee across borders in 2011 with more people becoming refugees than in any year since 2000. Antonio Guterres, the United Nation's High Commissioner for Refugees described the numbers as "suffering on an epic scale." UNHCR, "UNHCR Report Shows a Record 800,000 People Forced to Flee across Borders in 2011" *Press Release* (18 June 2012); online: <<http://www.unhcr.org/4fd85c2c6.html>>.

BIBLIOGRAPHY

Interviews & Correspondence

Adelman, Howard, telephone interview with author, 8 July 2010.

Augenfeld, Rivka, former JIAS employee, e-mail correspondence with author, 7 July 2010.

- Telephone interview with author, 9 July 2010.

- Interview with author, 23 August 2010.

Cohen, Sara, Political Counsellor, Canadian Embassy in Bogota, CCR delegation interview, 10 November 2010.

Dench, Janet, Executive Director, Canadian Council for Refugees, e-mail correspondence with author, 7 February 2011.

Friesen, Chris, Immigrant Services Society of British Columbia, Director of Settlement Services, interview with author, 26 February 2010.

Halliburton, Jackie, City of Winnipeg, Wellness & Diversity Coordinator, interview with author, 11 March 2011.

Jordan, Sharalyn, Rainbow Refugee Committee, e-mail correspondence with author, 1 April 2011.

Jones, Evelyn, Immigrant Settlement and Integration Services Refugee Sponsorship Coordinator, e-mail correspondence with author, 18 June 2012.

Kalita, Marta, Co-Manager, Settlement Services, Manitoba Interfaith Immigration Council, interview with author, 17 March 2010.

Molloy, Mike, Former Director of Refugee Policy Division, interview with author, 24 March 2011.

Peters, John, Manager Sponsorship Services, Manitoba Interfaith Immigration Council interview with author, 17 March 2010.

Pressé, Debra, Director of Refugee Resettlement at Citizenship and Immigration Canada, interview with author, 18 November 2009.

- E-mail correspondence with author, 28 August 2012.

Ravier, Guilhelm, Protection Coordinator, ICRC Colombia, CCR delegation interview, 11 November 2010.

Romero, Amanda, Proceso De Comunidades Negras De Colombia, CCR delegation interview, 12 November 2010.

Rumsey, Suzanne, Public Engagement Program Coordinator, The Primate's World Relief and Development Fund, The Anglican Church of Canada, e-mail correspondence with author, 13 December 2010.

International Documents

Asian-African Legal Consultative Organization, *Bangkok Principles on the Status and Treatment of Refugees* (31 December 1966).

Chinese Immigration Act 1923, 13-14 George V., c. 38.

Constitution of the International Refugee Organization, (15 December 1946).

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85

Convention concerning the Status of Refugees coming from Germany, 10 February 1938, 4461 LNTS 61.

Convention relating to the International Status of Refugees, 28 October 1933, 3663 LNTS.

Convention relating to the Status of Refugees, 1951, 189 UNTS 150 (entered into force 22 April 1954).

Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General (22 September 1989) A/44/523.

Declaration on Territorial Asylum, (14 December 1967) A/RES/2312(XXII).

European Refugee Fund, Decision No 573/2007/EC of the European Parliament and of the Council (23 May 2007) and COM(2009) final amending Decision No 573/2007EC 2009/0127(COD); online:

<<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0456:FIN:EN:PDF>.

League of Nations, Fourteenth Council Session, Annexes 245 and 245a.

"Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America" Mexico City (16 November 2004).

Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, (10 September 1969) 1001 UNTS 45.

Organization of American States, *American Convention on Human Rights*, "Pact of San Jose" Costa Rica, (22 November 1969).

Peace Treaty of Versailles, Covenant of the League of Nations.

Protocol relating to the Status of Refugees, 1967, 606 UNTS 267 (entered into force 4 October 1967).

Provisional Arrangement concerning the Status of Refugees coming from Germany, 4 July 1936, 3952 LNTS 77.

Question of Refugees, UNGA Res. (8/1), 12 February 1946.

Refugees and Stateless Persons, UNGA Res. 319(IV), 3 December 1949.

Resolution on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe (29 June 1967).

Statute of the Office of the United Nations High Commissioner for Refugees, UNGA A/RES/428(V), 14 December 1950.

Declaration on Territorial Asylum (14 December 1967) A/RES/2312(XXII)

United Nations Economic and Social Council, ECOSOC Resolution E/RES/672 (XXV) (30 April 1958).

United Nations General Assembly, UNGA Res 57/186 C.3 104, 18 December 2002.

United Nations General Assembly, UNGA A/RES/58/153, 22 December 2003.

Bills, Legislation, Regulations & Rules

An Act Respecting Immigration and Immigrants, S.C. 1896-1869, c.10.

An Act to Amend the Immigration Appeal Board Act, S.C. 1973-1974, c.27.

Balanced Refugee Reform Act, S.C. 2010, c. 8 (assented to 29 June 2010) (formerly Bill C-11).

Bill of Rights, S.C. 1960, c.44.

Bill C-4 Preventing Human Smugglers from Abusing Canada's Immigration System Act.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11.

Domestic Refugee Resettlement Reform and Modernization Act of 2011 (H.R. 1475 - 112th Congress).

Federal Courts Act, R.S.C. 1985, c.F-7.

Federal Court Immigration and Refugee Protection Rules, SOR/93-22.

Federal Courts Rules, SOR/98-106.

Indochinese Designated Class Regulations, SOR/78-931.

Immigration Act, S.C.1906, c.19.

Immigration Act, S.C.1909-1910, c.27.

Immigration Act, S.C. 1952, c.42.

Immigration Act, 1976, S.C. 1976-77, c.52.

Immigration Act, R.S.C. 1985, c.I-2.

Immigration and Nationality Act of 1952, Public Law No. 82-414, 66 Stat.163 (8 U.S.C. §§ 1101-1157) (1952).

Immigration and Refugee Protection Act, S.C. 2001 c. 27.

Immigration and Refugee Protection Regulations, SOR/2002-227.

Immigration Regulations, SOR/78-172.

Indochinese Designated Class Regulations, SOR/78-931.

Migration Act, 1958 (Cth).

Migration Legislation Amendment (Offshore Processing and Other Measures), Act 2011.

Migration Regulations, 1994, Schedule 2.

Political Prisoners and Oppressed Persons Designated Class Regulations, SOR/82-977.

Protecting Canada's Immigration System Act, S.C. 2012 c.17 (assented to 28 June 2012) (formerly Bill C-31).

Public Law No. 101-167, § 599D, 103 Stat. 1261 (1989), as amended (Lautenberg Amendment).

Refugee Act of 1980, Public Law No. 96-212, 94 Stat. 102 (8 U.S.C. §§ 1157-1159) (1980).

Refugee Protection Act of 2011 (S. 1202 - 112th Congress).

Self-Exiled Persons Designated Class Regulations, SOR/78-933.

Jurisprudence

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

Canada v. Ward, [1993] 2 S.C.R. 689.

Canadian Council for Refugees v. Canada, 2007 F.C. 1262, [2008] 3 F.C.R. 606 (F.C.);
rev'd 2008 F.C.A 299, [2009] 3 F.C.R. 136.

Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711.

Chiau v. Canada (Minister of Citizenship and Immigration), [2001] 2 F.C. 297 (2000)
(F.C.A.).

Ghirmatsion v. Canada (Minister Of Citizenship and Immigration) 2011 F.C. 519.

Ghirmatsion v. Canada (Minister Of Citizenship and Immigration) 2011 F.C. 773.

Ha v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 174.

Jallow v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 1452.

Kamara v. Canada (Minister of Citizenship and Immigration), 2008 F.C. 785.

Kidane v. Canada (Minister Of Citizenship and Immigration) 2011 F.C. 520.

Mohamed v. Canada (Minister of Citizenship and Immigration), [1999] F.C.J. No. 1230.

Muhazi v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 1670.

Oraha v. Canada (Minister of Citizenship and Immigration), [1997] F.C.J. No. 788.

Plaintiff M70/Plaintiff M106 v. Minister for Immigration [2011] HCA 32.

Qarizada v. Canada (Minister of Citizenship and Immigration), [2008] F.C.J. No. 1662.

Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177.

Smajic et al. v. Canada (Minister of Citizenship and Immigration), [1999] F.C.J. No. 1904.

Weldesilassie v. Canada (Minister Of Citizenship and Immigration) 2011 F.C. 521.

Woldesellassie v. Canada (Minister Of Citizenship and Immigration) 2011 F.C. 522.

Primary & Secondary Sources

Access to Information Request A-2011-02100/bm. Prepared by IR Statistics Unit.

Adams, Robert M., Letter to Joseph Kage, 9 January 1973 (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

Adelman, Howard, *Canada and the Indochinese Refugees* (Regina: L.A. Weigl Educational Associates, 1982).

- "Changes in Policy: Background on the Federal Government Decision to Alter Its Position with Respect to the Indochinese Refugees" in Howard Adelman (ed.) *The Indochinese Refugee Movement, The Canadian Experience* (Toronto: Operation Lifeline, 1979).
- "Private Sponsorship Consultation" (1991).
- "The Policy Maker and the Advocate: Case Studies in Refugee Policy" in Peter Harries-Jones (ed.), *Making Knowledge Count: Advocacy and Social Science* (Montreal: McGill-Queen's University Press, 1991) 54.
- & Elazar Barkman, *No Return, No Refuge: Rites and Rights in Minority Repatriation* (Columbia University Press, 2011).

Agreement to Establish The Winnipeg Private Refugee Sponsorship Assurance Program, Between the City of Winnipeg and Manitoba Refugee Sponsors Group.

Aiken, Sharryn J., "Of Gods and Monsters: National Security and Canadian Refugee Policy" (2001) 14 *Revue Québécoise de Droit International* 1.

Albert, Matthew, "Governance and Prima Facie Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx" (2010) 29 *Refugee Survey Quarterly* 61.

Alcalá, Pilar Riaño, Martha Colorado, Patricia Díaz & Amantina Osorio, *Forced Migration of Colombians: Colombia, Ecuador, Canada* (Colombia, Vancouver: Corporación Región (Spanish) School of Social Work, University of British Columbia (English), 2008).

Aleinikoff, Alexander, "State-centered Refugee Law: From Resettlement to Containment" in E.V. Daniel & J.R. Knudsen (eds.), *Mistrusting Refugees* (Berkeley: University of California Press, 1995).

Anker, Deborah, Joan Fitzpatrick & Andrew Shacknove, "Crisis and Cure: A Reply to Hathaway/Neve and Schuck" (1998) 11 *Harvard Human Rights Journal* 295.

Armstrong, Jane, "A New Set of Challenges" *The Globe and Mail* (17 October 2009) A15.

- "From Refugees to Pioneers" *The Globe and Mail* (18 July 2009) A1.
- "The Boat People's Big Gamble" *The Globe and Mail* (22 July 2000) A7.

- & John Ibbitson, "Seeking a safe haven, finding a closed door" *The Globe and Mail* (20 October 2009) A1.

"Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement"; online
<<http://www.minister.immi.gov.au/media/cb/2011/cb168739.htm>>.

Auden, W.H., "Refugee Blues", *Collected Shorter Poems 1927-1957* (New York: Random House, 1967).

Augenfeld, Rivka "Giving Refugees a Second Chance: A Personal Reflection on Refugee Sponsorship" (April 2004) 2 *JLAS Canada Newsletter*.

Baidya, Pratibedan, & Nini Gurung, "Resettlement Programme for Refugees in Nepal Passes 40,000 Mark" UNHCR (13 December 2010); online:
<<http://www.unhcr.org/refworld/docid/4d07286e2.html>>.

Bagambiire, Davies, *Canadian Immigration and Refugee Law* (Aurora, Ontario: Canada Law Book Inc., 1996).

Basavarajappa, K.G. & Bali Ram, "Historical Statistics of Canada" *Population* (Series A1-247); online: <<http://www.statcan.gc.ca/pub/11-516-x/sectiona/4147436-eng.htm#1>>.

Beck, Robert J., "Britian and the 1933 Refugee Convention: National or State Sovereignty?" (1999) 11 *International Journal or Refugee Law* 697.

Beddoes, Dick, "A Rush of Aid" *The Globe and Mail* (27 June 1979) P8.

Bell, Stewart, "Canada monitors suspicious vessel" *National Post* (16 July 2010) A1.

Bentham, Jeremy, *Of Laws in General* (1782) H.L.A. Hart (ed.) (London: Athlone Press, 1970).

Betts, Alexander, *The Politics, Human Rights and Security Implications of Protracted Refugee Situations* (Conference Report) 19-20 September 2006, St. Antony's College, University of Oxford (Oxford: OUP, 2006).

- & Jean-François Durieux, *Convention Plus as a Norm-Setting Exercise* (Oxford: OUP, 2007).

"Bhutan PM Coming: Nepal to Seek Dialogue on Refugees' Return" *The Katmandu Post* (11 April 2011).

Boas, Heidi H., "The New Face of America's Refugees: African Refugee Resettlement to the United States" (2006-2007) 21 *Georgetown Immigration Law Journal* 431.

Böhning, W.R. & M.L. Schloeter-Paredes, (eds.) *Aid in Place of Migration?: Selected Contributions to an ILO-UNHCR Meeting, A WEP Study* (Geneva: International Labour Office, 1994).

Bowen, Chris, Minister for Immigration and Citizenship, “Australia and Canada Unite against People Smuggling” *Media Release* (20 September 2010).

- “Bridging Visas for Boat Arrivals, Asylum Seeker Processing, Malaysia Arrangement” *Doorstop Interview, Sydney* (25 November 2011).

Brick, Kate, Amy Cushing-Savvi, Samia Elshafie, Alan Krill, Megan McGlynn Scanlon & Marianne Stone, “Refugee Resettlement in the United States: An Examination of Challenges and Proposed Solutions” (Columbia University School of International and Public Affairs, 2010).

Brunnée, Jutta & Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge; New York: Cambridge University Press, 2010).

Brunner, Lisa Ruth, Jennifer Hyndman & Chris Friesen, “Post-IRPA GARs from Aceh: An Analysis of Refugee Integration Five Years On” (2011) 8 *Our Diverse Cities* 106.

Brunner, Lisa Ruth, & Chris Friesen, “Changing Faces, Changing Neighbourhoods: Government-Assisted Refugee Resettlement Patterns in Metro Vancouver 2005-2009” (2011) 8 *Our Diverse Cities* 93.

Bruno, Andorra, “U.S. Refugee Resettlement Assistance” Congressional Research Service Report for Congress (4 January 2011).

Bureau of Population, Refugees and Migration, U.S. Department of State, “Refugee Resettlement in the United States” Fact Sheet (16 September 2010); online <<http://www.state.gov/g/prm/rls/147254.htm>>.

- “U.S. Refugee Admissions Program Reception and Placement Program Agencies FY 2010” Fact Sheet (20 August 2010); online: <<http://www.state.gov/g/prm/rls/146403.htm>>.

Canada Employment and Immigration Advisory Council, *Perspectives on Immigration in Canada*, Final Report (Ottawa: Ministry of Supply and Services Canada, 1988).

Canada Employment and Immigration Commission, Refugee Policy Division “Refugee and Humanitarian Plans” (1980).

Canada, High Commissioner’s Forum, “Resettlement and Convention Plus Initiatives” (Discussion Paper) FORUM/2003/02 (18 June 2003).

Canada-Québec Accord Relating to Immigration and Temporary Admission of Aliens, (5 February 1991); online:

<http://www.micc.gouv.qc.ca/publications/pdf/Accord_canada_quebec_immigration_anglais.pdf>.

Canada-U.S. Safe Third Country Agreement, 5 December 2002, online: <<http://www.cic.gc.ca/english/policy/safe-third.html>>.

Canadian Bar Association, National Citizenship and Immigration Law Section, “Bill C-11, *Balanced Refugee Reform Act*” (May 2010).

Canadian Council for Refugees, “Brief History of Canada's Response to Refugees” (2009); online: <<http://ccrweb.ca/canadarefugeeshistory5.htm>>.

- “Canada Refugee History”; online: <<http://ccrweb.ca/canadarefugeeshistory5.htm>>.

- “CCR Welcomes Opening of Door to More Privately Sponsored Refugees” *Media Release* (21 July 2010).

- “Changes to Healthcare for Refugee Claimants and Protected Persons Inhuman” *Media Release* (27 April 2012).

- “Comments on Notice of Intent - Changes to the Private Sponsorship of Refugees Program” (9 January 2012); online: <http://ccrweb.ca/files/g5_comments_jan2012.pdf>.

- “Comments on Proposed Elimination of Source Country Class” (18 April 2011); online: <<http://ccrweb.ca/en/comments-proposed-elimination-source-country-class>>.

- “Concerns with Refugee Decision-Making at Cairo” (31 January 2010); online: <<http://ccrweb.ca/files/CairoConcerns.pdf>>.

- “D) Proposal to End Source Country Class” 6 *Canadian Council for Refugees E-Chronicle* (8 April 2011); online: <http://ccrweb.ca/en/bulletin/11/04/08#_Toc290021136>.

- “Disturbing Upsurge in Rejection of Eritrean Refugees in Cairo by Canada” *Media Release* (30 November 2009).

- *First Annual Report Card on Canada's Refugee and Immigration Programs* (November 2003); online: <<http://www.web.net/~ccr/reportcard2003.htm>>.

- “Government information on refugee healthcare changes is misleading, may be fatal” *Media Release* (3 May 2012); online: <<http://ccrweb.ca/en/bulletin/12/05/03>>.

- “Mission Statement”; online: <<http://ccrweb.ca/en/about-ccr>>.

- “Nairobi: Protection Delayed, Protection Denied” (Montreal, 2009); online: <<http://www.ccrweb.ca/documents/Nairobireport.pdf>>.

- "The Private Sponsorship of Refugees Program: Current Challenges and Opportunities" (Montreal, April 2006).
- "The Refugee Appeal: Is No One Listening?" (31 March 2005).
- & Elected Sponsorship Agreement Holder Representatives, "Comments on Private Sponsorship Evaluation" (Montreal: Canadian Council for Refugees, 2007).

Canadian Press, "Ottawa Revamps Refugee Program, Increases 1980 Quota by 10,000" *The Globe and Mail* (3 April 1980) P1.

- "Onus Put on Public Groups, Ottawa Won't Sponsor More Refugees" *The Globe and Mail* (6 December 1979) P1.

Carasco, Emily F., Donald Galloway, Sharryn J. Aiken & Audrey Macklin, *Immigration and Refugee Law: Cases, Materials and Commentary* (Toronto: Emond Montgomery Publications, 2007).

Carens, Joseph "Immigration, Political Community, and the Transformation of Identity: Quebec's Immigration Policies in Critical Perspective" in Joseph Carens, (ed.) *Is Quebec Nationalism Just? Perspectives from Anglophone Canada* (Montreal: McGill-Queen's University Press, 1995) 20.

Carter, Tom, Chesya Polevychok, Anita Friesen & John Osborne, "Privately Sponsored Refugees Phase One Report" Prepared for Manitoba Labour and Immigration (Winnipeg: University of Winnipeg, 2008).

Casasola, Michael, "Current Trends and New Challenges for Canada's Resettlement Program" (2001) 19 *Refuge* 76.

Castles, Stephen "The Factors That Make and Unmake Migration Policies" (2004) 38 *International Migration Review* 852.

- "The Migration-Asylum Nexus and Regional Approaches" in Susan Kneebone & Felicity Rawlings-Sanei (eds.), *New Regionalism and Asylum Seekers* (Oxford: Berghahn Books, 2007) 25.

Chase, Steven, "Ottawa Helps Block Another Batch of Smuggled Sri Lankans" *The Globe and Mail* (14 June 2012).

Chimni, B.S., *The Geopolitics of Refugee Studies and the Practice of International Institutions: A View from the South* (Oxford: Refugee Studies Programme, 1998).

Citizens for Public Justice, "Group Processing of Refugees" Policy Notes (September 2006); online <<http://www.cpj.ca/files/docs/CPJ-Group-processing-of-Refugees.pdf>>.

Citizenship and Immigration Canada, "A Broader Vision: Immigration and Citizenship Plan 1995-2000" (Canada, 1994).

- "A Broader Vision: Immigration Plan (1996 Annual Report to Parliament)" (Canada: Minister of Supply and Services Canada, 1995).
- "Annual Reports to Parliament on Immigration" (2002-2011); online: <<http://www.cic.gc.ca/english/resources/publications/index.asp>>.
- "Appeal To Canadians To Sponsor The Kosovar Refugees" *News Release 99-24*, (10 May 1999); online: <<http://www.cic.gc.ca/english/press/99/9924-pre.html>>.
- "Backgrounder - Bill C-11: The Balanced Refugee Reform Act" (14 October 2010); online <<http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-06-29.asp>>.
- "Backgrounder - Group Resettlement to Canada: Karen Refugees in Mae La Oon Camp, Thailand" (2006); online: <<http://www.cic.gc.ca/English/department/media/backgrounders/2006/2006-06-20.asp#tphp%20idtp>>.
- "Backgrounder Karen Refugees"; online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2007/2007-02-09.asp>>.
- "Backgrounder - the Visa Requirement for Mexico" (13 July 2009); online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2009/2009-07-13.asp>>.
- "Backgrounder - the Visa Requirement for the Czech Republic" (13 July 2009); online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2009/2009-07-13a.asp>>.
- "Bhutanese Refugees"; online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2007/2007-05-22.asp>>.
- "Canada and Anglican Church Give 50 Refugee Families New Hope" *News Release* (13 February 2012).
- "Canada Announces Plan to Resettle More Bhutanese Refugees" *News Release* (20 June 2012); online: <<http://www.cic.gc.ca/english/department/media/releases/2012/2012-06-20a.asp>>.
- "Canada's Commitment to Iraqi Refugees Remains Strong" *News Release* (18 March 2011).
- "Canada's New Government to Accept 5,000 Bhutanese Refugees"; online: <<http://www.cic.gc.ca/english/department/media/releases/2007/2007-05-22.asp>>.

- “Canada’s Resettlement Programs” *News Release* (18 March 2011); online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2011/2011-03-18b.asp>>.
- “Canada to Welcome 2,000 More Karen Refugees”; online: <<http://www.cic.gc.ca/english/department/media/releases/2007/2007-02-09.asp>>.
- “Caplan Tables New Immigration and Refugee Protection Act” *News Release* 2000-09 (6 April 2000); online: <<http://www.cic.gc.ca/english/press/00/0009-pre.html>>.
- “Departmental Performance Report for the Period Ending March 31, 2002” (Canada: Minister of Public Works and Government Services, 2002).
- “Departmental Performance Report for the Period Ending March 31, 2003” (Canada: Minister of Public Works and Government Services, 2003).
- “Expanding Canada’s Refugee Resettlement Programs” *News Release* (29 March 2010).
- *Facts and Figures 2005* (2005); online: <<http://web.archive.org/web/20061231004748/www.cic.gc.ca/english/pub/facts2005/overview/01.html>>.
- *Facts and Figures 2009* “Canada – Permanent residents by category, 2005-2009”; online: <<http://www.cic.gc.ca/english/resources/statistics/facts2009/permanent/01.asp>>.
- *Facts and Figures 2010: Immigration overview – Permanent and temporary residents* “Canada – Permanent residents by category”; online: <<http://www.cic.gc.ca/english/resources/statistics/facts2010/permanent/02.asp>>.
- “Government of Canada and the Anglican Church of Canada Encourage Canadians to Sponsor Refugees” *News Release* (16 April 2009); online: <<http://www.cic.gc.ca/english/department/media/releases/2009/2009-04-16.asp>>.
- “Government of Canada to Help Gay and Lesbian Refugees Fleeing Persecution” *News Release* (24 March 2011).
- “Government to Refocus Resettlement Efforts” *News Release* (18 March 2011).
- *Guide to the Private Sponsorship of Refugees Program*, (Minister of Public Works and Government Services Canada, 2003); online: <<http://www.cic.gc.ca/english/resources/publications/ref-sponsor/index.asp>>.
- “Guide 6000 - Convention Refugees Abroad and Humanitarian-Protected Persons Abroad”; (2012); online: <<http://www.cic.gc.ca/english/information/applications/guides/E16000TOC.asp>>.

- “IP5 Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds” Manual (1 April 2011); online: <<http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf>>.
- “Notice requesting comments on a proposed regulatory amendment that will affect the Private Sponsorship of Refugees Program” 145:50 Canada Gazette (10 December 2011); online: <<http://www.canadagazette.gc.ca/rp-pr/p1/2011/2011-12-10/html/notice-avis-eng.html#d1111>>.
- “OP4: Processing of Applications under Section 25 of the IRPA” Manual (2008); online: <<http://www.cic.gc.ca/english/resources/manuals/op/index.asp>>.
- “OP5: Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-Protected Persons Abroad Classes” Manual (2006); online: <<http://www.cic.gc.ca/manuals-guides/english/op/index.html>>.
- “Planning Now for Canada’s Future - Introducing a Multi-Year Planning Process and the Immigration Plan for 2001 and 2002” (Canada, 2001).
- *PSRP: Results-Based Management and Accountability Framework (RMAF)*, Final Report, (November 2004).
- “Pursuing Canada’s Commitment to Immigration The Immigration Plan for 2002” (2001); online: <<http://www.cic.gc.ca/english/pub/anrep02.html>>.
- “Refugee Resettlement in Canada Information Bulletin No. 1 (Bhutan)”; online: <<http://www.cic.gc.ca/english/resources/publications/bhutanese.asp>>.
- “Refugee Resettlement in Canada Information Bulletin No.2” (2010); online: <<http://www.cic.gc.ca/English/resources/publications/bhutanese2.asp>>.
- “Refugee Resettlement in Canada Information Bulletin No.3” (2010); online: <<http://www.cic.gc.ca/English/resources/publications/bhutanese3.asp>>.
- “Refugee Resettlement in Canada Information Bulletin No. 4 (Bhutan)”; online: <<http://www.cic.gc.ca/english/resources/publications/bhutanese4.asp>>.
- “Regulations Amending the Immigration and Refugee Protection Regulations and Regulatory Impact Analysis Statement.” 145:2 Canada Gazette (19 March 2011); online: <<http://www.gazette.gc.ca/rp-pr/p1/2011/2011-03-19/html/reg3-eng.html>>.
- “Regulations Amending the Immigration and Refugee Protection Regulations” 146:23 Canada Gazette (9 June 2012); online: <<http://www.gazette.gc.ca/rp-pr/p1/2012/2012-06-09/html/reg1-eng.html>>.
- “Repeal of the Source Country Class of Humanitarian-Protected Persons Abroad” Operational Bulletin 346 (7 October 2011).

- “Resettlement Assistance Program”; online:
<<http://www.cic.gc.ca/english/refugees/outside/resettle-assist.asp>>.
- “Resettling Bhutanese Refugees - Update on Canada’s Commitment” (2010); online:
<<http://www.cic.gc.ca/English/refugees/outside/bhutanese.asp#tph%20idtp>>.
- *Summative Evaluation of the Private Sponsorship of Refugees Program* (2007);
online: <<http://www.cic.gc.ca/english/resources/evaluation/psrp/psrp-summary.asp#summary>>.
- “Undertaking/Application to Sponsor - Sponsorship Agreement Holders and Constituent Groups” (IMM 5439 (10-2009) E).
- “Undertaking/Application to Sponsor - Groups of Five” (IMM 5373 (10-2009) E).

Clark, Campbell, “Minister Calls for Overhaul of Canada’s Refugee System” *The Globe and Mail* (15 July 2009) A1.

Coles, Gervase, “The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Inquiry” in A. Nash (ed.), *Human Rights and the Protection of Refugees Under International Law* (Halifax: Institute for Research on Public Policy, 1988) 195.

Corbett, David, *Canada’s Immigration Policy: A Critique* (Toronto: University of Toronto Press, 1957).

Creskey, Jim, “Jason Kenney’s Troubling Refugee Legacy” *Embassy* (30 March 2011).

Crisp, Jeff, “A State of Insecurity: The Political Economy of Violence in Refugee-Populated Areas of Kenya” (*New Issues in Refugee Research* (Evaluation and Policy Analysis Unit, UNHCR, 1999).

- *No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa* (Geneva: UNHCR, 2003).

Crock, Mary, Ben Saul & Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Sydney: Federation Press, 2006).

Cronin, Katherine “A Culture of Control: An Overview of Immigration Policy-Making” in James Jupp & Marie Kabala (eds.) *The Politics of Australian Immigration* (Australian Government Public Service, 1993) 83.

Dauvergne, Catherine, “Evaluating Canada’s New Immigration and Refugee Protection Act in Its Global Context” (2003) 41 *Alberta Law Review* 725.

- *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005).

- *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008).

- , Leonora C. Angeles & Agnes Huang, *Gendering Canada's Refugee Process* (Ottawa: Status of Women Canada, 2006).

Davies, Margaret, *Asking the Law Question* (Sydney: Law Book Co. 2nd ed., 2002).

Davis, Susan, Roslyn Kunin & Robert Trempe, "Not Just Numbers: A Canadian Framework for Future Immigration" (Ottawa: Minister of Public Works and Government Services Canada, 1997).

Dench, Janet, *A Hundred Years of Immigration to Canada 1900-1999: A Chronology Focusing on Refugees and Discrimination*, (2000) Canadian Council for Refugees; online: <<http://ccrweb.ca/en/hundred-years-immigration-canada-1900-1999>>.

Denton, Thomas R. "Relational Migration and Refugee Policy" Conference paper presented at 2011 National Metropolis Conference, Vancouver, British Columbia (25 March 2001).

- "Understanding Private Refugee Sponsorship in Manitoba" (2003) 4 *Journal of International Migration & Integration* 257.

Department of Immigration and Citizenship (Australia), "Annual Report 2010-11" (2011); online: <<http://www.immi.gov.au/about/reports/annual/2010-11/>>.

- *Fact Sheet 60: Australia's Refugee and Humanitarian Program*, Commonwealth of Australia (2009); online: <<http://www.immi.gov.au/media/fact-sheets/60refugee.htm>>.

- Fact Sheet "No to People Smuggling – No Advantage"; online: <http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/no-people-smuggling/_pdf/fact-sheet-english.pdf>.

- "Refugee and Humanitarian Entry to Australia"; online: <<http://www.immi.gov.au/visas/humanitarian/offshore/immediate-family.htm>>.

- "Refugee and Humanitarian Issues: Australia's Response" (June 2009); online: <<http://www.immi.gov.au/media/publications/refugee/ref-hum-issues/ref-hum-issues-june09.htm>>.

Department of Immigration and Multicultural and Indigenous Affairs, *Population Flows: Immigration Aspects 2002-03*. Commonwealth of Australia (2004); online: <<http://www.immi.gov.au/media/publications/statistics/popflows2002-3/>>.

Department of Manpower and Immigration, "Annual Report - Department of Manpower and Immigration Canada" (Ottawa: Department of Manpower and Immigration, 1969).

- "A Report of the Canadian Immigration and Population Study" (Ottawa: Information Canada, 1974).

Dimano, Rosie "Refugee Burden Is Too Heavy, Private Sponsorship Head Says" *The Globe and Mail* (25 July 1979) P4.

Dirks, Gerald E., "A Policy within a Policy: The Identification and Admission of Refugees to Canada" (1984) 17 *Canadian Journal of Political Science* 279.

- *Canada's Refugee Policy: Indifference or Opportunism* (Montreal and London: McGill-Queen's University Press, 1977).

- *Controversy and Complexity: Canadian Immigration Policy During the 1980s* (Montreal and Kingston: McGill-Queen's University Press, 1995).

Douzinias, Costas, *Justice Miscarried: Ethics, Aesthetics, and the Law* (Hemel Hempstead: Harvester Wheatsheaf, 1994).

-, Shaun McVeigh, and Ronnie Warrington, "The Alta(e)rs of Law" (1994) 9:4 *Theory Culture and Society* 193.

- & Lynda Read, (eds.) *The Law of the Image* (Chicago: University of Chicago Press, 1999).

Durieux, Jean-Francois, "The Role of International Law: Convention Plus" (2005) 24 *Refugee Survey Quarterly* 89.

Dworkin, Ronald, *Law's Empire* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1986).

Eby, Jessica, Erika Iverson, Jenifer Smyers & Erol Kekic, "The Faith Community's Role in Refugee Resettlement in the United States" (2011) 24 *Journal of Refugee Studies* 586.

Editorial "On the lookout for Tigers" *The Globe and Mail* (12 August 2010) A16.

Elayadathusseril, Gloria, "Immigrant Intake Will Remain at 250,000 Says Minister Kenney" *canadianimmigrant.ca* (1 November 2011).

Employment and Immigration Canada, "Annual Report to Parliament on Future Immigration Levels" (Canada, 1984).

- "Annual Report to Parliament on Future Immigration Levels" (Canada, 1986).

- "Annual Report to Parliament on Future Immigration Levels" (Canada, 1987).

- “Annual Report to Parliament: Immigration Plan for 1991-1995” (Canada, 1990).
- “Annual Report to Parliament: Immigration Plan for 1991-1995 Year Two” (Canada, 1991).
- Policy and Program Development Immigration “Future Immigration Levels: 1988 Consultation Issues” (1988).
- *Indochinese Refugees: The Canadian Response, 1979 and 1980* (Ottawa: Minister of Supply and Services Canada, 1982).
- “Private Sponsorship of Refugee Program” (1992) 12 *Refuge* 2.

Epstein, Lee & Gary King, “The Rules of Inference” (2002) 69 *The University of Chicago Law Review* 133.

Erlanger, Howard, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, “New Legal Realism Symposium: Is It Time For A New Legal Realism?: Foreword: Is It Time For A New Legal Realism?” (2005) *Wisconsin Law Review*.

Federal Court, “Immigration – Certified Questions”; online: <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Certified_Questions>.

- “Statistics”; online: < http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics>.

Feller, Erika, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come” (2006) 18 *International Journal of Refugee Law* 509.

- “The Evolution of the International Refugee Protection Regime” (2001) 5 *Washington University Journal of Law and Policy* 129.

- “Rule of Law 60 Years On” Statement at Sixty-first Session of the Executive Committee of the High Commissioner’s Programme Agenda item 5(a) (6 October 2010).

-, Volker Türk & Frances Nicholson, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003).

Foster, Michelle, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge ; New York: Cambridge University Press, 2007).

Fredriksson, John, “Reinvigorating Resettlement: Changing Realities Demand Changed Approaches” (2002) 13 *Forced Migration Review* 28.

Frelick, Bill, "In-Country Refugee Processing of Haitians: The Case Against" (2003) 21 *Refugee* 66.

- "Preventive Protection, and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia" (1992) 4 *International Journal of Refugee Law* 439.

Gallagher, Dennis, "The Evolution of the International Refugee System" (1989) 23 *The International Migration Review* 579.

Galloway, Donald "Liberalism, Globalism, and Immigration" (1993) 18 *Queen's Law Journal* 266.

Gearey, Adam, "Death and the Law Between James Joyce and Pierre Legendre" in *Courting Death: The Law of Mortality*, Desmond Manderson (ed.) (Pluto Press, 1999) 194.

Gibney, Matthew, "Forced Migration, Engineered Regionalism and Justice between States" in Susan Kneebone & Felicity Rawlings-Sanei (eds.), *New Regionalism and Asylum Seekers* (Oxford: Berghahn Books, 2007) 57.

- *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004).

Gillard, Julia, *Moving Australia forward*, speech to the Lowy Institute, (6 July 2010).

Gillard, Julia, Prime Minister of Australia & Minister for Immigration and Citizenship Chris Bowen, "Australia and Malaysia Sign Transfer Deal" *Joint Media Release* (25 July 2011).

- Transcript of Joint Press Conference, Canberra, (13 October 2011); online: <<http://www.pm.gov.au/press-office/transcript-joint-press-conference-canberra-17>>.

Goodrich, Peter, *Oedipus Lex: Psychoanalysis, Law, History* (Berkeley: University of California Press, 1995).

Glavin, Terry, "Why Such Loopiness over a Few Rusty Boats?" *The Globe and Mail* (10 September 1999) A11.

Goodwin-Gill, Guy & Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd ed., 2007).

Gotlieb, Alan, "Canada and the Refugee Question in International Law" (1975) 13 *Canadian Yearbook of International Law* 3.

Government of Canada, "Country Chapter: CANADA" in UNHCR, *Resettlement Handbook* (November 2004); online: <<http://www.unhcr.org/protect/3d4545984.html>> .

- *Canada Country Chapter* in UNHCR, “Resettlement Handbook” (July 2011); online: <<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3c5e55594&query=Canad>>.
- Canada 2012 Federal Budget (29 March 2012); online: <www.budget.gc.ca>.
- “Global Consultations on International Protection, Strengthening and Expanding Resettlement Today: Challenges and Opportunities” 4th Mtg., EC/GC/02/7 (25 April 2002).
- Global Special Humanitarian Visa (subclass 202); online: <<http://www.immi.gov.au/visas/humanitarian/offshore/202/>>.
- Grahl-Madsen, Atle, *The Status of Refugees in International Law* (Leyden: A.W. Sijthoff, 1966).
- Green, Alan G. & David Green, “The Goals of Canada’s Immigration Policy: A Historical Perspective” (2004) 13:1 *Canadian Journal of Urban Research* 102.
- Greenaway, Norma, “Tories tackle refugee backlog while opening door to those in camps overseas” *Canwest News Service* (29 March 2010).
- Haddad, Emma, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008).
- Haines, D.W. *Safe Haven?: A History of Refugees in America* (Kumarian Press, 2010).
- Haldar, Piyel, “In and Out of Court: Of Topographies of Law and the Architecture of Court Buildings” 7 *International Journal for the Semiotics of Law* 185.
- Hardina, Alexandra, “Working Across the Aisle to Welcome Refugees” *Voices from the Field - The IRC Blog* (12 April 2011); online: <<http://www.rescue.org/blog/working-across-aisle-welcome-refugees>>.
- Hart, H.L.A., *The Concept of Law*, 2nd ed., P. Bulloch & J. Raz (eds.) (Oxford: Clarendon Press, 1994).
- Hathaway, James, “Reconceiving Refugee Law as Human Rights Protection” (1991) 4 *Journal of Refugee Studies* 113.
- “Selective Concern: An Overview of Refugee Law in Canada” (1987-1988) 33 *McGill Law Journal* 676.
- “The Evolution of Refugee Status in International Law: 1920-1950” (1984) 33 *International and Comparative Law Quarterly* 348.
- *The Law of Refugee Status* (Toronto: Butterworths, 1991).

- *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005).

- & Alexander Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection" (1997) 10 *Harvard Human Rights Journal* 115.

Hawkins, Freda, *Canada and Immigration: Public Policy and Public Concern* (Montreal: McGill-Queen's University Press, 1972).

- *Critical Years in Immigration: Canada and Australia Compared*, 2nd ed. (Montreal: McGill-Queen's University Press, 1991).

Hibbitts, Bernard, "Last Writes? Reassessing the Law Review in the Age of Cyberspace" Version 1.2 created 10 March 1997 (Version 1.0 created February 5, 1996 printed in (1996) 71 *New York University Law Review* 615); online: <<http://faculty.law.pitt.edu/hibbitts/lastrev.htm>>.

High Commissioner's Forum, "Multilateral Framework of Understandings on Resettlement" FORUM/2004/6, 16 September 2004; online: <<http://www.unhcr.org/doclist/protect/408d17494.html>>.

Hillyard, Paddy, "Law's Empire: Socio-legal Empirical Research in the Twenty-first Century" (2007) 34 *Journal of Law & Society* 266.

Holten, Robert & Michael Lanphier, "Public Opinion, Immigration and Refugees" in Howard Adelman, Allan Borowski, Meyer Burnstein & Lois Foster (eds.) *Immigration and Refugee Policy: Australia and Canada Compared* (Toronto, Buffalo: University of Toronto Press, 1994) Volume 1 of 3.

Human Rights First, "Support the Refugee Protection Act of 2011 (S.1202/H.R.2185)" (2011).

Human Rights Watch, "By Invitation Only: Australian Asylum Policy" (2002) 14:10(C) *Human Rights Watch*; online: <<http://hrw.org/reports/2002/australia/>>.

Humphreys, David, "Two Ministers Condemn Vietnam, Canada Will Take 3,000 More Asian Refugees" *The Globe and Mail* (22 June 1979) P9.

Hyndman, Jennifer, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis; London: University of Minnesota Press, 2000).

- "Second-Class Immigrants or First Class Protection" in Pieter Bevelander, Mirjam Hagström & Sofia Rönnqvist (eds.), *Resettled and Included? The Employment Integration of Resettled Refugees in Sweden* (Malmö University, MIM, Malmö: Holmbergs, 2009) 247.

- & James McLean, "Settling Like a State: Acehese Refugees in Vancouver" (2006) 19:3 *Journal of Refugee Studies* 345.

- & Bo Viktor Nylund, "UNHCR and the Status of Prima Facie Refugees in Kenya" (1998) 10 *International Journal of Refugee Law* 21.

Ibbitson, John, Steven Chase & Marten Youssef "Ottawa plans new rules for boat migrants" *The Globe and Mail* (13 August 2010) A1.

Illingworth, Robert, "Durable Solutions: Refugee Status Determination and the Framework of International Protection" in Susan Kneebone, *The Refugees Convention 50 Years On: Globalisation and International Law* (Aldershot: Ashgate, 2003) 91.

Immigrant Settlement and Integration Services, *ISIS Annual Report 2012*; online: <http://www.isisns.ca/wpcontent/uploads/2010/06/isis_annualreport_2012_WEB.pdf>.

Informal Record, "Meeting of the Convention Plus Core Group on the Strategic Use of Resettlement" Geneva, FORUM/CG/RES/05, 24 November 2003; online: <<http://www.unhcr.org/doclist/protect/408d17494.html>>.

Integrated Regional Information Networks "Nepal: Repatriation or Resettlement for Bhutanese Refugees?" (22 June 2009); online: <<http://www.unhcr.org/refworld/docid/4a433cf5c.html>>.

Internal Displacement Monitoring Centre, "Global Overview 2011: People Internally Displaced by Conflict and Violence" Norwegian Refugee Council (April 2012); online: <<http://www.internal-displacement.org/publications/global-overview>>.

Inzunza, Ricardo, "The Refugee Act of 1980 Ten Years After - Still the Way to Go" (1990) 2 *International Journal of Refugee Law* 413.

Jackson, Ivor C. "Dr. Fridtjof Nansen a Pioneer in the International Protection of Refugees" (2003) 22 *Refugee Survey Quarterly* 7.

Janzen, William, "The 1979 MCC Canada Master Agreement for the Sponsorship of Refugees in Historical Perspective" (2006) 24 *Journal of Mennonite Studies* 211.

Jewish Immigrant Aid Society, "1972 in Review: Highlights - JIAS Activities and Pending Issues" (1972) (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

"Joint Statements by the Prime Ministers of Australia and Malaysia on a Regional Cooperation Framework" *Media Release* (7 May 2011).

Joppke, Christian, "Exclusion in the Liberal State: The Case of Immigration and Citizenship Policy" (2005) 8:1 *European Journal of Social Theory* 43.

Jupp, James, "Australia's Refugee and Humanitarian Policies" in Christian Reus-Smit (ed.) *Refugees and the Myth of the Borderless World* (Canberra: Department of International Relations, Australia National University, 2002).

Kafka, Franz, "Before the Law" in Nahum N. Glazer, *Kafka: The Complete Stories and Parables*, Willa Muir & Edwin Muir (trans.), Quality Paperback Book Club (New York: Schocken Books Inc., 1971).

Kage, Joseph, "Re-Appraising the Canadian Immigration Policy: An Analysis and Comments on the White Paper on Immigration" (Montreal, January 1967) (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

- "Stepping Stones Towards the New Canadian Immigration Act" in Jewish Immigrant Aid Society Information Bulletin No. 347 (20 November 1973) (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

- Letter to R.B. Curry, 29 May 1969 (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

- Letter to Robert M. Adams, 18 December 1972 (retrieved from the Canadian Jewish Congress Charities Committee National Archives).

Kaplan, Robert "A Critique of Government Policy on Refugees" in Howard Adelman (ed.) *The Indochinese Refugee Movement, The Canadian Experience* (Toronto: Operation Lifeline, 1979) 17.

Karlsen, Elbritt, "Refugee Resettlement to Australia: What Are the Facts" Background Note, Law and Bills Digest Section, Department of Parliamentary Services (2011).

- , Janet Philips & Elsa Koeth, "Seeking Asylum: Australia's Humanitarian Program" Background Note, Law and Bills Digest Section; Social Policy Section, Department of Parliamentary Services (21 January 2011).

Kelley, Ninette & Michael J. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998).

Kelsen, Hans, *Pure Theory of Law*, M. Knight (trans.) (Berkeley: University of California Press, 1967).

Kennedy, Edward M. "Refugee Act of 1980" (1981) 15 *International Migration Review* 141.

Kenney, Jason, "Kenney Responds to Immigration Story" Letter to the Editor, *X-tra* (4 February 2012).

Kenny, Paul, & Kate Lockwood-Kenny, "A Mixed Blessing: Karen Resettlement to the United States" (2011) 24 *Journal of Refugee Studies* 217.

Kerwin, Donald, "The Faltering US Refugee Protection System: Legal and Policy Responses to Refugees, Asylum-Seekers, and Others in Need of Protection" (2012) 31 *Refugee Survey Quarterly* 1.

Keung, Nicholas, "Ottawa Eyes Axing 'Life-Saving' Asylum Program" *The Toronto Star* (12 April 2011).

- "Tough Approach to Refugees Criticized; Australian Coalition Urges Ottawa to Rethink New Anti-Smuggling Bill" *The Toronto Star* (5 January 2012) A3.

Kneebone, Susan, "The Refugee-Trafficking Nexus: Making (Good) the Connections" (2010) 29:1 *Refugee Survey Quarterly* 137.

Kruchak, Matthew, "Family's Journey to Canada Started Years Ago" *The Globe and Mail* (18 July 2009) A5.

Kruger, Erin, Marlene Mulder & Bojan Korenic "Canada after 11 September: Security Measures and 'Preferred' Immigrants" (2004) 15:4 *Mediterranean Quarterly* 72.

Kumin, Judith, "In-Country 'Refugee' Processing Arrangements: A Humanitarian Alternative?" in Michael Jandl (ed.), *Innovative Concepts for Alternative Migration Policies* (Amsterdam: Amsterdam University Press, 2007) 79.

- "New Approaches to Asylum: Reconciling Individual Rights and State Interests" (2004) 22 *Refuge* 3.

Kurzban, Ira J., "A Critical Analysis of Refugee Law" (1981-1982) 36 *Miami Law Review* 865.

Labman, Shauna, "CCR Visit Finds Colombia Not Safe for Some" (2010) 69 *Refugee Update* 5.

- "Looking Back, Moving Forward: The History and Future of Refugee Protection" (2010) *Chicago-Kent Journal of International and Comparative Law*; online: <<http://www.kentlaw.edu/jicl/spring2010.html>>.

- "Queue the Rhetoric: Refugees, Resettlement and Reform" (2011) 62 *University of New Brunswick Law Journal* 55.

- "Refocus Concern for Refugees" *Winnipeg Free Press* (12 August 2009) A11.

- "The Invisibles: An Examination of Refugee Resettlement" LL.M. Thesis, UBC Faculty of Law (Vancouver: University of British Columbia, 2007).

Lamba, N.K. & H. Krahn, "Social Capital and Refugee Resettlement: The Social Networks of Refugees in Canada" (2003) 4 *Journal of International Migration and Integration* 335.

Lanphier, C.M. "Refugee Resettlement: Models in Action" (1983) 17:1 *International Migration Review* 4.

Loescher, Gil, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (New York; Oxford: Oxford University Press, 1993).

- & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* (New York, London: Free Press; Collier Macmillan, 1986).

- & James Milner, *Protracted Refugee Situations: Domestic and International Security Implications* (Abingdon; New York: Routledge for the International Institute of Strategic Studies, 2005).

- *Protracted Refugee Situations: Political, Human Rights and Security Implications* (Tokyo: United Nations University Press, 2008).

- "Protection and Humanitarian Action in the Post-Cold War Era" in Aristide R. Zolberg & Peter Benda (eds.), *Global Migrants, Global Refugees: Problems and Solutions* (New York, Oxford: Berghahn Books, 2001).

- "UNHCR at Fifty: Refugee Protection and World Politics" in Niklaus Steiner, Mark Gibney & Gil Loescher (eds.), *Problems of Protection: The UNHCR, Refugees and Human Rights* (New York, London: Routledge, 2003) 3.

Lowes, Sasha, "The Legality of Extraterritorial Processing of Asylum Claims: The Judgment of the High Court of Australia in the 'Malaysian Solution' Case" (2012) 12 *Human Rights Law Review* 168.

Lucy, William, *Understanding and Explaining Adjudication* (Oxford, U.K.; New York: Oxford University Press, 1999).

Macklin, Audrey, "Disappearing Refugees: Reflections of the Canada-U.S. Safe Third Country Agreement" (2005) 36 *Columbia Human Rights Law Review* 365.

MacNeil, William, "The Monstrous Body of Law: Wollstonecraft v. Shelley" (1999) 12 *Australian Feminist Law Journal* 21.

- "John Austin or Jane Austen?" *The Province of Jurisprudence Determined in Pride and Prejudice* (1998) 4:2 *Law Text Culture* 1.

Madokoro, Laura "Remembering Uganda" ActiveHistory.ca; online: <<http://activehistory.ca/2012/03/remembering-uganda/>>.

- "Who gets to decide?" *The Globe and Mail* (1 April 2008) A13.

Maley, William, "Receiving Afghanistan's Asylum Seekers: Australia, the Tampa 'Crisis' and Refugee Protection" (2002) 13 *Forced Migration Review* 19.

Manderson, Desmond, "Apocryphal Jurisprudence" (2001) 23 *Studies in Law, Politics and Society* 81; online: <<http://www.mcgill.ca/files/crclaw-discourse/manderson-apocryphal.pdf>>.

- "Desert Island Disks: Ten Reveries on Inter-Disciplinary Pedagogy" (2008) 2 *Public Space: The Journal of Law and Social Justice*.

Manitoba Interfaith Immigration Council, "2010 Annual Report" Summarized Financial Statements (31 March 2010).

Marmor, Andrei, "The Nature of Law" in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (2011).

Marrocco, Frank N. & Henry M. Goslett, *The 2002 Annotated Immigration Act of Canada* (Toronto: Carswell, 2001).

Martin, David A., *The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement* (Washington, DC: Migration Policy Institute, 2005).

Martin, P.L. "Reducing Emigration Pressure: What Role Can Foreign Aid Play?" in W.R. Böhning & M.L. Schloeter-Paredes, (eds.), *Aid in Place of Migration?: Selected Contributions to an ILO-UNHCR Meeting, A WEP Study* (Geneva: International Labour Office, 1994) 241.

Martinez, Francisco Rico & Canadian Council for Refugees, "The Future of Colombian Refugees in Canada: Are We Being Equitable?" (Canadian Council for Refugees, 2011)

Matas, David, "Political Prisoners and Oppressed Persons Class and the Soviet Union" (1991) 10 *Refuge* 3.

- "Racism in Canadian Immigration Policy" (1985) 5:2 *Refuge* 8.

McAdam, Jane, *Complementary Protection in International Refugee Law* (Oxford: Oxford University Press, 2007).

McDonald-Wilmsen, Brooke, Sandra M. Gifford, Kim Webster, John Wiseman & Sue Casey, "Resettling Refugees in Rural and Regional Australia: Learning from Recent Policy and Program Initiatives" (2009) 68 *Australian Journal of Public Administration* 97.

McLean, James, Chris Friesen, & Jennifer Hyndman, "The First 365 Days: Acehnese Refugees in Vancouver, British Columbia" (2006) RIIM Working Paper Series 06-07, Vancouver/Burnaby, BC Centre for Excellence.

Meissner, Doris M., "The Refugee Act of 1980: What Have We Learned?" 6 *Revue Européenne de Migrations Internationales* 129.

Menadue, John, Arja Keski-Nummi & Kate Gauthier, "A New Approach. Breaking the Stalemate on Refugees and Asylum Seekers" (Centre for Policy Development, 2011).

Milner, James, "Refugees and the Regional Dynamics of Peacebuilding" (2009) 28 *Refugee Survey Quarterly* 13.

Mnookin, Robert, & Lewis Kornhauser, "Bargaining in the Shadow or the Law: The Case of Divorce" (1978-1979) 88 *Yale Law Journal* 950.

Musalo, Karen, Jennifer Moore & Richard A. Boswell, *Refugee Law and Policy: A Comparative and International Approach* (Durham, N.C.: Carolina Academic Press, 3rd ed., 2007).

Nansen, Fridtjof, "Russin Refugees: Report to the Council of July 20th, 1922 by Dr. Nansen" Official Journal (August 1922).

National Security Council; online: <<http://www.whitehouse.gov/administration/eop/nsc>>.

Neuwirth, Gertrude, & J.R. Rogge, "Canada and the Indochinese Refugees" in Supang Chantavanich and E. Bruce Reynolds (eds.), *Indochinese Refugees: Asylum and Resettlement* (Bangkok: Institute of Asian Studies, Chulalongkorn University, 1988) 249.

Noll, Gregor, "Protection in a Spirit of Solidarity" in Rosemary Byrne, Gregor Noll & Jens Vedsted-Hansen (eds.), *New Asylum Countries?: Migration Control and Refugee Protection in an Enlarged European Union* (The Hague; London: Kluwer Law International, 2002) 305.

- & Joanne van Selm, "Rediscovering Resettlement: A Transatlantic Comparison of Refugee Protection" (2003) 3 *MPI Insight*.

O'Brien, Steven, "It's a Long Way from Myanmar for Karen Refugees" *UNHCR News Stories* (28 January 2008).

Office of Admissions, Bureau of Population, Refugees, and Migration; U.S. Department of State, "Fiscal Year 2012 as of 31 Mar 2012" (Prepared by Refugee Processing Center, 2012).

Office of the Minister of Manpower and Immigration, "Statement by the Honourable Robert Andras, Minister of Manpower and Immigration" *Release* (17 Septemeber 1973).

Office of the United Nations High Commissioner for Human Rights, "International Law Instruments Relating to Human Rights" online: <<http://www2.ohchr.org/english/law/>>.

Patrick, Erin, "The US Refugee Resettlement Program" *Migration Information Source* (Migration Policy Institute: 2004).

Powers, Samantha, "*A Problem from Hell*" *America and the Age of Genocide* (New York: Harper Collins, 2002).

Pressé, Debra, 40th Parliament, 3rd Session, Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, Evidence, (9 December 2010).

- & Jessie Thomson, "The Resettlement Challenge: Integration of Refugees from Protracted Refugee Situations" (2007) 24 *Refugee* 48.

Public Safety Canada, "Canada's Generous Program for Refugee Resettlement Is Undermined by Human Smugglers Who Abuse Canada's Immigration System" *News Release* (21 October 2010), online:
<<http://www.publicsafety.gc.ca/media/nr/2010/nr20101021-6-eng.aspx>>.

Rawls, John, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 2005).

Raz, Joseph, *The Authority of Law* (Oxford: Clarendon Press, 1979).

Refugee Council of Australia, "Annual Submission on Refugee Program"; online:
<<http://www.refugeecouncil.org.au/resources/consultations.html>>.

- "Australia's Refugee and Humanitarian Program: Community Views on Current Challenges and Future Directions." (2009) 2009 Intake Submission.

- "Australia's Refugee and Humanitarian Program: Community Views on Current Challenges and Future Directions" (2010) 2010 Intake Submission.

- "Australia's Refugee and Humanitarian Program 2011-12: Community Views on Current Challenges and Future Directions" (2011) 2011 Intake Submission.

- "Australian Statistics"; online: <<http://www.refugeecouncil.org.au/arp/stats-02.html>>.

- "Humanitarian Family Reunion: The Building Block of Good Settlement" (April 2012); online: <<http://www.refugeecouncil.org.au/r/rpt/2012-Family.pdf>>.

- *The Size and Composition of the 2000-2001 Humanitarian Program: Views from the Community Sector* (Refugee Council of Australia, 2000).

- *Who Bears the Cost of Australia's Special Humanitarian Program?* (2008); online:
<http://www.refugeecouncil.org.au/docs/resources/reports/Travel_Costs_report.pdf>.

Refugee Council USA, "History of the U.S. Refugee Resettlement Program"; online:
<<http://www.rcusa.org/index.php?page=history>>.

- "Living on the Edge: Colombian Refugees in Panama and Ecuador" (2011).

- "Refugee Admission Levels"; online:
<<http://www.rcusa.org/index.php?page=refugee-admission-levels>>.

Rehaag, Sean, "The Luck of the Draw? Judicial Review of Refugee Determinations in the Federal Court of Canada (2005-2010)" (2012) *SSRN eLibrary*.

- "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 *Ottawa Law Review* 335.

- "2011 Refugee Claim Data and IRN Member Recognition Rates" (12 March 2012); online: <<http://ccrweb.ca/en/2011-refugee-claim-data>>.

Robinson, W. Courtland, *Terms of Refuge: The Indochinese Exodus and the International Response* (London, New York: Zed Books Ltd., 1998).

Roversi, Alessandra, "The Evolution of the Refugee Regime and Institutional Responses: Legacies from the Nansen Period" (2003) 22 *Refugee Survey Quarterly* 21.

Ross, Oakland, "Canada Is Conned into Taking Rebels; Colombians Given Refugee Status Bogota Arrests 3 Civil Servants" *The Toronto Star* (8 September 2004) A1.

- "Colombian Immigrants Fear Fallout from Scam" *The Toronto Star* (10 September 2004) A15.

Ryan, Kelly, Deputy Assistant Secretary Bureau of Population, Refugees, and Migration, Department of State, Testimony before the Senate Special Committee on Aging Hearing on Health and Welfare Needs of Elderly Refugees and Asylees (December 5, 2007); online: <<http://aging.senate.gov/events/hr184kr.pdf>>.

Sanders, Carol, "Health-Benefit Cut for Refugees Spurs Lawsuit" *Winnipeg Free Press* (23 June 2012) A12.

Scheingold, Stuart, *The Politics of Rights: Lawyers, Public Policy and Political Change* (Ann Arbor: University of Michigan Press, 2004).

Schoenholtz, Andrew, "Refugee Protection in the United States Post-September 11" (2005) 36 *Columbia Human Rights Law Review* 323.

Schuck, Peter H. "A Response to the Critics" (1999) 12 *Harvard Human Rights Journal* 385.

- "Refugee Burden-Sharing: A Modest Proposal" in Peter H. Schuck (ed.), *Citizens, Strangers, and in in-Betweens: Essays on Immigration and Citizenship* (Colorado: Westview Press, 1998) 281.

Shakespeare, William, *Hamlet*, Barbara A. Mowat & Paul Werstine (eds.) (New York: Washington Square-Pocket, 1992).

Shane, Kristen “Feds Cut Privately-Sponsored Refugee Claim Intake to a Trickle” *Embassy* (9 November 2011).

Sheppard, Robert “Ottawa’s Challenge: Triple Flow of Refugees to 50,000” *The Globe and Mail* (19 July 1979) P1.

Sherrell, Kathy, Chris Friesen, Jennifer Hyndman, & Subrath Shrestha, “From ‘One Nation, One People’ to ‘Operation Swagatam’: Bhutanese Refugees in Coquitlam, BC” *Metropolis British Columbia Working Paper 11-11* (2011); online: <http://mbc.metropolis.net/wp_2011.html>.

Sherrell, Kathy, Jennifer Hyndman & Preniqi Fisnik, “Sharing the Wealth, Spreading The “Burden”? The Settlement of Kosovar Refugees in Smaller British Columbia Cities” (2005) 37 *Canadian Ethnic Studies* 76.

Showler, Peter, *Refugee Sandwich: Stories of Exile and Asylum* (McGill-Queen’s University Press, 2006).

Singer, Audrey, & Jill H. Wilson, “From ‘There’ to ‘Here’: Refugee Resettlement in Metropolitan America” (2006) *The Brookings Institution Living Cities Census Series*.

Skran, Claudena, “Profiles of the First Two High Commissioners” (1988) 1 *Journal of Refugee Studies* 277.

- *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford: Clarendon Press, 1995).

Smith, Dale, “Queer Ugandans Ask Parliament for Refugee Assistance” *X-tra* (5 November 2010).

Solberg, Monte, Minister of Citizenship and Immigration, “Speaking Notes” 10th Biennial Conference of the International Association for the Study of Forced Migration and the International Refugee Rights Conference of the Canadian Council for Refugees, Toronto, Ontario (18 June 2006).

Standing Committee on Immigration and Citizenship, M.P. Norman Doyle, Chair, “Safeguarding Asylum-Sustaining Canada’s Commitments to Refugees” 39th Parliament, 1st Session (Canada: House of Commons, 2007); online: <<http://cmte.parl.gc.ca/Content/HOC/committee/391/cimm/reports/rp2969755/cimmrp15/04-toc-e.htm>>.

Statistics Canada, 2006 Census, *Portrait of the Canadian Population in 2006*. Statistics Canada Catalogue no. 97-550-XWE200600113, Analysis Series, 2006 Census, Ottawa (13 March 2006); online: <<http://www12.statcan.ca/english/census06/analysis/popdwell/NatlPortrait1.cf>>.

Statistics prepared by Canadian Council for Refugees from CIC data, April 2010.

Steinbock, David, "The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement" (2003) 36 *University of Michigan Journal of Law Reform* 951.

Submitted on Behalf of the President of the United States, "Proposed Refugee Admissions for Fiscal Year 2010, Report to the Congress."

Taylor, Louisa, "Groups Claim Partial Win In Refugee Health Benefits; Tories Deny Backtracking, Claim Wording Of Policy Has Just Been Clarified" *Ottawa Citizen* (4 July 2012) A3.

Taylor, Paige, "Prime Minister Gillard Announces Australia, Malaysia Working on Deal to Trade Asylum-Seekers" *The Australian* (7 May 2011).

Taylor, Savitri, "Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?" in Jane McAdam (ed.), *Forced Migration, Human Rights and Security* (Oxford; Portland: Hart, 2008).

The Holy Bible: King James Version (Iowa Falls, IA: World Bible Publishers, 2001).

The White House, Office of the Press Secretary, "Presidential Memorandum--Fiscal Year 2012 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status" Presidential Determination No. 2011-17; online: <<http://www.whitehouse.gov/the-press-office/2011/09/30/presidential-memorandum-fiscal-year-2012-refugee-admissions-numbers-and->>.

Thomas, Brook, *Cross Examinations* (New York: Cambridge University Press, 1987).

Thompson, Elizabeth, "Finding Refuge in Canada Could Get Tougher" *Vancouver Sun* (22 March 2011) B3.

Torpey, John, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000).

Treviranus, Barbara & Michael Casasola, "Canada's Private Sponsorship of Refugees Program: A Practitioners Perspective of Its Past and Future" (2003) 4 *Journal of International Migration & Integration* 177.

Troeller, Gary, "UNHCR Resettlement: Evolution and Future Direction" (2002) 14 *International Journal of Refugee Law* 85.

Unger, Roberto, "The Critical Legal Studies Movement" (1983) 96:3 *Harvard Law Review* 561.

UNHCR Executive Committee, *Biennial Program Budget 2012-2012 of the Office of the United Nations High Commissioner for Refugees*, Report by the High Commissioner, Executive Committee of the High Commissioner's Programme, Sixty-second sessions, Geneva 3-7 October 2011 (A/AC.96/1100).

- "Conclusion on Protracted Refugee Situations" ExCom Conclusion No. 109 (LXI) (8 December 2009).

- "Resettlement as an Instrument of Protection" ExCom Conclusion No. 67 (1991) at para (g);
online: <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c4368>>.

- *Resettlement: An Instrument of Protection and a Durable Solution* (EC/46/SC/CRP.32) Standing Committee, 28 May 1996.

UNHCR, "A Year of Crisis: UNHCR Global Trends 2011"; online:
<<http://www.unhcr.org/4fd6f87f9.html>>.

- *Agenda for Protection*, A/AC.96/965/Add.1, General Assembly, Executive Committee of the High Commissioner's Programme (26 June 2002) 3rd ed., (October 2003).

- *Archive of Past Nansen Winners*; online: <<http://www.unhcr.org/pages/49c3646c467-page4.html>>.

- "Asylum Levels and Trends in Industrialized Countries 2010" Division of Programme Support and Management (28 March 2011).

- "Excom Membership by Date of Admission of Members" (30 June 2009).

- "Frequently Asked Questions about Resettlement," online
<<http://www.unhcr.org/4ac0873d6.html>>.

- *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/Rev.1 (Geneva, 1992).

- "Japan to Start a Pilot Resettlement Programme" Briefing Notes (19 December 2008);
online <<http://www.unhcr.org/494b7e3011.html>>.

- *Note on Non-Refoulement (Submitted by the High Commissioner)*, 23 August 1977, EC/SCP/2; online: <<http://www.unhcr.org/refworld/docid/3ae68ccd10.html>>.

- "Progress Report on Resettlement" (2007) 26:1 *Refugee Survey Quarterly* 150.

- “Protection Framework Guidance: Kosovo Situation - Revision 1” (30 April 1999); online: <<http://www.unhcr.org/refworld/docid/3ae6b33414.html>>.
- “Refugee Resettlement: Performance Outcomes 2007 and Global Projections 2009” (30 June 2008).
- “Report of the UNHCR Working Group on International Protection” (Geneva: UNHCR, 1992).
- “Request for Proposal for UNHCR’s Brand Development” RFP/2010/384 (28 May 2010).
- *Resettlement Handbook* (November 2004).
- *Resettlement Handbook* (July 2011).
- “Resettlement in the Nordics and the Role of UNHCR”; online: <<http://www.unhcr.se/en/what-we-do/durable-solutions/resettlement-in-the-region.html>>.
- “Standing Committee 15th Meeting - Family Protection Issues Ec/49/Sc/Crp.14.” (1999) 18(4) *Refugee Survey Quarterly* 155.
- “States Parties to the Convention and the Protocol”; online: <<http://www.unhcr.org/pages/49da0e466.html>>.
- “The Refugee Status Determination Project” (2008).
- “The Strategic Use of Resettlement” Discussion Paper by the Working Group on Resettlement, WGR/03/04.Rev4 (2003); online: <<http://www.unhcr.org/protect/PROTECTION/3ee6dc6f4.pdf>>.
- *Where We Work*; online: <<http://www.unhcr.org/pages/49c3646c206.html>>.
- *UNHCR and Human Rights*, a policy paper resulting from deliberations in the Policy Committee on the basis of a paper prepared by the Division of International Protection (1997).
- “UNHCR Global Appeal 2010-2011” *UNHCR Fundraising Reports* (1 December 2009).
- “UNHCR Projected Global Resettlement Needs 2013” 18th Annual Tripartite Consultations on Resettlement, Geneva (9-11 July 2012); online: <<http://www.unhcr.org/5006aff49.html>>.

- “UNHCR Projected Resettlement Needs 2012” (Geneva: Division of International Protection, 2011).
- “UNHCR Projected Global Resettlement Needs 2011” (Geneva: Division of International Protection, Resettlement Service, 2010).
- “UNHCR Report Shows a Record 800,000 People Forced to Flee across Borders in 2011” *Press Release* (18 June 2012); online: <<http://www.unhcr.org/4fd85c2c6.html>>.
- Annual Tripartite Consultations on Resettlement, “Workshop of the Resettlement Registration Form” Geneva (15-16 June 2004); online: <<http://www.unhcr.org/doclist/protect/409b4ed04.html>>.
- “2009 Global Trends” (Division of Programme Support and Management, 2009).
- “2012 Regional Operations Profile - Asia and the Pacific”; online <<http://www.unhcr.org/pages/4a02d8ec6.html>>.
- “2012 UNHCR country operations profile – Ecuador”; online <<http://www.unhcr.org/pages/49e492b66.html>>.
- “2012 UNHCR country operations profile – Pakistan”; online: <<http://www.unhcr.org/pages/49e487016.html>>.

UNHCR Regional Office Washington, “UNHCR Global Resettlement Statistical Report 2010” (Washington DC, 2011).

- Resettlement Section “US Resettlement Overview” (2008); online: <http://www.unrefugees.org/site/c.lfIQKSOWFqG/b.5067919/k.A437/UNHCR_Washington.htm>.

U.S. Department of State; U.S. Department of Homeland Security; U.S. Department of Health and Human Services, “Proposed Refugee Admissions for Fiscal Year 2011: Report to Congress” (2011) Submitted on Behalf of the President of the United States.

- “Proposed Refugee Admissions for Fiscal Year 2010: Report to the Congress” (2010). Submitted on Behalf of the President of the United States.

van Selm, Joanne “Public-Private Partnerships in Refugee Resettlement: Europe and the US” (2003) 4:2 *Journal of International Migration & Integration* 157.

- “Refugee Protection in Europe and the U.S. after 9/11” in Niklaus Steiner, Mark Gibney & Gil Loescher (eds.), *Problems of Protection: The UNHCR, Refugees and Human Rights* (New York, London: Routledge, 2003) 237.

- "Refugee Protection Policies and Security Issues" in Edward Newman & Joanne van Selm, *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo: United Nations University Press, 2003) 66.

Verdirame, Guglielmo & Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (Oxford; New York: Berghahn Books, 2005).

Walkom, Thomas "No Bias in Shuffled Border Quotas, Axworthy" *The Globe and Mail* (4 November 1981) P8.

Waldman, Lorne, *Immigration Law and Practice*, 2nd ed. looseleaf (Markham, Ontario: LexisNexis Butterworths, 2005).

Warner, Daniel & James Hathaway, "Refugee Law and Human Rights: Warner and Hathaway in Debate" (1992) 5 *Journal of Refugee Studies* 162.

Webber, Jeremy, "National Sovereignty, Migration, and the Tenuous Hold of International Legality: the Resurfacing (and Resubmersion?) of Carl Schmitt" in *Of States, Rights, and Social Closure*, Oliver Schmidtke & Saime Ozcurumezeds (eds.) (New York: Palgrave Macmillan, 2008).

Wimmer, Andreas & Nina Glick-Schiller, "Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences" (2002) 2:4 *Global Networks* 301.

Winnipeg Private Refugee Assurance Program, *Report of the Executive Policy Committee*, File G-8 (Vol.6), (18 September 2002).

Zieck, Marjoleine, "Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited" (2009) 21 *International Journal of Refugee Law* 387.

Zizek, Slavoj, *The Plague of Phantasies* (London: Verso, 1997).

Zweigert, Konrad & Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 3rd ed., 1987).

APPENDICES

Appendix A: Organizations and Individuals Interviewed

Individuals Interviewed for Dissertation

Michael Casasola, Resettlement Officer, Office of the United Nations High Commissioner for Refugees, interview with author, 18 November 2009.

Debra Pressé, Director of Refugee Resettlement at Citizenship and Immigration Canada, interview with author, 18 November 2009.

- E-mail correspondence with author, 28 August 2012.

Chris Friesen, Immigrant Services Society of British Columbia, Director of Settlement Services, interview with author, 26 February 2010.

John Peters, Manager Sponsorship Services, Manitoba Interfaith Immigration Council interview with author, 17 March 2010.

Marta Kalita, Co-Manager, Settlement Services, Manitoba Interfaith Immigration Council, interview with author, 17 March 2010.

Howard Adelman, telephone interview with author, 8 July 2010.

Rivka Augenfeld, former JIAS employee, telephone interview with author, 9 July 2010.

- E-mail correspondence with author, 7 July 2010.
- Interview with author, 23 August 2010.

Suzanne Rumsey, Public Engagement Program Coordinator, The Primate's World Relief and Development Fund, The Anglican Church of Canada, e-mail correspondence with author, 13 December 2010.

Janet Dench, Executive Director, Canadian Council for Refugees, e-mail correspondence with author, 7 February 2011.

Jackie Halliburton, City of Winnipeg, Wellness & Diversity Coordinator, interview with author, 11 March 2011.

Mike Molloy, Former Director of Refugee Policy Division, interview with author, 24 March 2011.

Sharalyn Jordan, Rainbow Refugee Committee, e-mail correspondence with author, 1 April 2011.

Evelyn Jones, Immigrant Settlement and Integration Services Refugee Sponsorship Coordinator, e-mail correspondence with author, 18 June 2012.

Organizations Interviewed as Part of CCR Colombia Delegation (10-12 November 2010)
Colombian National Organization of Indigenous Peoples (O.N.I.C.)

Black Communities Process of Colombia (P.C.N. Colombia)

Canadian Embassy in Bogota

United Nations High Commissioner for Refugees

International Red Cross Committee

Defensoria del Pueblo, Colombia (National Ombudsman Office)

Centre for Research and Popular Education (CINEP)

Coordinacion para los Derechos Humanos y el Desplazamiento, CODHES

Colombian Jurists Commission

Jesuit Refugee Service (JRS)

Mennonite Church in Colombia

Fernando Cubides, National University of Colombia, Department of Sociology

Derek Künsken, Heather Michaud and Mark Floyd at Citizenship and Immigration Canada in Ottawa, as well as Merle Bolick at the Visa Office at the Canadian Embassy in Bogota were interviewed by telephone conference call on 21 October 2010 preceding the delegation.

Appendix B: Federal Court of Canada Resettlement Cases by Year

2010

- *Saiffee v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 693 (TD)
- *Shokohi v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 514 (TD)
- *Kumarasamy v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 239 (TD)
- *Sribalaganeshamoorthy v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 6 (TD)

2009

- *Besadh v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 847 (TD)
- *Alakozai v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 374 (TD)
- *Qurbani v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 152 (TD)
- *Latif v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 93 (TD)

2008

- *Nassima v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 881 (TD)
- *Azali v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 674 (TD)
- *Nasir v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 634 (TD)
- *Qarizada v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 1662 (TD)
- *Kamara v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 986 (TD)

2007

- *Sutharsan v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 294 (TD)
- *Salimi v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 1126 (TD)
- *Anton v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 798 (TD)
- *Asl v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 632 (TD)

2006

- *Khwaja v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 703 (TD)
- *El Karm v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 1225 (TD)

- *Abdulle v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 1898 (TD)
- 2005**
 - *Jimenez v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1312 (TD)
 - *Velautham v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1385
 - *Beltran v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1007
 - *Asmelash v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 2145 (TD)
- 2004**
 - *Muhazi v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1670 (TD)
 - *Alemu v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1210 (TD)
 - *Beganovic v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 406 (TD)
- 2003**
 - *Rudi v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 1220 (TD)
 - *Abdi v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 219 (TD)
 - *Horvat v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 354 (TD)
 - *Sarkissian v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 489 (TD)
 - *Atputharajah v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 332 (TD)
- 2002**
 - *Dang v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 910 (TD)
 - *Ha v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 1788 (TD), rev'd [2004] F.C.J. No. 174 (CA).
 - *Mahzooz v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 1203 (TD)
- 2001**
 - *Haljiti v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 500 (TD)
 - *Mujezinovic v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 1487 (TD)
 - *Bahtijari v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 976 (TD)
- 2000**
 - *Phan v. Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 728 (TD)

1999

- *Mengesha v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1322 (TD)
- *Mohamed v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1230 (TD)
- *Smajic v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1904 (TD)

1997

- *Ayubi v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 777 (TD)
- *Oraha v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 788 (TD)
- *Zia v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 784 (TD)

1996

- *Jallow v. Canada (Minister of Citizenship and Immigration)* [1996] F.C.J. No. 1452 (TD)

1994

- *Knarik v. Canada (Solicitor General)* [1994] F.C.J. No. 816 (TD)

Appendix C: Federal Court of Canada Resettlement Cases by Result

Application for Judicial Review Allowed - Returned for Re-Determination by New Visa Officer

- *Saifee v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 693 (TD)
- *Shokohi v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 514 (TD)
- *Kumarasamy v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 239 (TD)
- *Latif v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 93 (TD)
- *Nasir v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 634 (TD)
- *Anton v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 798 (TD)
- *Sutharsan v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 294 (TD)
- *Asl v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 632 (TD)
- *Abdulle v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 1898 (TD)
- *Velautham v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1385 (TD)
- *Muhazi v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1670 (TD)
- *Alemu v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1210 (TD)
- *Rudi v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 1220 (TD)
- *Abdi v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 219 (TD)
- *Dang v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 910 (TD)
- *Haljiti v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 500 (TD)
- *Phan v. Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 728 (TD)
- *Ayubi v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 777 (TD)

Application for Judicial Review Dismissed

- *Sribalaganeshamoorthy v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 6 (TD)
- *Alakozai v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 374 (TD)

- *Qurbani v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 152 (TD)
- *Besadh v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 847 (TD)
- *Azali v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 674 (TD)
- *Qarizada v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 1662 (TD)
- *Kamara v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 986 (TD)
- *Nassima v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 881 (TD)
- *Salimi v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 1126 (TD)
- *Khwaja v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 703 (TD)
- *El Karm v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 1225 (TD)
- *Jimenez v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1312 (TD)
- *Beltran v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1007 (TD)
- *Asmelash v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 2145 (TD)
- *Beganovic v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 406 (TD)
- *Atputharajah v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 332 (TD)
- *Horvat v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 354 (TD)
- *Sarkissian v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 489 (TD)
- *Mahzooz v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 1203 (TD)
- *Ha v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 1788 (TD), **rev'd** [2004] F.C.J. No. 174 (CA).
- *Mujezinovic v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 1487 (TD)
- *Bahtijari v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 976 (TD)
- *Mengesha v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1322 (TD)
- *Mohamed v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1230 (TD)
- *Smajic v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1904 (TD)

- *Oraha v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 788 (TD)
- *Zia v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 784 (TD)
- *Jallow v. Canada (Minister of Citizenship and Immigration)* [1996] F.C.J. No. 1452 (TD)
- *Knarik v. Canada (Solicitor General)* [1994] F.C.J. No. 816 (TD)

Appendix D: Federal Court of Canada Resettlement Cases by Visa Application Country

Austria

- *Mujezinovic v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 1487 (TD) (Serbian applicant)

Colombia

- *Beltran v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1007 (TD) (source country applicant)
- *Jimenez v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1312 (TD) (source country applicant)

Egypt

- *Besadh v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 847 (TD) (Sudanese Christian applicant)
- *El Karm v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 1225 (TD) (Palestinian applicant)

England

- *Anton v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 798 (TD) (Sri Lankan applicant)
- *Sutharsan v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 294 (TD) (Sri Lankan applicant)
- *Velautham v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1385 (TD) (Sri Lankan applicant)
- *Atputharajah v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 332 (TD) (Sri Lankan applicant)

Germany

- *Beganovic v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 406 (TD) (from former Yugoslavia in Germany)
- *Horvat v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 354 (TD) (Bosnian applicant)
- *Sarkissian v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 489 (TD) (Iranian applicant)
- *Haljiti v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 500 (TD) (unidentified applicant)
- *Bahtijari v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 976 (TD) (from former Yugoslavia in Germany)
- *Phan v. Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 728 (TD) (Vietnamese applicant)
- *Mohamed v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1230 (TD) (Ethiopian applicant)
- *Smajic v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1904 (TD) (Bosnian applicant)
- *Knarik v. Canada (Solicitor General)* [1994] F.C.J. No. 816 (TD) (Iranian applicant)

Ghana

- *Kumarasamy v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 239 (TD) (Sri Lankan applicant)

Guinea

- *Kamara v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 986 (TD) (Sierra Leonean applicant) – judgment does not indicate but the Canadian Embassy in Dakar (Senegal) covers Guinea

Italy

- *Oraha v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 788 (TD) (Iraqi applicant)
- *Jallow v. Canada (Minister of Citizenship and Immigration)* [1996] F.C.J. No. 1452 (TD) (Iraqi applicant living in Malta and applying through Italy)

Jamaica

- *Mengesha v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1322 (TD) (Ethiopian applicant)

Japan

- *Asl v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 632 (TD) (Iranian applicant)

Jordan

- *Zia v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 784 (TD) (Iraqi applicant)

Kenya

- *Asmelash v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 2145 (TD) (Eritrean applicant living in Ethiopia and applying through Kenya)
- *Muhazi v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1670 (TD) (Rwandan applicant)
- *Abdi v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 219 (TD) (Somalian applicant living in Ethiopia and applying through Kenya)

Malaysia

- *Sribalaganeshamoorthy v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 6 (TD) (Sri Lankan applicant)

Pakistan

- *Alakozai v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 374 (TD) (Afghans applicant)
- *Latif v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 93 (TD) Private Sponsorship (Afghans applicant)
- *Qurbani v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 152 (TD) (Afghan applicant)
- *Nasir v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 634 (TD) (Afghan applicant)
- *Qarizada v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 1662 (TD) (Afghan applicant)
- *Nassima v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 881 (Afghan applicant)
- *Salimi v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 1126 (Afghan applicant)

- *Rudi v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 1220 (TD) (Afghan applicant)
- *Mahzooz v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 1203 (TD) (Afghan applicant)
- *Phan v. Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 728 (TD) (Vietnamese applicant)
- *Ayubi v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 777 (TD) (Afghan applicant)

Russia

- *Khwaja v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 703 (TD) (Afghan applicant)

Sri Lanka

- *Rudi v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 1220 (TD) (Afghan applicant)

Singapore

- *Ha v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 1788 (TD), rev'd [2004] F.C.J. No. 174 (CA) (Cambodian applicant living in Vietnam and applying through Singapore)

South Africa

- *Alemu v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1210 (TD) (Ethiopian applicant)

Vietnam

- *Dang v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 910 (TD) (Cambodian applicant)

Appendix E: Federal Court of Canada Resettlement Cases Identified as Sponsorship

- *Sribalaganeshamoorthy v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 6 (TD)
- *Shokohi v. Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 514 (TD)
- *Qurbani v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 152 (TD)
- *Alakozai v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 374 (TD)
- *Latif v. Canada (Minister of Citizenship and Immigration)* [2009] F.C.J. No. 93 (TD)
- *Nasir v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 634 (TD)
- *Kamara v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 986 (TD)
- *Qarizada v. Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 1662 (TD)
- *Salimi v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 1126 (TD)
- *Asl v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 632 (TD)
- *Sutharsan v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 294 (TD)
- *El Karm v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 1225 (TD)
- *Jimenez v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1312 (TD)
- *Muhazi v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1670 (TD)
- *Alemu v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1210 (TD)
- *Rudi v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 1220 (TD)
- *Abdi v. Canada (Minister of Citizenship and Immigration)* [2003] F.C.J. No. 219 (TD)
- *Mahzooz v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 1203 (TD)
- *Ha v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 1788 (TD), rev'd [2004] F.C.J. No. 174 (CA)
- *Dang v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 910 (TD)
- *Phan v. Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 728 (TD)
- *Mengesha v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1322 (TD)

- *Mohamed v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1230 (TD)
- *Ayubi v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 777 (TD)
- *Oraha v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 788 (TD)
- *Zia v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 784 (TD)
- *Jallow v. Canada (Minister of Citizenship and Immigration)* [1996] F.C.J. No. 1452 (TD)