

THE INVISIBLES:
AN EXAMINATION OF REFUGEE RESETTLEMENT

by

SHAUNA LABMAN

LL.B., University of Victoria, 2003
B.A., The University of British Columbia, 1999

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ABSTRACT

Resettlement is one of three durable solutions, which the United Nations High Commissioner for Refugees (UNHCR) uses to achieve refugee protection. Refugees are assumed to locally integrate, voluntarily repatriate or resettle. Too many of the world's refugees, however, are left to linger in non-durable conditions in countries of first asylum that are often only minimally safer than the countries they have fled. Where neither local integration nor repatriation is possible, resettlement is the only option. Resettlement requires a third country to be willing to accept refugees into its territory. While signatory states to the 1951 *Convention relating to the Status of Refugees* (1951 Convention) are obliged not to *refoule* asylum seekers at their borders, they have not committed to accept refugees for resettlement.

By geographic distance, presumptions of safety, and a lack of legal obligations, those refugees who fail to make it to the frontiers of safe states are simply not seen. These refugees remain so far removed in a vague, far-off realm that they are rendered invisible. Their invisibility is reflected in the 1951 Convention's silence on obligations to them, the dearth of academic examination of resettlement, and media and government attention only in the celebratory act of making a small number of such refugees visible and legal, through the act of bringing them within a protective state's borders. Despite their invisibility, the protection needs of those refugees left outside the borders of safe states remains.

The goals of this thesis are therefore to create visibility and increase resettlement. Resettlement is examined from its theoretical motivations, historical origins, current manipulations, and future possibilities – both generally and through an examination of the Canadian scheme. The thesis closes with recommendations for resettlement reform. They are targeted at UNHCR, the international community, national governments, and Canada in particular. For resettlement to offer a fair mode of protection a comprehensive and global model of resettlement must be designed and, ultimately, implemented.

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My father has undoubtedly read every word I have ever written. While my writing has greatly improved under his direction, his assistance remains invaluable. My mother has been my listener and raised me with the courage and independence to see the world before I began to write about it. And my sisters, who awe me with their energy, remind me there are more important things in life than school.

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DEDICATION

This work is dedicated to the Afghan refugees in India whose strength, courage and hope first inspired me. And to Ahad, whose family was my first resettlement case, who served as my interpreter, and whose successful resettlement in the United States continually reminds me that lives can begin again.

CHAPTER ONE

Introduction

The origins of this thesis began at a small desk. Across from me was not the blinking patience of the cursor that has accompanied me since, but the hopeful eyes of Afghan refugees grasping at the chance for resettlement to Canada. It was late 2004. I was working for the United Nations High Commissioner for Refugees (UNHCR) in New Delhi, India.

In April 2000, UNHCR's Evaluation and Policy Unit (EPAU) conducted a case study of the urban refugee population in New Delhi. A new UNHCR policy on urban refugee situations had been issued in 1997, and in 1999 EPAU was requested to review the policy's implementation. New Delhi was chosen as the first case study because it hosts a large refugee population, close to 16,000 in total, most from Afghanistan and many of whom had fled their home country several years previously and as far back as the early 1980s following the Soviet invasion of Afghanistan. India is not a signatory to the 1951 *Convention relating to the Status of Refugees*¹ (1951 Convention) and has no domestic refugee legislation. Afghan refugees are not encouraged to integrate. They suffer various forms of discrimination and distrust, and exist in a precarious and unpredictable state of limbo. As a result, the refugee situation in New Delhi had been particularly problematic.

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

The resulting EPAU report by Naoko Obi and Jeff Crisp was released in November 2000.² The report highlighted the need for increased efforts to promote durable solutions. While resettlement was recognized as a “valuable tool of protection in New Delhi,”³ the report is filled with cautions that “a limited number of resettlement opportunities exist,”⁴ “few of the refugees meet the [resettlement] criteria of the countries concerned,”⁵ and that “large-scale resettlement came to an effective end in the early 1990s.”⁶ Efforts and frustration continued.

Then, in the summer of 2004, the Canadian government agreed to accept 525 Afghan refugees from Kyrgyzstan.⁷ As in India, the Afghans in Kyrgyzstan had begun to flee their homeland with the Communist takeover and continued to escape Afghanistan throughout the civil strife of the mujahadin rule and the even more brutal Taliban. Canada’s willingness to accept these refugees caused UNHCR’s New Delhi Office to take notice. A similar request was made for Canada to resettle Afghan refugees from India. Canada, it turned out, was open to considering individual Afghan referrals. UNHCR commenced an intensive screening of eligible Afghans in New Delhi. After years of protests, demands, despair and uncertainty, there was hope.

Based mainly on my own recollection, this is a condensed version of a complicated series of events and considerations. However, after Obi and Crisp reported in 2000 that “the resettlement opportunities for the Afghans [in India] are limited, and very few of the

² Naoko Obi & Jeff Crisp, *Evaluation of UNHCR’s Policy on Refugees in Urban Areas: A Case Study Review of New Delhi* (Geneva: UNHCR Evaluation and Policy Analysis Unit, 2000).

³ *Ibid.* at para. 108.

⁴ *Ibid.* at para. 4.

⁵ *Ibid.* at para. 58.

⁶ *Ibid.* at para. 107.

⁷ UNHCR, “Afghan refugees leave Kyrgyzstan for new life in Canada” *UNHCR News Stories*, 12 July 2005, online: <<http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=40f2b7ae4>>.

refugees meet the criteria of the countries concerned”⁸ all that was required in 2004 was for UNHCR to make an inquiry to the Canadian High Commission in India, and Canada indicated its willingness to consider Afghan referrals. While a happy story for those refugees who were eventually resettled to Canada, it is the extended period during which the Afghans lingered in limbo that I found, and find, troubling. Lives were wasted, educations lost and spirits stifled.

Nor could many of the Afghans I interviewed, or who worked with me as interpreters, understand why I, as a Canadian citizen, would choose to come to India – a country they were desperate to leave. My privileged status was glaringly apparent, not only as one who possessed decision-making power over their futures, but as a passport holder who could explore and experience the world while certain of my ability to return home. Equally apparent, at least to me, was the fact that it was a fluke of fortunate birth.

Twenty years ago Joseph Carens declared, “[c]itizenship in Western liberal democracies is the modern equivalent of feudal privilege – an inherited status that greatly enhances one’s life chances.”⁹ As “[b]irthplace and parentage are natural contingencies that are ‘arbitrary from a moral point of view,’”¹⁰ Carens proceeded to make a “case for open borders”¹¹ and argued for “free migration”¹² as a fundamental tenet of liberal theory. My aspirations are less ambitious although potentially equally utopian. Focusing on refugees who lack the foundation of a secure home, and whom the international community has

⁸ *Supra* note 2 at para. 58.

⁹ Joseph Carens, “Aliens and Citizens: The Case for Open Borders” (1987) 49:2 *The Review of Politics* 251 at 252 [“Aliens and Citizens”].

¹⁰ *Ibid.* at 261.

¹¹ *Ibid.* at 251, Title.

¹² *Ibid.* at 270.

acknowledged a duty to protect,¹³ but fails to actually see, I question how the current state of limbo in which so many of the world's most vulnerable exist is in any way justifiable.

The 1951 Convention defines a refugee as a person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."¹⁴ Countries that have signed and ratified the 1951 Convention have assumed the obligation not to *refoule* refugees.¹⁵ In signatory states, refugee protection is conferred under domestic legislation once the state determines that an individual meets the refugee definition. In non-signatory states that lack similar refugee laws or status determination procedures, UNHCR may grant mandate refugee status under the *Statute of the United Nations High Commissioner for Refugees*.¹⁶ UNHCR seeks "durable solutions" for refugees. Durable solutions comprise of local integration in the receiving country, voluntary repatriation to one's country of origin where the situation has changed so as to make this a possibility, or resettlement to another country.¹⁷

The chapters that follow consider the specific case of the movement of refugees to third countries through resettlement. Resettlement is defined by UNHCR as "the selection and

¹³ Within the Preamble to the 1951 Convention, *supra* note 1, it is noted that UNHCR "is charged with the task of supervising international conventions providing for the protection of refugees..."

¹⁴ *Supra* note 1 at Article 1A.

¹⁵ 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.

¹⁶ *Statute of the United Nations High Commissioner for Refugees*, UNGA A/RES/248, 14 December 1950, s.1.

¹⁷ UNHCR, *Resettlement Handbook* (November 2004) at 1/2, online: <<http://www.unhcr.org/protect/3d4545984.html>>.

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.”¹⁸ The decision to resettle a refugee is only made in the absence of other options – local integration or repatriation.¹⁹ There is an undercurrent of debate as to whether resettled refugees should be granted permanent residence.²⁰ Nor does refugee resettlement only occur through arrangements between UNHCR and states. It can also occur in certain countries through referrals from organizations other than UNHCR or through private sponsorship by an organization or individual of the third state. This discussion, however, is primarily confined to a consideration of “government-assisted”²¹ permanent resettlement through UNHCR.

The assumption that underlies this work is that resettlement is a positive and valuable mechanism of protection. This is not an uncontested position. There are many who counter 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 stabilization possibilities through the permanent departure of citizens. The argument has also been made that

¹⁸ *Ibid.*

¹⁹ This statement belies the complexity of resettlement decisions that are explored in the substance of this thesis.

²⁰ In the 1990s James C. Hathaway and Alexander Neve and, separately, Peter Schuck proposed temporary protection regimes as a means to encourage states to accept greater refugee numbers while deterring false claims. James C. Hathaway & R. Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection” (1997) 10 *Harvard Human Rights Journal* 115; Peter H. Schuck, “Refugee Burden-Sharing: A Modest Proposal” (1997) 22 *Yale Journal of International Law* 243. See also James C. Hathaway, “Book Review: Rethinking Refugee Law” (2004) 98 *American Journal of International Law* 616 at 617.

²¹ I take this term from the Canadian resettlement program where “government-assisted refugees” is used to describe refugees resettled through the Canadian government resettlement program in contrast to private sponsorship by Canadian citizens.

attention and resources should focus on “preventative protection.” UNHCR defines preventative protection as:

the establishment or undertaking of specific activities inside the country of origin so that people no longer feel compelled to cross borders in search of protection and assistance. In this sense, for instance, action on behalf of the internally displaced can be defined as preventative protection...Preventative protection in this sense may also include the establishment of “safety zones” or “safety areas” inside the country of origin where protection may be sought. It relates therefore to the protection of nationals in their own country.²²

Preventing persecution requires political and perhaps military action that precedes refugee protection.²³ UNHCR recognizes though that “the primary motive [behind preventative protection] may be to address a genuine gap in protection rather than to avert outflow.”²⁴ Refugee flows should never simply be assumed but neither can they be ignored.

It is by no means ideal to relocate people from their homes, their families, their regions, their languages or their cultures. 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. This thesis is not, however, about the debate on budgetary allocations, the need for interference in the situations that create refugee flows, or the

²² UNHCR, *Report of the UNHCR Working Group on International Protection* (Geneva, July 6, 1992) cited in Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (Minneapolis: University of Minnesota Press, 2000) at 17-18.

²³ Jennifer Hyndman, *ibid.* at 27-28, argues however 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, at 181, 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.’”

²⁴ *Report of the UNHCR Working Group on International Protection, supra* note 22 at 17-18.

concern with inducing flows. Recognizing that resettlement is not the appropriate solution in all situations, the argument is made that it is the necessary solution in many more instances than those in which it currently occurs.

While the call is made for a comprehensive resettlement program, this program must be understood to exist within a coherently integrated program of voluntary repatriation, local integration and resettlement.²⁵ The Afghans in India highlight the complexity of considerations. While I worked in the New Delhi office, UNHCR was coordinating voluntary repatriation, facilitating local integration, submitting resettlement referrals and still receiving new asylum-seekers from Afghanistan. Refugee status is an individual identity. As such, individual considerations apply and differ. David Martin begins his review of resettlement reform in the United States by noting the “[o]bstacles, barriers, and possible reasons against resettlement initiatives.”²⁶ Acknowledgement of these concerns does not lead to a rejection of resettlement. Rather, as Martin concludes, “[b]ecause of host-country or UNHCR resistance, desires not to torpedo chances for repatriation, difficulties of equitable and manageable selection through processes that assure integrity, definitional disconnects, and particularly concern not to induce unmanageable further migration, choices to resettle specific groups or categories must be done carefully and case-by-case.”²⁷ He continues, “[a]ll these factors may deserve

²⁵ UNHCR’s Executive Committee has recognized the need for “more coherence in integrating voluntary repatriation, local integration, and resettlement, whenever feasible, into one comprehensive approach, implemented in close cooperation among countries of origin, host States, UNHCR and its humanitarian and development partners, especially NGOs, as well as refugees.” United Nations, *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 Goal 5 (Preamble).

²⁶ David A. Martin, *The United States Refugee Admissions Program: Reforms for a New Era of Refugee Resettlement* (Washington, DC: Migration Policy Institute, 2005) at 3.

²⁷ *Ibid.* at 8.

attention, but they are simply cautionary considerations, not absolute trumps that should defeat the initiation of significant refugee resettlement from given regions.”²⁸

What has tended to occur, with Martin’s review as an exception, is that the difficulties and legitimate concerns with resettlement have deterred a close examination of its use. As this thesis will outline, resettlement is a necessary aspect of refugee protection. Its current usage, however, has been *ad hoc*, intermittent, and sometimes manipulative, all with unacceptably low numbers. The difficulties with resettlement are situation-specific. The broader, beneficial application of resettlement nonetheless requires consideration so as to limit rather than exacerbate the challenges of its application.

In line with the above, I label refugees in need of resettlement “the invisibles.” For the most part these are the refugees who reside in camps, barely past the borders of the countries they have fled. Some, such as the Afghans in India, make up urban refugee populations. These are refugees recognized by UNHCR and offered a degree of protection under its mandate. They remain, however, in countries of first asylum that are often only minimally safer than the countries they have fled. Aside from glimpses in the media and the occasional academic argument, such refugees are rarely discussed until they are made visible by the act of resettlement. Those who are resettled are celebrated, as is the resettlement country for its generosity.²⁹ The majority, who are not resettled,

²⁸ *Ibid.*

²⁹ A statement during the Global Consultations, *infra* note 143, stated “resettlement countries deserve tremendous credit for going beyond their obligations of asylum and ‘volunteering’ to open their doors to refugees in need of third-country resettlement.” “Part 8: The NGO Perspective Global Consultations on International Protection Third Track, Theme 3: The Search for Protection-Based Solutions: NGO Statement on Resettlement (22–24 May 2002)” 22:2/3 *Refugee Survey Quarterly* (2003) 432 at 435 [“NGO Statement”].

remain invisible. The underlying goal of this thesis is to increase their visibility. The underlying hope is that increased visibility will spark increased resettlement.

Chapter 2 begins by reviewing the theoretical arguments that struggle to justify open borders, refugee protection and resettlement. What becomes apparent is a gap between ideal visions and realistic possibilities. Examining this struggle from the varied perspectives of human rights, liberalism and humanitarianism leads to a single conclusion: Theory cannot provide a clear answer on admission decisions or numbers. Theoretical arguments nonetheless play an important role in real world refugee protection. It is the consciousness of the ideal that compels a search for realistic solutions. While the later chapters involve a more practical discussion of resettlement and realistic recommendations, they rest on the theoretical call for refugee protection, and seek to narrow the gap between the ideal and the real.

Chapter 3 is “cautionary advocacy.” It argues for the increased use of resettlement as a tool of protection and responsibility-sharing while also warning against resettlement’s vulnerability to manipulation. Although current resettlement numbers and the disproportionate geographic distribution of refugees are themselves incontrovertible arguments for increased resettlement, the use of resettlement tends to be a veiled means of migrant selection and/or a method of avoiding the legal obligation of *non-refoulement* undertaken by all signatory states to the 1951 Convention. Resettlement models for fair refugee selection are therefore explored. Chapter 3 concludes with the recommendation for a transparent top-down resettlement scheme managed by UNHCR, and vehemently advocates resettlement quotas far exceeding current numbers.

Chapter 4 recognizes that the voluntary nature of resettlement means that states are disinclined to participate in the type of global responsibility-sharing resettlement scheme proposed in Chapter 3. Chapter 4 therefore proceeds to “look back” at the international resettlement agreements that pre-date the 1951 Convention. The argument is made that refugee protection has always included the proactive movement of refugees to safe states together with the reactive promise of *non-refoulement*. It is suggested that the legalization of the obligation not to *refoule* refugees in Article 33 of the 1951 Convention³⁰ created a schism in refugee protection that inadvertently privileged *non-refoulement* over resettlement as a mechanism of refugee protection. Chapter 4 then “moves forward” to examine recent international efforts to surpass the confines of the 1951 Convention focusing on the “Multilateral Framework of Understandings on Resettlement” (MFU) reached in June 2004.³¹ The inadequacy and lack of substantial guidance offered by the MFU is explored. The chapter concludes by recognizing that any dialogue on resettlement is positive, but that what is needed is to combine this dialogue with the historical knowledge of past schemes to create an effective top-down model of international resettlement distribution and a willingness by individual states to participate in such a scheme.

Chapter 5 shifts from the international to the national setting with Canada as a case study. Canada is an active resettlement country. It has immigration and refugee legislation loaded with references to humanitarianism. However, a review of Canada’s refugee policy from its origins and through its statutory framework, policies and jurisprudence,

³⁰ *Supra* note 1 at Article 33(1).

³¹ 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>>.

regrettably reveals an actual lack of humanitarianism in the program. And yet, the desire for and consciousness of humanitarianism in its refugee policy positions Canada as an ideal leader to increase resettlement numbers and implement the type of resettlement selection model advocated for in the earlier chapters. The chapter concludes with this call to Canada to actualize its ambitions as a humanitarian country and world leader in refugee protection.

Chapter 6 closes the thesis with recommendations for resettlement reform. They are targeted at UNHCR, the international community, national governments, and Canada in particular. These recommendations are but the beginning. There remains a need for increased critical examination of resettlement. There remains a need to increase resettlement numbers. Refugees simply cannot be left to linger invisibly, as too many of them do currently.

CHAPTER TWO

Theory's Role in Real World Refugee Protection

No one would argue that refugees should be abandoned, ignored or forgotten. Invisibility primarily results from the sense of impossibility and intractability of the refugee situation. It might be suggested that the real problem is blindness – willful blindness by those who could offer protection. The images of both blindness and invisibility point to the reality that too often refugees remain unseen. Invisibility, I believe, better captures the argument that such refugees need to be more clearly brought into international focus, dialogue and examination. A range of proposals and examinations exist for managing, or ideally solving, refugee situations. Their existence weakens the blindness argument. That invisibility remains, despite these same proposals and examinations, frustrates the search for solutions.

Refugee discussions emanate from multiple disciplines – geography, political science, law and economics to name a few. Broadly defined “theoretical” approaches provide the foundation from which the disciplinary queries arise. “Theory” seeks the underlying justification for refugee protection that precedes protection proposals. Theoretical debates therefore provide one means of understanding the intractability of the refugee dilemma. The debates also offer, as much through their limitations as their successes, a better sense of how visibility may be achieved.

Theoretical Approaches

Liberal theory is the usual location for arguments advocating for refugee protection. Both liberalism and refugees have emerged out of the modern state. Catherine Dauvergne notes that:

Liberal hegemony in domestic and international political spheres requires that we seek to understand immigration debates in liberal terms...Because international order is built on a liberal infrastructure and the prosperous countries attracting aspiring immigrants are liberal democracies, debates about immigration law and policy use liberal terms whether they take place in the political arena, the supermarket, or the university lecture theatre. Efforts to move the argument away from liberal theory, to a framework where questions of justice could perhaps be more easily answered, lose their resonance in the face of liberalism's hegemony.³²

Liberalism, however, as a product of the state, presupposes the closed borders of the state and traditionally fails to conceive of outsiders.³³ Consequently, as a theoretical approach to refugee protection, it is frustratingly flawed. Two types of arguments emerge from liberalism's core: human rights and morality. A third approach, humanitarianism, seeks to distinguish itself from liberalism but ultimately suffers a similarly frustrated fate. Understanding these arguments, their failings and their persistence, will serve to situate this thesis not within a particular theoretical framework but within a developing dialogue that can be seen to use theory as a measuring stick and persuasive tool for policy change.

Human Rights

In the last few years the rights-based argument has gained momentum in refugee discussions. The benefit of such a stance is that it adds a concrete assertion of legal obligation and accountability to refugee protection. There is an entitlement to these rights. The difficulty, in the case of refugees, is establishing the origin of these rights – determining who bears the obligation to uphold the asserted rights and what is the mechanism for asserting such rights.

³² Catherine Dauvergne, *Humanitarianism, Identity and Nation: Migration Laws in Canada and Australia*, (Vancouver: UBC Press, 2005) at 66 [*Humanitarianism, Identity and Nation*].

³³ "Aliens and Citizens" *supra* note 9 at 265.

Under the *Universal Declaration of Human Rights*, human rights are proclaimed to be universal, indivisible and inalienable.³⁴ Yet as Hannah Arendt recognized, statelessness and refugeehood creates conditions in which individuals exist without the “right to have rights.”³⁵ For Arendt, the universality of rights is meaningless for those individuals as they are condemned to “a position, outside as it were, of mankind as a whole.”³⁶ Refugees, by definition, are those whose home countries have failed to protect them through their laws. Asylum is sought specifically for the legal and physical protection of a new country. In the realm between the persecuting and protecting countries, refugees lack anywhere to assert their rights. The difficulty, as noted by Dauvergne, is that “[h]uman rights are still dependent upon a venue in which to lay a claim to them.”³⁷

The structure of international refugee protection overlooks the rights dilemma. The 1951 Convention’s approach “presupposes the crossing of frontiers and that refugees can reach a point where they can activate such rights.”³⁸ Dauvergne explains that the 1951 Convention “protects the rights of those who are already there, but does not create any rights to get there.”³⁹ The difficulty with this vision is that states are not precluded from devising a myriad of non-entry procedures that prevent access to their frontiers. As

³⁴ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No.13, UN Doc. A/810 (1948).

³⁵ Hannah Arendt, *The Origins of Totalitarianism*, rev. ed. (San Diego: Harcourt Brace & Company, 1979) at 296 [*Origins of Totalitarianism*]. Arendt earlier explains at 291-292 “The Rights of Man, after all, had been defined as ‘inalienable’ because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own governments and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.” See generally 290-302.

³⁶ Hannah Arendt, *Responsibility and Judgment*, rev. ed. (New York: Schocken Books, 2003) at 150 [*Responsibility and Judgment*].

³⁷ Catherine Dauvergne, “Sovereignty, Migration and the Rule of Law in Global Times” (2004) 67:4 *The Modern Law Review* 588 at 612 [“Sovereignty, Migration and the Rule of Law”].

³⁸ Patrick Twomey & Frances Nicholson, “Introduction” in Patrick Twomey & Frances Nicholson, eds., *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999) 1 at 4.

³⁹ “Sovereignty, Migration and the Rule of Law” *supra* note 37 at 612.

Dauvergne notes, the “most unambiguous right is the right of a nation to exclude all outsiders.”⁴⁰

Matthew Gibney suggests there is an inherent paradox in increasingly restrictive asylum policies and the incorporation and expansion of human rights protections. He argues the conflict is rooted in the nature of the constitutional state:

The principles western states claim to represent are failing to live up to challenges posed by asylum, as the current asylum crisis exposed the tense and conflictual relationship between the values that constitutional democracies are supposed to uphold. Embodying the principle of democratic rule, electoral politics pushes policies towards closure and restriction; embodying constitutional principles, the law inches unevenly towards greater respect for the human rights of those seeking asylum.⁴¹

He notes that in resorting to non-arrival measures, states are “carv[ing] out a realm for themselves free of the legal constraint and scrutiny they would face if asylum seekers arrived on their territory.”⁴² He concludes that the “cost of increasingly inclusive practices towards asylum seekers *within* the territory of the state is the rapid development of exclusive measures *outside* it.”⁴³ Rights advocacy, understood in this light, works against refugees who remain outside of the right granting states.

James Hathaway has devoted careful and significant attention to the rights of refugees under international law.⁴⁴ He anchors refugee protection in a system of legal rights and

⁴⁰ *Humanitarianism, Identity and Nation*, *supra* note 32 at 211.

⁴¹ Matthew J. Gibney, “The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy” in Susan Kneebone, ed., *The Refugee Convention 50 Years On: Globalisation and International Law* (Aldershots, Hants, England; Burlington, VT: Ashgate, 2003) 19 at 43.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge; New York: Cambridge University Press, 2005) [*The Rights of Refugees*].

intentionally conceives of the 1951 Convention as human rights document.⁴⁵ Hathaway labels resettlement as a “right of solution.”⁴⁶ Importantly, however, this right of solution pertains only to the refugee’s legal entitlement to “an opportunity to devise his or her own resettlement solution before being required to accept the government’s option.”⁴⁷ This right, grounded in Article 31(2) of the 1951 Convention which provides that “[t]he Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country,” protects a refugee against mandatory (forced) resettlement schemes.⁴⁸ There is no obligation on the first country of asylum to assist the refugee in securing resettlement, nor is any state obliged to make an offer of resettlement.⁴⁹ While the drafters of the 1951 Convention were quite concerned with ensuring the transfer of a refugee’s assets upon resettlement, they were likewise committed to “safeguarding the sovereign right of states to decide which refugees should be permanently admitted to their territories.”⁵⁰

Hathaway, in a moment of apparent defeatism, concedes that “[t]here is little doubt that the residual role now officially attributed to resettlement is at least in part a practical accommodation to the absence of a binding duty of states to resettle refugees, coupled with a disinclination by most states to in fact make resettlement opportunities available on any significant scale.”⁵¹ Ultimately, Hathaway positively concludes with the hope that “a renewed debate about the viability of a strong commitment to resettlement will afford the opportunity to return to the fundamental question of whether this solution – clearly

⁴⁵ *Ibid.* at 4.

⁴⁶ *Ibid.* at 963.

⁴⁷ *Ibid.* at 965.

⁴⁸ *Ibid.* at 966.

⁴⁹ *Ibid.* at 966-967.

⁵⁰ *Ibid.* at 966.

⁵¹ *Ibid.* at 976.

envisaged by the Refugee Convention, and in no sense treated by it as inferior to other options – may prove a vital means of ensuring the human dignity of refugees themselves.”⁵² This hope, while concerned with human dignity, does not, nor can it, attach itself to human rights. As Arendt aptly notes: “Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity.”⁵³

Morality

Joseph Carens leads the search for a moral justification for open borders. As he structures it, liberalism implies a *moral* obligation to permit free movement. While Carens’ arguments have evolved and shifted since his first examination of the ethics of immigration in his 1987 “Aliens and Citizens,”⁵⁴ it remains his original statement that has the greatest resonance.⁵⁵ His later writings will be discussed but it is necessary to begin with his initial argument. Carens examines three distinct theories – utilitarian, Rawlsian and Nozickian – all rooted in the liberal tradition.⁵⁶ He suggests that each theory is premised on an assumption of moral equality of all individuals, and a presumption that the individual exists prior to the community. He takes this theoretical convergence to suggest “there is little justification for restricting immigration.”⁵⁷

Carens acknowledges his strongest argument is his discussion of John Rawls’ *A Theory of Justice* and the conception of an ideal society.⁵⁸ Using this ideal theory, Carens argues

⁵² *Ibid.* at 977.

⁵³ *Responsibility and Judgment*, *supra* note 36 at 297.

⁵⁴ *Supra* note 9.

⁵⁵ Carens has since admitted that at the time of writing “Aliens and Citizens” he “felt somewhat ambivalent about the argument.” Joseph Carens, “A Reply to Meilaender: Reconsidering Open Borders” (1999) 33:4 *International Migration Review* 1082 at 1082 [“Reconsidering Open Borders”]. The lasting endurance of Carens’ initial argument will be discussed at the conclusion of this chapter.

⁵⁶ “Aliens and Citizens” *supra* note 9 at 265.

⁵⁷ *Ibid.* at 252.

⁵⁸ Carens admits that he finds Rawls the “most illuminating.” *Ibid.*

free migration to be “an essential part of the just social order toward which we should strive.”⁵⁹ The inescapable difficulty with this argument, readily acknowledged by Carens but also too readily dismissed by him, is that “Rawls himself explicitly assumes a closed system in which questions about immigration could not arise.”⁶⁰ However, even when Carens constrains his argument to close the borders somewhat and abandons the ideal construct, access and openness to refugees is maintained:

Rawls asserts that the priority accorded to liberty normally holds under nonideal conditions as well. This suggests that, if there are restrictions on immigration for public order reasons, priority should be given to those seeking to immigrate because they have been denied basic liberties over those seeking to immigrate simply for economic opportunities.⁶¹

This need-based exception to closed border circumstances will be further elaborated upon below.

In the last part of his article, Carens turns to the communitarian arguments of Michael Walzer. Walzer counters the conclusion that liberalism demands open borders. While Walzer and Carens are in agreement that moral theory requires the assumed recognition of all human beings,⁶² Walzer argues that closed borders are a necessary pre-condition of justice:

⁵⁹ *Ibid.* at 262.

⁶⁰ *Ibid.* at 255. Rawls describes his ideal society as “a closed system isolated from other societies.” John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) at 8 [*Theory of Justice*].

⁶¹ “Aliens and Citizens” *supra* note 9 at 260-261.

⁶² Carens writes “my findings...rest primarily on assumptions that I think no defensible moral theory can reject: that our social institutions and public policies must respect all human beings as moral persons and that this respect entails recognition, in some form, of the freedom and equality of every human being.” *Ibid.* at 265. Walzer similarly notes that “[t]he answer has to do with our recognition of one another as human beings, members of the same species, and what we recognize are bodies and minds and feelings and hopes and maybe even souls. For the purposes of this book I assume recognition.” Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at xii.

Across a considerable range of the decisions that are made, states are simply free to take in strangers (or not)...the right to choose an admissions policy...is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination.⁶³

Even Walzer, however, acknowledges the exceptional circumstance of refugees: “[t]he victims of political or religious persecution...make the most forceful claim for admission.”⁶⁴ For Walzer this claim derives from the principle of mutual aid.⁶⁵ Mutual aid arises when there is a need of assistance by one party and the costs to the other party of giving it are relatively low.⁶⁶ Refugees are “needy outsiders” whose claims “can only be met by taking people in.”⁶⁷

A different manner of challenge to Carens’ argument comes from Donald Galloway. Disagreeing with Carens but not attaching himself to the communitarians, Galloway argues that the open border vision falters in the assumption that moral individuals in the ideal state believe they have unlimited freedom of movement.⁶⁸ On the contrary, Galloway suggests that “they would believe in respecting the autonomy of others, and in allowing others the capacity to follow their own plans of life without interference. This would lead them to constrain their own movements.”⁶⁹ Galloway himself seeks to

⁶³ Walzer, *ibid.* at 61-62.

⁶⁴ *Ibid.* at 49. While Walzer acknowledges that a valid asylum claim can never morally be denied, he suggests a sufficiently large number of refugee claimants will annul the duty of mutual aid. For Walzer, when a state is faced with choosing among refugees, those who most resemble community members should be admitted.

⁶⁵ *Ibid.* at 33.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at 49.

⁶⁸ Donald Galloway, “Liberalism, Globalism, and Immigration” (1993) 18 *Queen’s Law Journal* 266 at 297.

⁶⁹ *Ibid.*

identify the admission criteria that a liberal immigration policy should follow.⁷⁰ While challenging the contention that morality demands open borders,⁷¹ he nonetheless concludes that immigration policy should be “at least in part” needs based.⁷² As does Walzer, Galloway acknowledges that “[o]nly if the grant of membership is a necessary means of providing the required assistance... would a stranger have a right to it.”⁷³

Leaving Liberalism and Minding the Gap

Other than the limited agreement on the admission of outsiders in need, the open-closed border arguments are so conflictingly convincing, and the interpretive scope of liberalism so wide, that they have been repeated for two decades:

- Liberalism requires equality and therefore borders must be open.
- vs.
- Liberalism requires self-determination and therefore there is a right to maintain closed borders.

Gibney summarizes these two claims as “the right of a political community to provide for its own members, and the right of all human beings to equal concern and respect.”⁷⁴ He takes these two perspectives beyond the realm of liberalism’s moral debate to suggest the divide can be summarized as *impartiality* (being the moral, liberal, utilitarian approach) versus *partiality* (being the approach of communitarians, conservatives and

⁷⁰ *Ibid.* at 270.

⁷¹ Galloway also flips the argument in a manner not considered by either Walzer or Carens. He 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.” For the state to prevent the admission of people under these circumstances, Galloway argues, would be hinder the fulfillment of the member’s personal moral duty. *Ibid.* at 295. Galloway’s argument makes the case for private sponsorship. See *infra* note 408.

⁷² *Ibid.* at 270.

⁷³ *Ibid.* at 295.

⁷⁴ Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004) at 194 [*Ethics and Politics of Asylum*].

nationalists).⁷⁵ Finding flaws in each approach, the former for failing to consider citizen claims and interests and the potential consequent “demise of the welfare state,” the latter by its “unjustifiable assumption of the legitimacy of the current territorial holdings of states, its elision of the claims of states and those of nations or distinct cultures, and its failure to account for the harm that states do,”⁷⁶ Gibney argues for the need to integrate both approaches into “an ideal for entrance policy needs.”⁷⁷

Gibney’s resulting ideal acknowledges a state’s right to restrict entry to preserve its values and institutions extending from civil and political rights to social rights and welfare. While recognizing the communitarian (partial) value of a common identity, Gibney distinguishes his vision by “the refusal to attach any intrinsic worth to the modern state as a site of cultural unity, legitimating a wide-ranging prerogative to control entrance.”⁷⁸ However, taking from the equality (impartial) argument, Gibney suggests “states would eschew cultural and ethnic grounds for admission and distribute entrance for membership and residence on the basis of need and familial connections.”⁷⁹ According to Gibney’s ideal, states would be required to admit refugees in significantly increased numbers to the point that their admission would threaten the provision of collective or public goods amongst the state’s members.⁸⁰

Having sketched his ethical ideal, Gibney explores the recent experiences of Germany, the United Kingdom, the United States, and Australia and observes the need for

⁷⁵ *Ibid.* at 19-20.

⁷⁶ *Ibid.* at 20.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 83.

⁷⁹ *Ibid.* at 83-84.

⁸⁰ *Ibid.* at 84.

“practical prescriptions for actually existing states.”⁸¹ Strict attachment to ideal theory risks the purchase of “its moral purity at the cost of practical relevance.”⁸² Gibney warns that:

If we are to respond to the great urgency of the claims of refugees we must aim to direct the actions of governments through the hazardous and unpredictable circumstances within which they actually operate. To do otherwise is to allow normative theory to drift loose from the real world of political debate, choice and, ultimately, action.⁸³

Within the need for practical relevance, however, remains the concern identified by Gibney as the “large and growing gap” between “the ethically ideal” and the “current practices of liberal democratic states.”⁸⁴

Carens, in his more recent work, has similarly focused on this concept of a “gap.” He takes as his premise Stanley Hoffman’s explanation of gap:

One of the key necessities in this field is to avoid too big a gap between what is and what ought to be. In any system of law, or in any system of morals, there is always a gap between the *is* and the *ought*, between the empirical patterns and the norm. The gap is necessary and inevitable. If there were no gap, people would not feel any sense of obligation, or any remorse when they violate a norm. But when the gap becomes too big, the system of law or the system of morals is really doomed – to have no impact whatsoever or to be destroyed.⁸⁵

Carens has consequently revised his approach and developed the concept of “realistic morality.”⁸⁶ He suggests that this is the approach that “informs most actual discussions

⁸¹ *Ibid.* at 194.

⁸² *Ibid.* at 228.

⁸³ *Ibid.*

⁸⁴ *Ibid.* at 196.

⁸⁵ Stanley Hoffman, *Duties Beyond Borders* (Syracuse, NY: Syracuse University Press, 1981) at 28 cited in Joseph Carens “Realistic and Idealistic Approaches to the Ethics of Migration” (1996) 30:1 *International Migration Review* 156 at 157 [“Realistic and Idealistic”].

⁸⁶ “Realistic and Idealistic” *ibid.* at 156.

of public policy, not only by officials but also by activists struggling to change current policies.”⁸⁷

Carens places his realism between expected behaviour and moral requirements.⁸⁸ Given the need for a narrow gap, Carens acknowledges that “no one would suppose that open borders (between all states, not just those of the affluent West) is a realistic policy option, so from this perspective there would be no point in wasting time on evaluating the hypothetical moral merits of such an approach.”⁸⁹ Seemingly dismissing his own earlier arguments,⁹⁰ Carens proceeds to question the pragmatism of making even the lesser argument for increased refugee resettlement:

Take the issue of admission of refugees. In principle, it is widely accepted that refugees who have no reasonable prospect of safe return to their homeland in the foreseeable future should be offered the opportunity to resettle permanently elsewhere. In a sense, this principle is just a corollary of a system that divides the world into territorial states. Everyone should have a state where he or she can live in peace and safety. In practice, very few countries are willing to accept refugees for permanent resettlement. The United States and Canada accept many more (in relation to population) than most states. They are proud of their records in this area. From the perspective of realistic morality, their pride is justifiable because they do more than other countries. They deserve praise and admiration for their policies. It would be pointless to ask whether they do their fair share (as measured, say, by the number they would have to take if they accepted their proportion in relation to the population of all the refugees seeking permanent resettlement or the number they would have to take if the quotas were adjusted for existing population densities). It would be even more senseless to criticize these two nations for failing to live up to some abstract standard, like admitting all refugees who want to come.⁹¹

⁸⁷ *Ibid.* at 157.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* at 159.

⁹⁰ Later in the article Carens notes that “Aliens and Citizens” his “best known” essay “is undoubtedly at the extreme end of the spectrum.” His shift in later works to a more realistic approach and the attempt to combine the perspectives is in order to “make my analysis more relevant to practical policy concerns.” *Ibid.* at 169.

⁹¹ *Ibid.* at 158-159.

While I accept Carens' conclusion that "[a] moral approach that ignores behavioural realities is doomed to irrelevance,"⁹² I do not accept his example of resettlement numbers in Canada and the United States as representative of an acceptable sized gap. He characterizes a realistic ethics of migration as requiring "that it not place too much strain on the state and that it not require too many sacrifices from current citizens."⁹³ If this is taken as the theoretical test, the proposals for increased resettlement pass, even in Canada and the United States. Despite Carens' disagreement, arguably increased resettlement numbers fall within a reasonable gap of his realistic morality.

However, it is in Carens' warning of the dangers of realistic morality that a stronger argument emerges for increased resettlement: "[i]f we are forced to choose between the lesser of two evils, it is essential not to delude ourselves into thinking that the lesser evil is really a good."⁹⁴ The difficulty with the realistic argument is that "[w]e want a more critical perspective...[w]e do not want to build the flaws and limitations of existing arrangements into our moral inquiry."⁹⁵ Thus Carens never actually abandons his earlier ideals: "[i]f any discussion of the ethics of migration should recognize reality, it should also consider whether we should embrace that reality as an ideal or regard it as a limitation to be transcended as soon as possible. Only the perspective of an idealistic approach to morality can enable us to do this."⁹⁶ Under the idealistic approach, the question to be asked regarding migration is "[i]n a just world, what rights would political

⁹² *Ibid.* at 159.

⁹³ *Ibid.* at 163.

⁹⁴ *Ibid.* at 167. See also "Reconsidering Open Borders" *supra* note 55 at 1091.

⁹⁵ "Realistic and Idealistic" *ibid.* at 166.

⁹⁶ *Ibid.*

communities have to limit migration and what rights would individuals have to travel freely across state borders and settle wherever they chose?”⁹⁷

Yet the idealistic approach unfortunately offers no greater clarity. Carens notes that “[i]n a just world, however it was organized, there would presumably be no refugees since refugees, by definition, are a product of injustice. So, if we think about the ethics of migration in the context of a just world, we will simply not turn our minds to the problem of refugees.”⁹⁸ Carens consequently warns that “[i]dealistic inquiries may be academic in the pejorative sense of that term, privileged speculations that do little to help us reflect upon the moral choice we must make or to guide us to act responsibly in the world.”⁹⁹ Thus we are left with a double-edged sword of morality – both the realistic and idealistic approaches are hazardous on their own.

In conclusion, Carens, like Gibney, proposes combining the two approaches. As an example he posits a discussion of “what an ideal refugee regime would look like, thus presupposing the existence of a refugee problem but perhaps not accepting, for the purposes of such an analysis, all of the political realities that might stand in the way of

⁹⁷ *Ibid.* at 167.

⁹⁸ *Ibid.* at 168. John Rawls employs the same logic in *The Law of Peoples* to explain why immigration is left untreated in his concept of a “realistic utopia”:

There are numerous causes of immigration. I mention several and suggest that they would disappear in the Society of liberal and decent Peoples. One is the persecution of religious and ethnic minorities, the denial of their human rights. Another is political oppression of various forms... Often people are simply fleeing from starvation... The last cause I mention is population pressure in the home territory, and among its complex of causes is the inequality and subjection of women... Thus, religious freedom and liberty of conscience, political freedom and constitutional liberties, and equal justice for women are all fundamental aspects of sound social policy for a realistic utopia... The problem of immigration is not, then, simply left aside, but is eliminated as a serious problem in a realistic utopia.

John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999) at 8-9 (footnotes omitted).

⁹⁹ “Realistic and Idealistic” *ibid.*

such an ideal regime.”¹⁰⁰ Ultimately, for Carens, “[t]here is no uniquely satisfying perspective on the ethics of migration.”¹⁰¹ Nonetheless, Carens still argues that “if we took the principle of equal moral worth seriously, it would dramatically constrain the sorts of considerations that now drive immigration policy and would make borders much more open.”¹⁰² He maintains that:

Although I now feel able to present the argument more clearly and to acknowledge its limitations more fully, I think the core of the argument remains intact. Most of the versions of liberalism that reject the ideal of open borders do so almost as an aside...and do so because they adopt, explicitly or implicitly, presuppositions that evade the problem that the open borders argument is designed to confront...apart from the early discussion of Walzer which I criticized in the original article, I know of no attempt to lay out in a systematic way a fundamental moral justification for the right of states to exclude migrants in the world as it is, nor any to justify a general right of exclusion on the world as it ought to be...The challenge of open borders continues.¹⁰³

Carens’ argument has shifted but the core of his assertion has not changed.

Humanitarianism

Dauvergne conversely deals with the liberal dilemma by arguing the impossibility of finding any guidance in morality. For her, “immigration law is an amoral realm, beyond or at the border of liberal conceptions of justice.”¹⁰⁴ Dauvergne derives this amorality from the lack of a liberal justice standard in classical liberal theory – exemplified by the Carens-Walzer conflict – to guide just immigration selection and admissions. As a consequence “immigration laws and policies cannot be critiqued by comparison to an

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² “Reconsidering Open Borders” *supra* note 55 at 1089.

¹⁰³ *Ibid.* at 1096-1097.

¹⁰⁴ *Humanitarianism, Identity and Nation, supra* note 32 at 70-71.

accepted notion of the good. The realm is not *immoral*, but is outside the reach of agreed versions of liberal morality, justice, and equality.”¹⁰⁵

Absent an agreed answer on the measure of morality, Dauvergne argues the search for “just” immigration laws is futile.¹⁰⁶ Rather, she explores the realm of agreement that does exist between open and closed border theorists on the admission of the “needy,” and labels this agreement “the humanitarian consensus.”¹⁰⁷ For Dauvergne, this is the “point of convergence for those liberals who claim the need for closed borders, those who assert the importance of open borders, and those who claim that this intractable argument must be circumvented to achieve real change.”¹⁰⁸ Humanitarianism cannot lead to “just” immigration laws or quantitatively answer admissions questions as it “differs profoundly from justice.”¹⁰⁹ Dauvergne contrasts justice, which she defines as “a standard that implies, and applies, equality between individuals,” to humanitarianism which is “grounded in a specific type of difference created by material inequality.”¹¹⁰ Justice is an obligation. Humanitarianism is an act of beneficence and charity.

While Dauvergne refines the humanitarian positions of liberal theorists stating that “by *any* liberal standard, contemporary nations are failing in their moral obligations” she ultimately concludes that “[b]eyond this, humanitarianism spells out little.”¹¹¹ The difficulty is that humanitarianism is always subject to limitations, and just like morality, lacks any actual measurement mechanism. While humanitarianism may rightly be the

¹⁰⁵ “Sovereignty, Migration and the Rule of Law” *supra* note 37 at 599.

¹⁰⁶ *Ibid.* at 600-609.

¹⁰⁷ *Humanitarianism, Identity and Nation*, *supra* note 32 at 60.

¹⁰⁸ *Ibid.* at 71.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* at 72.

¹¹¹ *Ibid.* at 71.

point of convergence of opposing theorists, its occupation of this space is hollow. Although Carens and Walzer and others may agree on the *concept* of humanitarianism, they will never reach agreement on its *content*.

Dauvergne nevertheless argues for the manipulation of humanitarianism for political and practical gains. In an allusion similar to that of the gap between the *is* and the *ought*, Dauvergne notes “the rhetoric of humanitarianism is valuable because it calls on us to think beyond ourselves, even if we do fall short of the mark.”¹¹² Exploring the power of the identity perceptions and desires of states, she argues that humanitarianism is a “self-serving ruse.”¹¹³ Her analysis, while exposing humanitarianism’s hollow core, suggests that “understanding the contours and the limits of liberalism’s humanitarian consensus is important to being able to structure arguments that will resonate within that consensus and thereby gain political purchase.”¹¹⁴

In Gibney’s shift from ideal to non-ideal he likewise ends by proposing humanitarianism “as the best way of capturing current responsibilities to refugees.”¹¹⁵ Reaching a similar conclusion as Dauvergne, Gibney regards humanitarianism as a “rallying principle” and site of “overlapping consensus”¹¹⁶ for partialists and impartialists alike.¹¹⁷

Demonstrating Dauvergne’s point of the concept’s vague and subjective meaning,

¹¹² *Ibid.* at 74.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.* at 66-67. Dauvergne’s concept of humanitarianism will be explored in greater detail in Chapter 5 “Humanitarianism and Half-Open Doors: Canada’s Refugee Resettlement Policy.”

¹¹⁵ *Ethics and Politics of Asylum*, *supra* note 74 at 230.

¹¹⁶ Gibney takes this term from John Rawls’ *Political Liberalism* (New York: Columbia University Press, 1993) at 10. In *Political Liberalism*, Rawls conceives of “overlapping consensus” as consisting of “all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizeable body of adherents in a more or less just constitutional regime” (at 15). The consensus is defined as the affirmation of all the doctrines “by society’s politically active citizens and the requirements of justice are not too much in conflict with citizens’ essential interests as formed and encouraged by their social arrangements” (at 134).

¹¹⁷ *Ethics and Politics of Asylum*, *supra* note 74 at 235.

Gibney's humanitarianism differs from Dauvergne's in that it lacks the nuanced distinction between obligation and beneficence. It is understood as a responsibility amongst all humankind to assist those in great need "when the costs of doing so are low."¹¹⁸ Like Dauvergne however, Gibney closes with the arguably weak recognition that while lacking the "critical teeth necessary to evaluate the actions by states towards refugees,"¹¹⁹ humanitarianism "*might* move these states closer to realizing the values they claim to live by now."¹²⁰

Using Theory

Reaching the end of Gibney and Dauvergne's work and following the shift in Carens' arguments over the years, one is left acutely unsatisfied and yet entirely sympathetic. Beyond the reverberations of the broad and simplistic assertions, in action not justification, that borders should be entirely open or completely closed, there has yet to be any clear guidance on admission decisions or numbers. As the theoretical alleys appear to have been explored to exhaustion, the question that lingers is whether theory holds any relevance in the real world problem of refugee protection. Unequivocally the theorists discussed above would answer in the affirmative. As I see it, the theorists, most clearly Carens, Dauvergne and Gibney, have plunged themselves into Hoffman's gap – clinging to the *ought* of the ideal with one arm while reaching to the *is* with the other arm, and trying with practical, "realistic" recommendations, to narrow the space in between.

The unwillingness to relinquish the ideal and fully grasp the real seems to stem from the ideal's ability to capture the imagination. Dauvergne speaks of an "appeal to the

¹¹⁸ *Ibid.* at 231.

¹¹⁹ *Ibid.* at 236.

¹²⁰ *Ibid.* at 260 (emphasis added).

humanitarian impulse” and “the emotive power of vast disparities in wealth between nations.”¹²¹ This is not the realm of the rational but of the instinctual. Carens’ original sweeping call for open borders and accusation of feudal privilege continues to resonate – for while it cannot be realized, neither can it be ignored. Most simply, the utopian dream and its obvious absence in the modern world *get people thinking*. This awareness is the necessary first step. There is the intermingled pull of guilt and of hope. Without this awareness there is no impetus to action. The ideal most clearly, most powerfully, most painfully, highlights our distance from it. It is the image of the ideal that drives us to seek solutions in reality. Thus even the academic moral musings ultimately serve a practical and persuasive purpose that should not be abandoned.

It is not really relevant whether Dauvergne’s humanitarianism is any different from Carens’ malleable morality, Gibney’s ethics or even the desire to declare human rights universal. What can be taken from all is that irrespective of the label, there exists a compelling call for the protection of refugees. The grounding in theory provides a foundation from which to achieve “political purchase,”¹²² and “change current policies,”¹²³ through recommendations of “practical relevance.”¹²⁴ That these recommendations require some theoretical slippage is not a failing. What is important is that their proponents have not lost their consciousness of the ideal or desire to diminish the gap.

¹²¹ *Humanitarianism, Identity and Nation*, *supra* note 32 at 65.

¹²² *Ibid.* at 74.

¹²³ “Realistic and Idealistic” *supra* note 85 at 156.

¹²⁴ *Ethics and Politics of Asylum*, *supra* note 74 at 194.

There is not however one direct gap-crossing route from ideal theory to policy recommendations. Various means of privileging protection remain. In the last part of this chapter I wish to return to the specific question of refugee protection through resettlement and the theoretical challenges that present when distinguishing between resettlement and *non-refoulement*.

The Invisibles

Carens, accepting for the sake of argument the state's entitlement to control immigration, has recently delved into a more practical exploration of "who should get in?"¹²⁵ In his consideration of refugee admissions, he notes that "[o]ne of the puzzles here is why the obligations of states toward asylum seekers should be so much stronger than their obligation toward refugees seeking resettlement."¹²⁶ His explanation is that:

What gives asylum seekers a vital moral claim, however, is the fact that their arrival involves the state directly and immediately in their fate. It is one thing to leave someone languishing in a refugee camp, quite another to send a person back to the country of origin to be tortured or killed. Leaving people in refugee camps rather than offering them entry is not so different from leaving people in the living conditions of many countries rather than offering them entry...if the state's general right to control immigration is taken as a given, then leaving people in refugee camps once they have a safe haven does not violate any moral obligations.¹²⁷

Gibney conversely views asylum seekers as making "exactly the same moral claim for entrance as the refugee."¹²⁸ He recognizes however the "unique set of practical and moral issues" raised by asylum seekers at a state's border.¹²⁹ Reiterating Carens' above assertion as a question, Gibney asks: "Do states have a special responsibility to refugees

¹²⁵ Joseph Carens, "Who Should Get In? The Ethics of Immigration Admissions" (2003) 17:1 *Ethics & International Affairs* 95 ["Who Should Get In?"].

¹²⁶ *Ibid.* at 101.

¹²⁷ *Ibid.*

¹²⁸ *Ethics and Politics of Asylum*, *supra* note 74 at 9.

¹²⁹ *Ibid.*

in their own territory that justifies them giving priority to these men and women over others in danger who are further away?”¹³⁰ An affirmative response such as Carens’, in Gibney’s view, “appears to commit one to the contentious position that physical proximity should make a difference to a state’s moral responsibilities.”¹³¹ While Carens’ argument is grounded in the assumption that the refugee seeking resettlement is “already safe,”¹³² Gibney assumes both refugees and asylum seekers to be in equal need.

Neither assumption is accurate all of the time. Resettlement is indeed only one of three durable solutions; many refugees are able to locally integrate and find safety in their first country of asylum. Conversely many refugees, such as the Afghans in India, linger in protracted situations, inadequately protected, and often in camps grudgingly set up by the neighbouring countries from those they have fled. At the same time, many argue that the asylum seekers who are able to obtain the funds, visas and means, and possess the physical health and strength to reach the distant borders of western states, are clearly the best equipped and “least needy” refugees, and that refugees alone do not hold a monopoly on need. All of these arguments will be returned to in the course of this thesis.

What must be considered in conjunction with both Carens’ and Gibney’s above assumptions is the power of the state to restrict entry. Gibney himself goes on to note that “liberal democratic states have generally responded to the rise of asylum seeking as a political issue by using a range of indiscriminate deterrent and preventative measures to reduce the flow of applicants to their frontiers where they could claim asylum.”¹³³ In her

¹³⁰ *Ibid.* at 10.

¹³¹ *Ibid.*

¹³² “Who Should Get In?” *supra* note 125 at 102.

¹³³ *Ethics and Politics of Asylum*, *supra* note 74 at 11.

work, Audrey Macklin posits there is an “erosion of the idea that people who seek asylum may actually be refugees.”¹³⁴ She confronts the tendency of western industrialized countries to convert refugees approaching their borders into “illegals” perpetually leaving “real” refugees “over there.”¹³⁵ Dauvergne addresses this same trend. For her, it is a reflection of the state’s means of securing its sovereignty in a globalized world: “Given threats to the relevance and vitality of the nation state, the importance of immigration laws is reflected in a series of changes in the laws of powerful nations aimed at ‘cracking down’ on ‘illegal’ migration and at facilitating the flow of the world’s most desirable migrants – with desirability defined in globalization’s terms.”¹³⁶ Macklin develops the notion of the “discursive disappearance of the refugee” and argues that “refugees are increasingly being erased from our discourse, and further, that this erasure performs a crucial preparatory step toward legitimating actual laws and practices that attempt to make them vanish in reality.”¹³⁷ Dauvergne’s work illustrates this “crackdown” has already occurred. As evidence she lists the United States’ *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, the 1999 British *Immigration and Asylum Act*, new laws reducing benefits to asylum seekers in Germany, France and the United Kingdom over the past decade, and Australia’s manipulation of its borders for the

¹³⁴ Audrey Macklin, “Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement” (2005) 36 *Columbia Human Rights Law Review* 365.

¹³⁵ *Ibid.* at 369.

¹³⁶ Catherine Dauvergne, “Evaluating Canada’s New Immigration and Refugee Protection Act in Its Global Context” (2003) 41 *Alberta Law Review* 725 at 735 [“Evaluating Canada’s New Immigration and Refugee Protection Act”].

¹³⁷ *Supra* note 134 at 369.

purpose of asylum claims.¹³⁸ The *Canada-US Safe Third Country Agreement* can be added to this list.¹³⁹

Working from Macklin's concept of "disappearance," I suggest that in addition to the disappearance of one category of refugees – the asylum seekers – the other "real" refugees remaining "over there" are so far removed in a vague, far-off realm that they are rendered invisible. By geographic distance, presumptions of safety, and a lack of legal obligations, those refugees who fail to make it to the frontiers of safe states, such as the Afghans left lingering in New Delhi, are simply not seen. Their invisibility is reflected in the 1951 Convention's silence on obligations to these refugees, the dearth of academic examination of resettlement and media and government attention only in the celebratory act of making a small number of these refugees visible and legal, through the act of bringing them within a protective state's borders. Despite their invisibility, the protection needs of refugees left outside the borders of safe states remains.

Conclusion

The remainder of this thesis is devoted to a dialogue on the protection needs of invisible refugees requiring resettlement. The goal is not to develop a theoretical argument but to achieve actual increases in resettlement numbers through dialogue and the design of a more comprehensive resettlement model. Carens' declaration of modern feudal privilege through citizenship in Western liberal democracies is compelling, regardless of whether

¹³⁸ "Evaluating Canada's New Immigration and Refugee Protection Act" *supra* note 136 at 736.

¹³⁹ *Canada-U.S. Safe Third Country Agreement*, 5 December 2002, online: <<http://www.cic.gc.ca/english/policy/safe-third.html>>. The agreement came into force on 29 December 2004 and requires asylum seekers to make their refugee claims in the first country of arrival. Asylum seekers arriving in the United States, as the majority inevitably do as a result of the greater number of American embassies worldwide and international flight routing through the United States, will 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.

one accepts his theoretical arguments.¹⁴⁰ In the same way, the chapters that follow can stand on their own absent theoretical attachment. The above theories have nonetheless provided certain consciousnesses that will be woven throughout the thesis. Even the most idealistic of theorists (Carens) has reconciled himself to a degree of realism in pursuit of politically persuasive arguments. Others (Dauvergne, Gibney) have demonstrated the ability to infuse a vague concept (humanitarianism) with meaning as a mirror for the same goal of political persuasiveness. Across the liberal spectrum (Carens-Galloway-Walzer) there is recognition of the moral pull to help those in need. This “humanitarian consensus” possesses meaning even if it cannot be measured. There is a need then to mingle the moral and the political, to minimize the gap and make it crossable. And while rights-based arguments lack an enforcement mechanism, this does not translate into a justification for exclusion from universal recognition and continued invisibility. Rather, it serves to highlight the need to bring refugees within humankind,¹⁴¹ within the borders of safe states, and to make them visible.

¹⁴⁰ “Aliens and Citizens” *supra* note 9.

¹⁴¹ *Responsibility and Judgment*, *supra* note 36.

CHAPTER THREE

Resettlement's Renaissance: A Cautionary Advocacy

As it approached its 50th anniversary in 2001, UNHCR was in the midst of an identity crisis. States that were the very authors of the 1951 Convention were vocally challenging its continued relevance and surreptitiously evading their obligations.¹⁴² In both response to the crisis and in celebration of the anniversary, UNHCR initiated the *Global Consultations on International Protection* (Global Consultations) to address the situation through ministerial meetings, expert roundtables and policy formulation.¹⁴³ One of the key developments to arise out of the resulting *Agenda for Protection* was a renewed emphasis on the role of resettlement.¹⁴⁴

Resettlement has a checkered past that pre-dates the 1951 Convention. The International Refugee Organization, established in 1946, resettled over 1 million refugees between 1947 and 1951.¹⁴⁵ In fact, resettlement was the tool of choice by all refugee

¹⁴² On a page titled "Protecting Refugees" on its website, UNHCR notes that "The main global treaty for the protection of refugees – the UN Convention relating to the Status of Refugees – marked its 50th anniversary on 28 July 2001 amid concerns that some of its key provisions are being questioned and even openly flouted by a growing number of states", online:

<<http://www.unhcr.org/cgi-bin/texis/vtx/protect?id=3c0794574>>. In a recent statistical report UNHCR further noted that violations of the core principle of *non-refoulement* were reported by 50% of UNHCR's country offices in 2005 and that 75% of the states in possible breach of the principle are signatories to the 1951 Convention or 1967 Protocol (*infra* note 159) or both. UNHCR, *Measuring Protection by Numbers 2005* (November 2006) at 11, online: <<http://www.unhcr.org/statistics>> [*Measuring Protection*].

¹⁴³ First Track: "Ministerial Meeting of States Parties" (12 & 13 December 2001), online: <<http://www.unhcr.org/protect/PROTECTION/3b9490a54.html>>; Second Track: Erika Feller, Volker Türk & Frances Nicholson, eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) 3, online: <<http://www.unhcr.org/protect/PROTECTION/3b94e7a2a.html>>; Third Track: "Executive Committee Meetings", online <<http://www.unhcr.org/protect/PROTECTION/3b95d8d17.html>>. See also "Protecting Refugees" *ibid*.

¹⁴⁴ *Agenda for Protection*, *supra* note 25.

¹⁴⁵ Dennis Gallagher, "The Evolution of the International Refugee System" (1989) 23:2 *The International Migration Review* 579 at 579. See also *infra* note 289.

organizations that preceded UNHCR.¹⁴⁶ As enshrined in Article 33(1), the 1951 Convention shifted the focus of refugee protection to the principle of *non-refoulement*. The boat people crisis of the 1970s and early 1980s brought a resurgence in resettlement enthusiasm with 1.2 million Indo-Chinese resettled by UNHCR between 1976 and 1989. Gary Troeller, a UNHCR representative, reports that by the late 1970s UNHCR was involved in the resettlement of 200,000 persons per year, and that at one point in 1979 “resettlement was viewed as the only viable solution for 1 in 20 of the global refugee population under the responsibility of UNHCR.”¹⁴⁷ Beginning in the late 1980s however, resettlement came to be viewed by UNHCR as the least preferred durable solution. 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 following the end of the cold war, limited enthusiasm for resettlement.¹⁴⁸ By 1996 UNHCR resettled only 1 in every 400 of the global refugee population under its care.¹⁴⁹

In its current re-invigorated state, UNHCR has proclaimed that resettlement “serves three equally important functions:”

First, it is a tool to provide international protection and meet the special needs of individual refugees whose life, liberty, safety, health or other fundamental rights are at risk in the country where they have sought refuge. *Second*, it is a durable solution for larger numbers or groups of refugees, alongside the other durable solutions of voluntary repatriation and local integration. *Third*, it can be a tangible expression of international solidarity and a responsibility sharing

¹⁴⁶ See *The Rights of Refugees*, *supra* note 44 at 964.

¹⁴⁷ Gary Troeller, “UNHCR Resettlement: Evolution and Future Direction” (2002) 14:1 International Journal of Refugee Law 85 at 87.

¹⁴⁸ *Ibid.* at 88.

¹⁴⁹ *Ibid.* at 85 and 89. Chapter 4 “Looking Back, Moving Forward: The History and Future of Refugee Protection” provides a more comprehensive review of the use of resettlement in the twentieth century.

mechanism, allowing States to help share each other's burdens, and reduce problems impacting the country of first asylum."¹⁵⁰

While the re-emergence of resettlement discourse is to be applauded, the difficulty with UNHCR's current tripartite construction is that it risks sending resettlement into its own dizzyingly schizophrenic identity crisis – uncertain of how to actualize its role in an effective manner.

Resettlement is a useful tool for all three reasons enumerated by UNHCR. Its malleability, however, also makes it prone to manipulation. It can and has been used by states to obfuscate an unwillingness to meet their legal obligations under the 1951 Convention through a replacement of refugee protection by migrant selection. Resettlement itself, and as a consequence this chapter, are in a difficult position. What follows can best be termed "cautionary advocacy." The argument is first made that resettlement is a necessary component of refugee protection, particularly in the current period of securitization following the events of 11 September 2001. This section is followed by a discussion of the dangers of the abusive use of resettlement to the overall refugee protection scheme. In conclusion, models for more structured resettlement are examined with a view to at least understanding what reform is needed.

Why Resettlement?

UNHCR reported that by the end of 2005 the global number of refugees was an estimated 8.7 million persons.¹⁵¹ 1 in 4 of these refugees, 24%, are in either Pakistan or the Islamic Republic of Iran.¹⁵² In total, by UNHCR bureau divisions, over 2.5 million refugees are

¹⁵⁰ 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.

¹⁵¹ *Measuring Protection*, *supra* note 142 at 1.

¹⁵² *Ibid.*

hosted in Africa, excluding North Africa, and almost another 2.5 million are in CASWANAME, UNHCR's bureau encompassing Central Asia, South West Asia, North Africa, and the Middle East. Europe hosts just under 2.0 million refugees and there are over 800,000 in Asia and the Pacific. In the Americas, in total, there are less than 600,000 refugees.¹⁵³ The numbers highlight "that refugees and mass movements are first and foremost a 'developing country' problem and that the biggest 'donors' are in reality developing countries who put at risk their fragile environment, economy and society to provide refuge to millions."¹⁵⁴ Matthew Gibney terms this uneven distribution the "tyranny of geography."¹⁵⁵ In somewhat more neutral parlance, it raises the issue of burden-sharing.¹⁵⁶ Following a review of the asylum policies of the United States (US), Germany, the United Kingdom (UK), and Australia, Gibney writes:

...the limitations of the current international response are rooted in the fact that states have failed to agree upon fair terms for the distribution of responsibility for refugees (resulting in huge inequalities in state burdens) and that most states are content to 'free ride' off countries that have more inclusive asylum policies...¹⁵⁷

In addition to more inclusive policies, or conversely less forceful interdiction, certain countries, particularly those in Africa, Asia, and the Middle East are simply closer to and more easily accessed by refugee flows.

¹⁵³ UNHCR, *2005 Global Refugee Trends* (Geneva: UNHCR, 2006) at 3, online: <<http://www.unhcr.org/statistics.html>>.

¹⁵⁴ View of the former Indian permanent representative to the United Nations at the forty-eighth Session on the UNHCR Executive Committee cited in Brian Gorlick, "Refugee Protection in Troubled Times" in Niklaus Steiner, Mark Gibney & Gil Loescher, eds., *Problems of Protection: The UNHCR, Refugees and Human Rights* (New York; London: Routledge, 2003) 79 at 81.

¹⁵⁵ *Ethics and Politics of Asylum*, *supra* note 74 at 195.

¹⁵⁶ Even this terminology has its drawbacks. Savitri Taylor notes "[t]he choice of terminology describing the obligation as 'responsibility-sharing' rather than 'burden-sharing' is deliberate. As others have pointed out, whether asylum seekers are a burden or benefit depends, among other things, on the time frame adopted." Savitri Taylor, "The Pacific Solution or a Pacific Nightmare?: The Difference between Burden Shifting and Responsibility Sharing" (2005) 6 *Asian-Pacific Law and Policy Journal* 1 at 39.

¹⁵⁷ *Ethics and Politics of Asylum*, *supra* note 74 at 246.

The 1951 Convention acknowledges the need for burden-sharing, considering in its Preamble, “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.”¹⁵⁸ There is no further mention of burden-sharing in the Convention or the subsequent 1967 *Protocol relating to the Status of Refugees* (1967 Protocol).¹⁵⁹ Resettlement is by no means the only form of burden-sharing. Many countries also make significant financial contributions to refugee receiving countries and UNHCR.¹⁶⁰ One controversial argument by Peter Schuck, for instance, recommends that all non-refugee producing states be allocated a yearly quota of refugees for care or resettlement that they can either absorb themselves or pay another country to provide surrogate care.¹⁶¹ Goal 3(6) of UNHCR’s *Agenda for Protection*, however, outlines the significant role of resettlement in burden-sharing:

¹⁵⁸ *Supra* note 1.

¹⁵⁹ *Protocol relating to the Status of Refugees*, 1967, 606 UNTS 267 (entered into force 4 October 1967).

¹⁶⁰ As at 10 December 2006, contributions to UNHCR programs for the budget year 2006 totaled US\$1,031,016,510 from governments and private donors. UNHCR, “Donors/Partners” online: <<http://www.unhcr.org/partners/3b963b874.html>>.

¹⁶¹ Schuck, *supra* note 20. Mary Crock provides a helpful summary of Schuck’s proposal and the consequent criticisms in “In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows” (2003) 12 *Pacific Rim Law and Policy Journal* 49 at 80:

Peter Schuck has argued for the introduction of a quota system whereby non-refugee producing states would be allocated a certain number of refugees for care or resettlement each year. This quota would be determined after establishing a global figure of the number of refugees in need of protection each year, and would be allocated in a manner proportionate to the wealth and carrying capacity of a nation. The essence of Schuck’s proposal is that developed states should then be able to elect either to take in their allocation of refugees or pay other states to take in or care for the specified number. Put another way, Schuck [*sic*] proposes that a state should be able to subrogate its liability by approaching other states to accept its refugee quota in exchange for cash, and/or other incentives such as “credit, commodities, development assistance, technical advice, weapons and political support.” (footnotes omitted).

And at 85:

After publishing his “modest proposal,” Schuck [*sic*] met with pointed criticisms from fellow academics Deborah Anker, Joan Fitzpatrick, and Andrew Schaknové. The three argue that the Schuck [*sic*] model would degrade the Refugee Convention as a human rights instrument. By

3(6): Resettlement used more effectively as a tool of burden-sharing.

-States to examine how more flexible resettlement criteria could be applied with regard to refugees recognized on a *prima facie* basis in mass displacement situations to whom Article 1 F does not apply, coupled with, as appropriate, temporary humanitarian evacuation programmes.

-The Working Group on Resettlement to examine further the potential use of resettlement as a burden-sharing tool, which would include the issue of criteria to be applied in mass displacement situations, especially where the prospect of other durable solutions is remote or absent.¹⁶²

As of 1 March 2006, there were 147 states party to the 1951 Convention or 1967 Protocol or both.¹⁶³ Stretching to the smallest numbers, there are a mere 16 resettlement countries with yearly resettlement numbers ranging from 53,813 in the US to 29 in Mexico.¹⁶⁴ Gil Loescher and James Milner note “[t]he 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.”¹⁶⁵ In its current incarnation, resettlement is not an effective tool of burden-sharing.

The argument for resettlement is difficult. Not because the image of wasted lives in limbo is not compelling but because it is not seen. It is for this reason that I label these

turning the plight of refugees into an economic bargaining tool, wealthy states would be able to take advantage of poorer states, forcing them to shoulder the burden of caring for refugees in circumstances where they are likely to suffer in both the short and long terms. The authors argue that “by emphasizing the temporary nature of physical asylum and conferring it through voluntary coalitions of states, the economic and social rights of refugees under the Refugee Convention and Protocol will be de-emphasized.” (footnotes omitted).

¹⁶² *Supra* note 25 at 61.

¹⁶³ UNHCR, “States Parties to the Convention and the Protocol” (1 December 2006), online: <<http://www.unhcr.org/cgi-bin/texis/vtx/protect?id=3c0762ea4>> [“UNHCR States Parties”]. 140 Countries have acceded to both the 1951 Convention and 1967 Protocol. The accession of Montenegro to both the 1951 Convention and 1967 Protocol in October 2006 is the most recent as of 1 December 2006.

¹⁶⁴ UNHCR, “Refugees by Numbers 2006 edition”, online: <<http://www.unhcr.org/basics/BASICS/3b028097c.html#Resettlement>> [“Refugees by Numbers”].

¹⁶⁵ Gil Loescher & James Milner, “Protracted Refugee Situations: Domestic and International Security Implications” (2005) 45:375 *Adelphi Papers* 7 at 74-75.

refugees “the invisibles.” Bill Frelick offers the following description of the reality for these individuals:

Millions of refugees worldwide have been relegated to a limbo existence, warehoused in camps or settlements with no prospects for voluntary repatriation or local integration. Children born and raised within the confines of camps often never see normal life outside the fences. These populations often become dependent and despondent, with predictably negative social consequence.¹⁶⁶

Highlighting the refugee’s invisibility, Jennifer Hyndman argues that camps “remove evidence of human displacement from view and contain ‘the problem’ without resolution, as noncommunities of the excluded.”¹⁶⁷

For those left in the camps, rural outskirts, or apartment complexes in urban corners, there is the assumption that while not receiving government protection, refugees are nonetheless within UNHCR’s protective bubble. To an extent this assumption is true. These refugees are recognized by UNHCR and receive protection under its mandate. UNHCR is able to offer basic aid and assistance. As Loescher explains: “UNHCR is identified primarily with assistance – the delivery of food, shelter, and medicine – to refugees and war-affected populations.”¹⁶⁸ Hyndman notes, though, that “UNHCR is careful not to make the camps too attractive to potential refugees or other migrants by maintaining minimum educational and other facilities, an approach that has been called ‘humane deterrence.’”¹⁶⁹

¹⁶⁶ Bill Frelick, “Rethinking US Refugee Admissions: Quantity and Quality” (2002) World Refugee Survey 28 at 35 cited in Martin, *supra* note 26 at 11.

¹⁶⁷ *Supra* note 22 at 190.

¹⁶⁸ Gil Loescher, “UNHCR at Fifty: Refugee Protection and World Politics” in Steiner, Gibney & Loescher, *supra* note 154, 3 at 13 [“UNHCR at Fifty”].

¹⁶⁹ *Supra* note 22 at 24 (footnote omitted).

While a comfortable camp environment and the chance at resettlement risk serving as pull factors that encourage migrant flows, these concerns are muted by the reality of UNHCR's powerlessness in the camp setting. Loescher indicates:

The central importance of human rights protection of displaced and threatened populations is frequently neglected. [...] 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...¹⁷⁰

He adds "host governments or dissident warlords ultimately exercise control over the agency's operational environment."¹⁷¹ In the chapter that follows Loescher's article, Arthur Helton recalls the image of soldiers from the "benign refugee-hosting state" of Tanzania marching Rwandan refugees back across the border at gunpoint in December 1996.¹⁷²

Beyond invisibility, the primary difficulty with resettlement is that it is undertaken by states on an entirely voluntary basis. Unlike the obligation on all signatory countries not to *refoule* refugees at their borders, there is no requirement that signatory states bring refugees to their borders. As Janet Dench notes, "[i]nstead of addressing how people fleeing persecution might seek asylum in other countries, the 1951 Convention relating to the Status of Refugees focused on the obligation of states not to *refoule* a refugee to persecution."¹⁷³ The 1951 Convention is, therefore, *reactive* in its structure.

¹⁷⁰ "UNHCR at Fifty" *supra* note 168 at 13.

¹⁷¹ *Ibid.* at 14.

¹⁷² Arthur C. Helton, "What is Refugee Protection? A Question Revisited" in Steiner, Gibney & Loescher, *supra* note 154, 19 at 30. See also Beth Elise Whitaker, "Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania" in Steiner, Gibney & Loescher, *ibid.* at 141-154.

¹⁷³ Janet Dench, "Controlling the Borders: C-31 and Interdiction" (2001) 19:4 *Refugee* 34 at 34.

Resettlement, in contrast, is, in Helton's terms, a "proactive refugee policy."¹⁷⁴ A coherent and comprehensive refugee policy must be both *proactive* and *reactive*.¹⁷⁵

This is an important point to highlight. An argument for increased resettlement should not be interpreted as a criticism of the principal of *non-refoulement* or as an argument that it should be diminished in favour of increased resettlement. What must be acknowledged is that the current world climate means that there are increased obstacles to asylum seekers reaching safe countries on their own. 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.¹⁷⁶

For Catherine Dauvergne, "[t]he worldwide fear of terror has overlapped and intertwined with the fear of illegal migration."¹⁷⁷ Although intentions are difficult to gauge and may be overlapping, it can safely be said that in some circumstances refugees are being targeted for exclusion while in others they are the unintentional victims. I will deal with the latter argument first and the former below under the heading "Dangers of Abuse."

While Article 31 of the 1951 Convention prevents the imposition of penalties for illegal entry by asylum seekers, it does not and cannot prevent a country from deterring illegal

¹⁷⁴ *Supra* note 160 at 31.

¹⁷⁵ Recall that both proactive and reactive responses should be preceded by attempts at preventative protection. See *supra* note 22.

¹⁷⁶ Volker Türk & Frances Nicholson, "Refugee Protection in International Law: An Overall Perspective" in Feller, Türk & Nicholson, *supra* note 143, 1 at 5.

¹⁷⁷ "Sovereignty, Migration and the Rule of Law" *supra* note 37 at 588.

entry – as this is, in many ways, the essence of statehood.¹⁷⁸ Refugees inevitably travel within mixed migratory flows.¹⁷⁹ There is no way, in advance, to decipher between legitimate refugees and economic migrants or even potential terrorists for that matter. While this does not legitimize the vilification of all migrants it does pose a conundrum for refugee protection. UNHCR reports a measured decrease in the number of asylum claims registered in industrialized countries from 2004 to 2005 and links the reduction to “increasingly restrictive national asylum policies.”¹⁸⁰

The intent of this chapter is neither to criticize nor support these policies although their recent explosion is remarkable.¹⁸¹ Rather, in the face of these policies, the argument is that increased resettlement makes particular sense. Troeller notes:

There is no necessary or proven correlation between increased resettlement and a reduction in the number of those legitimately or illegitimately seeking asylum. On the other hand, increased resettlement opportunities may reduce the motivation to move ‘irregularly’ in search of asylum.¹⁸²

¹⁷⁸ Article 31 states:

1) 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.

2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Franck Düvell writes that “[t]he political processes of nation building...defined the extent of a state’s territory, its national borders, national space, and so nationality and membership were reconstructed, and deserving and undeserving individuals defined and members created.” Franck Düvell, “The Irregular Migration Dilemma: Keeping Control, Out of Control of Regaining Control?” in Franck Düvell, ed., *Illegal Immigration in Europe: Beyond Control?* (New York: Palgrave Macmillan, 2006) 3 at 24. See also *Humanitarianism, Identity and Nation*, *supra* note 32 at c.3.

¹⁷⁹ *Agenda for Protection*, *supra* note 25 at 46.

¹⁸⁰ *Measuring Protection*, *supra* note 142 at 2.

¹⁸¹ See “Sovereignty, Migration and the Rule of Law” *supra* note 37 at 600.

¹⁸² *Supra* note 147 at 92.

Further, as borders turn into barriers, legitimate asylum seekers are finding it more and more difficult to find the protection envisioned by the 1951 Convention. John Fredriksson, one of the few people writing directly on resettlement, has therefore argued that “[i]n the aftermath of the tragic events of 11 September, [resettlement] may prove to be one of the most useful tools in the protection kit.”¹⁸³ Joanne van Selm similarly suggests 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.”¹⁸⁴

And indeed, according to Hathaway, there has been a “recent renaissance of interest by some governments” in resettlement schemes.¹⁸⁵ The top three resettlement countries have traditionally been and continue to be the US, Australia, and Canada.¹⁸⁶ In 2005, Australia and Canada each resettled approximately 10 times the number of refugees as Sweden, the fourth largest resettlement country, and the US resettled more than 50 times Sweden’s resettlement numbers.¹⁸⁷ The issue, however, is whether resettlement is truly being used as a tool of protection or as a tool of selection and evasion – what non-governmental organizations (NGOs) have referred to as a “fig leaf for policies of migration control.”¹⁸⁸

¹⁸³ John Fredriksson, “Reinvigorating Resettlement: Changing Realities Demand Changed Approaches” (2002) 13 *Forced Migration Review* 28 at 28.

¹⁸⁴ Joanne van Selm, “Refugee Protection in Europe and the U.S. after 9/11” in Steiner, Gibney & Loescher *supra* note 154, 237 at 239 [“Refugee Protection after 9/11”].

¹⁸⁵ *The Rights of Refugees*, *supra* note 44 at 964.

¹⁸⁶ *Measuring Protection*, *supra* note 142 at 19.

¹⁸⁷ *Ibid.* UNHCR provides data on resettlement through its own referrals. By these numbers, in 2005, the US received 23,289 cases for resettlement, Canada 5,811, Australia 5,117 and Sweden 1,190. UNHCR notes, however, that according to government sources Australia provides some 13,000 resettlement places annually and the US received a total of 52,000 individuals under its resettlement program during 2005 and Canada 10,400 persons.

¹⁸⁸ “NGO Statement” *supra* note 29 at 433.

Dangers of Abuse

It is not within the scope of this chapter to provide a comprehensive review and analysis of the instances and structures of abuse that occur. Rather, what follows is a brief survey of the top three resettlement countries – Canada, the US, and Australia – and the difficulties with their current resettlement schemes. This is followed by a comment on the UK, which has recently initiated a resettlement program.¹⁸⁹

Canada

In 2002, in response to critiques that its resettlement program amounted to “cherry-picking,” Canada reduced some of its barriers to refugee resettlement. Through regulations under the new *Immigration and Refugee Protection Act* that came into force in 2001, the “successful establishment” criterion that requires refugees to show that they have good settlement potential is waived for refugees designated “vulnerable” or in “urgent need.”¹⁹⁰ Further, in June 2003 Canada hosted the first UNHCR Resettlement Forum.¹⁹¹ Nonetheless, as the Canadian Council for Refugees (CCR) reported in its 2003 Report Card “[m]ost refugees seeking resettlement in Canada still need to meet the ‘successful establishment’ requirement, undermining the program’s ability to offer protection to those in need.”¹⁹² CCR goes on to note, “Canada is the only resettlement country to formally exclude refugees from resettlement based on their integration potential.”¹⁹³

¹⁸⁹ In 2005 the UK was listed by UNHCR as the tenth highest resettlement country with a mere 242 persons received. *Measuring Protection*, *supra* note 142 at 19.

¹⁹⁰ *Immigration and Refugee Protection Regulations*, SOR/2002-227, s.139(1)(g) “successfully established” and s.139(2) “vulnerable,” “urgent need”; *Immigration and Refugee Protection Act*, S.C. 2001 c. 27.

¹⁹¹ 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>>.

¹⁹² *Ibid.*

¹⁹³ *Ibid.* Chapter 5 “Humanitarianism and Half-Open Doors: Canada’s Refugee Resettlement Policy” provides a detailed analysis of Canada’s current resettlement legislation.

United States

With respect to the US resettlement program, Gibney succinctly describes it as “generous but not humanitarian.”¹⁹⁴ Gibney traces the role of lobby groups and foreign policy considerations in determining the composition and character of resettled refugees. He notes that as a discretionary scheme “there has been no move in resettlement policy to correspond with an attempt to expunge political preferences from asylum processes...”¹⁹⁵

van Selm adds:

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. The United States has considerable power to choose which of the world’s refugees become refugees in the United States, even if it is only selecting some 80,000 to 90,000 out of 20 million annually. The mere fact of such selection is linked not only to domestic policy concerns about the acceptability of certain groups of refugees or the appeal to public sympathies, but also to foreign policy concerns expressed in terms of national interest in supporting allied states.¹⁹⁶

She worries elsewhere that in the current period of securitization, resettlement, in the US at least, may be vulnerable to targeted profiling.¹⁹⁷ As Troeller cautions, expansion of resettlement must be developed in a way that “maintains its primacy as a protection tool and that it not be shaped in order to meet solely migration needs.”¹⁹⁸

Australia

Australia, in contrast to Canada and the US, highlights a more sinister side of resettlement. Australia makes an intentional distinction between onshore asylum seekers and offshore refugees, and formally links the intake from the two categories. Refugee

¹⁹⁴ *Ethics and Politics of Asylum*, *supra* note 74 at 159.

¹⁹⁵ *Ibid.* at 160.

¹⁹⁶ Joanne van Selm, “Refugee Protection Policies and Security Issues” in Edward Newman & Joanne van Selm, eds., *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo; New York; Paris: United Nations University Press, 2003) 66 at 69.

¹⁹⁷ “Refugee Protection after 9/11” *supra* note 184 at 258.

¹⁹⁸ *Supra* note 147 at 93.

numbers are balanced such that the offshore intake is reduced when onshore claimants increase.¹⁹⁹ This scheme permits Australia the rhetoric of repeatedly labeling those who arrive on its shores as “queue jumpers” who compromise Australia’s ability to help the “neediest” refugees still overseas.²⁰⁰ The essence of the argument, as put forth by Robert Illingworth, 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?”²⁰¹

The argument is as attractive as it is misleading. Australia is privileging resettlement over its obligation under the 1951 Convention of *non-refoulement*.²⁰² Human Rights Watch has described Australia’s system as an attempt to grant asylum “by invitation only.”²⁰³ While Canada and the US may be using resettlement as a means of migrant selection under a humanitarian guise,²⁰⁴ they are doing so in conjunction with the

¹⁹⁹ For a more detailed discussion of Australia’s policy see *Humanitarianism, Identity and Nation*, *supra* note 32 at 92, fn.30.

²⁰⁰ *Ibid.* 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.

²⁰¹ Robert Illingworth, “Durable Solutions: Refugee Status Determination and the Framework of International Protection” in Kneebone, *supra* note 41, 91 at 105.

²⁰² Australia ratified the 1951 Convention in 1954 and the 1967 Protocol in 1973. “UNHCR States Parties” *supra* note 163.

²⁰³ Human Rights Watch, “By Invitation Only: Australian Asylum Policy” (2002) 14:10(C) *Human Rights Watch*, online: <<http://hrw.org/reports/2002/australia/>>.

²⁰⁴ While comparing Canadian and Australian refugee policies in *Humanitarianism, Identity and Nation*, *supra* note 32, 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” at 74 and 218. Chapter 5 “Humanitarianism and Half-Open Doors: Canada’s Refugee Resettlement Policy” considers the role of humanitarianism in Canada’s refugee policy.

continued granting of inland/onshore asylum. Australia is attempting to do so in lieu of inland/onshore asylum. Nor does the 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.”²⁰⁵ Moreover, the argument that the granting of inland asylum encourages smugglers, traffickers or “organized criminals” has been solidly countered. It has been argued that in fact it is the “restrictive immigration policies in many industrialized States...[that] oblige economic migrants and refugees alike to use irregular channels” thereby stimulating the consequent growth in smuggling and trafficking.²⁰⁶ British philosopher Sir Michael Dummett has argued restrictive laws leave refugees with “no other way of escaping” and “the blame for the existence of these reviled traffickers in human beings lies largely with the governments that have erected the barriers the traffickers are helping people to circumvent.”²⁰⁷

United Kingdom

The UK began a resettlement program in coordination with UNHCR in 2004.²⁰⁸ This immediately brought the UK within UNHCR’s top ten resettlement countries.²⁰⁹ While encouraging new resettlement countries is in UNHCR’s interest, the background dialogue underlying the UK’s participation is troubling. In a similar vein to the Australian perspective, the Leader of the British House of Commons Jack Straw, while Home Secretary, proclaimed in 1999 that the 1951 Convention was “no longer working as its

²⁰⁵ 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 cited in Maley, *supra* note 200 at 20.

²⁰⁶ Türk & Nicholson, *supra* note 176 at 5.

²⁰⁷ Michael Dummett, *On Immigration and Refugees* (New York; London: Routledge, 2001) at 44 cited in Maley, *supra* note 200 at 20.

²⁰⁸ Refugee Council, “UK Refugee Resettlement Programme Begins” (23 March 2004), online: <<http://www.refugeecouncil.org.uk/news/press/2004/march/20040323ukre.htm>>.

²⁰⁹ *Measuring Protection*, *supra* note 142 at 19.

framers intended,” and suggested the European Union (EU) set up a program “under which an agreed number of refugees – and possible others in need of protection – would be identified in their own regions and brought to the EU for resettlement.”²¹⁰ In February 2002 the Labour Government issued a White Paper *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* which included a proposal to develop a resettlement program with the underlying intention that this would reduce asylum claims and remove the demand for smugglers.²¹¹

As noted above, the principle of *non-refoulement* is essential to refugee protection. The presumption of the Australian and British governments that inland claims can be replaced by comprehensive resettlement is in error. As is discussed further in the final section of this chapter, resettlement will never be comprehensive enough to absorb the world’s refugees. Moreover, there will always be refugees with the means, creativity, or sheer daring to make impossible journeys and survive. The Tampa incident in Australia in 2001 and the hijacking and rerouting of an internal Ariana Airlines flight in Afghanistan to the UK in February 2000 are extreme examples of such measures.²¹² It is impossible to ever deter people completely from “exercising their human right to seek and enjoy asylum from persecution in another country.”²¹³ However, as access to such asylum

²¹⁰ Jack Straw, “An Effective Protection Regime for the Twenty-first Century” speech at the Institute for Public Policy Research, London, 6 February 2001, cited in Gorlick, *supra* note 154 at 80.

²¹¹ David Blunkett, Home Secretary, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, (White Paper) (Crown Copyright, 2001), online: <<http://www.archive2.official-documents.co.uk/document/cm53/5387/cm5387.htm>>.

²¹² The Tampa incident refers to the rescue of 433 mostly Afghan asylum seekers from a sinking boat by the Norwegian freighter *Tampa* in August 2001. See Taylor, *supra* note 156 and Crock, *supra* note 161. In February 2000 a domestic Ariana Airlines flight within Afghanistan was hijacked and rerouted to the UK where asylum applications were filed by 78 of the passengers on board. See “Government Appeal over Hijackers” *BBC* (11 May 2006), online: <http://news.bbc.co.uk/2/hi/uk_news/politics/4760873.stm>.

²¹³ van Selm, “Refugee Protection after 9/11” *supra* note 184 at 254. The quotation is an allusion to Article 14(1) of the *Universal Declaration of Human Rights*, *supra* note 34, which provides “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

becomes more difficult to obtain, even the less overtly calculating approaches of Canada and the US to resettlement must be more carefully scrutinized.

Fair Selection Models

Assuming integration and repatriation whenever possible, it would be nice to imagine an ideal burden-sharing global refugee pie where all the world's remaining refugees were fairly parceled out. The unfortunate reality is that there is neither the organization nor willingness to implement such a program, even if one were to support Schuck's model where countries could buy out of their obligations.²¹⁴ David Martin of the Migration Policy Institute notes that "[w]e 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."²¹⁵ Former UNHCR High Commissioner Ruud Lubbers suggested a burden-sharing ratio of 1 refugee per 1,000 inhabitants.²¹⁶ The suggestion, maintained by UNHCR as an annual resettlement quota of 0.1 percent of a developed country's existing population, was greeted with silence by many governments.²¹⁷ Fredriksson calculated that this ratio would have meant a 387% increase in the 2002 resettlement targets of the US, already the most generous resettlement country.²¹⁸ Yet, even with increased resettlement numbers there will always be the matter of selection.

If selections must be made, what is the best model to base the selections? Little appears to have been written in this area. Martin, as earlier noted, has prepared a comprehensive

²¹⁴ See *supra* note 161.

²¹⁵ *Supra* note 26 at 8.

²¹⁶ See Fredriksson, *supra* note 183 at 31.

²¹⁷ *Ibid.*; Troeller, *supra* note 147 at 93.

²¹⁸ *Ibid.*

report on US resettlement reform published in 2005. While his recommendations are specifically directed to the US scheme, his overall message is broadly applicable. He recommends that the US 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....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.²¹⁹

In the Canadian context, Dauvergne, with Leonora Angeles, and Agnes Huang notes that men out-number women in both Canada's domestic refugee determinations and in the government-assisted refugee resettlement category despite evidence that women make up about half of the refugees currently seeking protection internationally.²²⁰ While Canada cannot control for the dominance of men in the inland determination process, Dauvergne, Angeles and Huang recommend that the Canadian government imprint a "somewhat crude equality measure" by ensuring "that women outnumber men in the government-assisted refugee category."²²¹

Two, more international, models have been proposed by Fredriksson. Fredriksson premises his proposals on the argument addressed above – that increased security measures and border enforcement following 11 September have had the consequent effect of reducing access to asylum. Fredriksson argues that "changing realities demand

²¹⁹ *Supra* note 26 at 119.

²²⁰ Catherine Dauvergne, Leonora C. Angeles & Agnes Huang, *Gendering Canada's Refugee Process* (Ottawa: Status of Women Canada, 2006) at 51.

²²¹ *Ibid.*

changed approaches.”²²² He proposes two potential models to “create a coherent global system and...set in motion a transparent programme...”²²³

The first model would be a formula-based approach factoring in length of time in an uncertain and non-durable situation and the likelihood and feasibility of repatriation in the foreseeable future.²²⁴ This is in line with UNHCR’s official position on resettlement – that it is one of 3 durable solutions alongside local integration and repatriation. Martin sees the *Agenda for Protection* as further stressing this need to “widen the resettlement horizon to include refugees who might not be in immediate danger but for whom no other long-term solution is in sight.”²²⁵ The suggestion focuses resettlement on protracted refugee situations. UNHCR defines a protracted refugee situation as:

...one in which refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance.²²⁶

UNHCR measures protracted situations as those in which refugee populations of 25,000 persons or more have been in exile in a developing country for five years or more.²²⁷ By this calculation, UNHCR estimated that at the end of 2005 there were 31 different protracted situations in the world, accounting for some 5.2 million refugees.²²⁸

²²² *Supra* note 183 at 28.

²²³ *Ibid.* at 31.

²²⁴ *Ibid.* at 30.

²²⁵ *Supra* note 26 at 98.

²²⁶ Executive Committee of the High Commissioner’s Programme, *Protracted Refugee Situations*, 30th Mtg., EC/54/SC/CRP.14 (10 June 2004) at para. 3. For a comprehensive discussion of the challenges and security concerns associated with protracted refugee situations see Loescher & Milner, *supra* note 165.

²²⁷ UNHCR numbers exclude Palestinian refugees who fall under the separate mandate of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

²²⁸ *Measuring Protection*, *supra* note 142 at 18.

Resettlement should not be viewed as the presumed solution for refugees in protracted situations. Engagement is required with both the host country and the country of origin to ideally achieve local integration or repatriation.²²⁹ Loescher and Milner note that comprehensive solutions for protracted refugee situations “would employ the full range of possible solutions for refugees – repatriation and reintegration, local integration in the host country, and resettlement in a third country.”²³⁰ Only when circumstances make the other options unviable should resettlement be considered. A timeframe for determining other solutions to be unviable is, unfortunately, difficult and situation-specific. Troeller makes the suggestion that resettlement could be used as a “safety-valve” to assist countries of first asylum.²³¹ This metaphor however fails to capture the essence of responsibility-sharing as it suggests waiting until countries of first asylum reach a sort of boiling point before assistance is offered. Further, for 2005, UNHCR reported that the global number of refugees accepted for resettlement reached 80,800²³² – barely over 1.5% of the protracted numbers. These numbers are troublingly low. Loescher and Milner note the “increasingly dire lack of protection for millions of refugees.”²³³ Thus, even supposing massive increases in the number of refugees countries are willing to accept for resettlement, eligibility would still require situation-specific evaluations and timeframe determinations, and the number of eligible refugees would presumably still

²²⁹ Loescher & Milner, *supra* note 165 at 19-20. Loescher and Milner argue, at 20, that “[t]he primary causes of protracted refugee situations are to be found in the failure of major powers, including the US and the EU, to engage in countries of origin and the failure to consolidate peace agreements.... Assistance to long-term refugee populations through humanitarian agencies is no substitute for sustained political and strategic action.”

²³⁰ *Ibid.* at 71.

²³¹ *Supra* note 147 at 93.

²³² “Refugees by Numbers” *supra* note 164.

²³³ Loescher & Milner, *supra* note 165 at 71.

demand further selection decisions. Fredriksson's first model therefore offers little real guidance on how resettlement refugees should be chosen.

As an alternative, Fredriksson suggests a second model in which resettlement need is defined on a group basis. Martin considers this the "key" to "enhancing the pace" of US resettlement expansion.²³⁴ In 2003 Canada piloted a group resettlement project in which individual assessments were by-passed with 780 Sudanese and Somali refugees from Kenyan refugee camps. Approximately 1,000 Afghans came from Central Asia under the same program in 2004 and 810 Burmese refugees from Thailand are being resettled over fall 2006 and early 2007.²³⁵ Since 2004, UNHCR has submitted 13 refugee groups (43,000 refugees) for resettlement consideration from asylum countries in Africa, the Middle East and Central and Eastern Asia.²³⁶ The theory behind the new system for group resettlement is that it will reduce processing time and create ready-made support systems for arriving refugees.

The question raised by the Canadian project is how these groups are selected? While these groups are undeniably *deserving* refugees, why were they chosen over other equally deserving groups? The concern, often heard in the American context, is that resettlement is too greatly influenced by interest groups.²³⁷ Adding to the concerns, Savitri Taylor notes:

The problem with relying on situation-specific agreements being negotiated on an ad hoc basis is that success is made dependent on the existence of a political will to undertake each specific exercise. As the Assistant High Commissioner has

²³⁴ *Supra* note 26 at 26.

²³⁵ Citizenship and Immigration Canada, News Release 2006-04, "Canada's New Government Welcomes Burmese Refugees" (20 June 2006), online: <<http://www.cic.gc.ca/english/press/06/0604-e.html>>.

²³⁶ *Measuring Protection*, *supra* note 142 at 19.

²³⁷ Martin, *supra* note 26 at 11; *Ethics and Politics of Asylum*, *supra* note 74 at 132.

noted, “comprehensive arrangements have not been always pursued even for refugee situations that warranted them.” While it makes sense to negotiate situation-specific agreements in the short-term where the political will clearly exists, doing so should not be a substitute for the long-term goal of negotiating a non-situation specific multilateral agreement on responsibility-sharing.²³⁸

The model is also extremely susceptible to the modes of abuse voiced by van Selm and Troeller. As Taylor notes though, this is not to say this model should be discarded. Effective processing that makes resettlement more attractive and affordable to the receiving countries should be encouraged in the hopes of encouraging the acceptance of increased numbers. What is currently lacking is a transparent and systematic structure for group selection.

A further model, not noted by Fredriksson, is need-based acceptance. Rather than addressing the “profound wastage of human lives” noted by Martin in protracted situations, need-based criteria targets specific refugee types. UNHCR’s resettlement criteria focuses on eight elements: legal and physical protection needs, medical needs, survivors of violence and torture, women-at-risk, family re-unification, children and adolescents, elderly refugees, and refugees without local integration prospects.²³⁹ From UNHCR’s global position, urgent need-based resettlement becomes a juggling act – looking at refugees and which country, each with distinct priorities and claim processes, will be the most likely to take an individual. In contrast to group resettlement, this model lends itself to detailed individual assessments of need.²⁴⁰

²³⁸ *Supra* note 156 at 39.

²³⁹ *Resettlement Handbook*, *supra* note 17 at c.3.

²⁴⁰ See *Resettlement Handbook*, *ibid.* at c.6 for the steps involved in the assessment and preparation of a resettlement submission.

Conclusion

These differing models, all well-intentioned and highlighting valid areas of resettlement need, return us to resettlement's schizophrenic dilemma. The solution, I believe, is a top-down approach coming from UNHCR that acknowledges the validity of all of the above models. This acknowledgement should come through operational guidelines and criteria for each type of resettlement that as Fredriksson laments "are now virtually absent from the UNHCR Resettlement Handbook."²⁴¹ The percentage of resettlement from protracted situations should be established as well as whether all or some of protracted resettlement should be through group resettlement – a sort of melding of Fredriksson's models. UNHCR's need-based resettlement is already well-structured but should not be privileged in a way that relegates protracted and group resettlement to *ad hoc* secondary arrangements. The two models should be running parallel with states encouraged to take in refugees from both streams and clear processes for how to do so. The "crude equality measure" proposed by Dauvergne, Angeles and Huang should likewise be transposed to the international scheme. Nothing in these models would prevent situation-specific considerations of whether resettlement is appropriate. All these models can be intermingled and combined in a complementary manner. What is needed is transparent planning and coordination from UNHCR.

UNHCR should likewise be more vocal in encouraging not just resettlement but resettlement quotas correlated to population density, gross domestic product, or some other agreed upon standard. While UNHCR cannot oblige states to take on their recommended numbers, a more emphatic statement by UNHCR would at least serve to highlight the low current resettlement numbers, even by the traditional resettlement

²⁴¹ *Supra* note 183 at 30.

countries. Further, more direction from UNHCR on resettlement distribution could lead to an increased willingness by states, and their citizens, for greater refugee resettlement. Gibney argues that “[a] well-publicized and transparent system for dealing with refugee burdens could only add to the legitimacy of international arrangements for protecting refugees...”²⁴² van Selm adds that resettlement, once started, “has a ‘knock on’ effect – meaning that the public gets more information and understands more about the situations from which both resettled refugees and asylum seekers have fled.”²⁴³ From the perspective of cost analysis, an issue not explored in this thesis but highly relevant, Loescher highlights that “international co-operation and collective action through resettlement sharing” would enable “clarity, consistency and lower transaction costs” for states.²⁴⁴

UNHCR recognizes the need for the type of resettlement scheme proposed herein. Two goals of the *Agenda for Protection* are for “States that offer resettlement opportunities to consider increasing their resettlement quotas, diversifying their intake of refugee groups, and introducing more flexible resettlement criteria,”²⁴⁵ and for “States and UNHCR to explore the feasibility of establishing a central biometric registration system to support the identification of refugees in need of resettlement.”²⁴⁶ This chapter can hopefully add to the dialogue that will bring these goals closer to reality.

²⁴² *Ethics and Politics of Asylum*, *supra* note 74 at 246.

²⁴³ Joanne van Selm, “The Strategic Use of Resettlement” paper presented at the International Seminar “Towards more orderly and managed entry in the EU of persons in need of international protection” Rome 13-14 October 2003, at 3-4, online: <<http://www.migrationpolicy.org/pubs/2003.php>>.

²⁴⁴ Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001) at 367 [*The UNHCR and World Politics*].

²⁴⁵ *Supra* note 25 at 79, Goal 5(5).

²⁴⁶ *Ibid.*, Goal 5(6).

CHAPTER FOUR

Looking Back, Moving Forward: The History and Future of Refugee Protection

The previous chapter reviewed the need for increased refugee resettlement in a period when the fear of terror translates into a fear of foreigners and it is becoming increasingly difficult for refugees to reach safe states and trigger the legal obligation of *non-refoulement*. It concluded with the recommendation for a top-down model originating from UNHCR to structure and encourage increased resettlement. The difficulty with this recommendation is the discretionary and voluntary nature of resettlement in contrast to the legal obligation of *non-refoulement*. States see no obligation to resettle refugees. Any willingness to do so is perceived as demonstrative of their generosity and secondary to inland/onshore status determinations. At the same time there is the risk that resettlement, when offered, is done to mask an avoidance of *non-refoulement* obligations. States are, as a result, disinclined to participate in the type of global burden-sharing agreement proposed in the last chapter.

This chapter therefore begins by looking back to the refugee agreements made during the first half of the twentieth century to argue that, from its origin, the international refugee protection scheme has been as much about bringing refugees to safety as refusing to return them to danger. Turning to examine the schism created by the 1951 Convention's focus on *non-refoulement*, the chapter then proceeds to review the most recent international statement on resettlement arising from a recognition of the 1951 Convention's inadequacy as a complete tool for protection – the concept of “Convention

Plus.” Flowing from the review of the historical commitment to the movement of refugees, as well as the previous chapter’s emphasis on fair geographic distribution and the need for a comprehensive selection model, the resettlement strand of Convention Plus will be seen to offer little in terms of an actual addition to the 1951 Convention. Progress is not being made. History is being forgotten. In conclusion, however, it is noted that resettlement numbers since the Convention Plus initiative have increased marginally. Dialogue that raises the profile of resettlement does seem, to a degree, to also raise resettlement numbers.

Looking Back: The Development of International Refugee Protection in the 20th Century

Historical review is rarely undertaken in refugee studies. Gil Loescher has argued that UNHCR’s “past experiences, both its successes and failures, have been largely forgotten or ignored because of the Office’s preoccupation with more recent refugee crises. As a result, the UNHCR lacks institutional memory and is always reinventing itself.”²⁴⁷

Claudena Skran looks further past UNHCR’s institutional foundation to suggest that

[t]he notion that the contemporary refugee crisis is unique lacks a historical perspective and neglects this important fact: mass refugee movements are neither new nor exclusive to specific regions. They have been an enduring and global issue throughout the twentieth century. Before the Second World War, the European continent experienced refugee flows similar to those taking place in Eastern Europe and the developing world today.²⁴⁸

Understanding how these past refugee flows were addressed and exploring instances of international cooperation demonstrates both the past reality, current desirability, and

²⁴⁷ *The UNHCR and World Politics*, *supra* note 244 at 4.

²⁴⁸ Claudena M. Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford: Clarendon Press, New York: Oxford University Press, 1995) at 4 [*Refugees in Inter-War Europe*].

future feasibility of the type of global resettlement cooperation proposed in the previous chapter.

The origins of refugee protection are commonly associated with the aftermath of the Second World War and the huge outpouring of refugees that it sparked. The 1951 Convention was in fact a revision and consolidation of previous international agreements relating to the status of refugees. This is acknowledged in the 1951 Convention's Preamble where it states:

CONSIDERING that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement.²⁴⁹

The 1951 Convention was not the start, but rather the culmination of previous refugee protection instruments.

Founded in 1919 pursuant to the Treaty of Versailles, the League of Nations was the first international organization to address refugee issues.²⁵⁰ John Torpey notes that a product of the collapse of the dynastic Austro-Hungarian, Ottoman and Russian Empires was “a world of nation-states, in which the population of the globe is theoretically divided up into exclusive bodies of citizens.”²⁵¹ The division is theoretical as many found themselves without documentation or lacking the attributes of citizenship.²⁵² The consequent population flows that arose from the fall of empires and the end of the First World War compelled the newly created League of Nations “to attempt to deal with the

²⁴⁹ *Supra* note 1, Preamble.

²⁵⁰ *Peace Treaty of Versailles*, Covenant of the League of Nations, Articles 1-30.

²⁵¹ John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000) at 122.

²⁵² *Ibid.* at 123.

reality that many in the game of international musical chairs had ended up without a seat.”²⁵³ The close to one million Russian refugees scattered across Europe following civil war and famines in their homeland were therefore the first twentieth century refugees to receive international attention and protection.²⁵⁴ While the refugee problem was not new, it was “magnified by the fact that Europe was drained by war; stirred by political tensions; and exhausted of capacities to provide adequate relief.”²⁵⁵ The League of Nations was well suited to “combine the moral authority to represent the rights of the refugees with a practical appreciation of the problems of the states which lodged these people.”²⁵⁶ In response to an appeal from the International Committee of the Red Cross (ICRC) to aid these refugees in 1921, the League of Nations therefore appointed a High Commissioner for Refugees, Fridtjof Nansen, a Norwegian arctic explorer, scientist and statesman.²⁵⁷

Nansen, as the first High Commissioner for Refugees, created a refugee travel document that came to be known as the “Nansen Passport.” Although not the equivalent of a national passport, and attaching no obligation on governments to re-admit the bearer,²⁵⁸ the document gave refugees a legal identity and enabled them to travel internationally.²⁵⁹

²⁵³ *Ibid.*

²⁵⁴ *Ibid.* at 124. Torpey refers to the estimations of demographer Eugene Kulischer who suggests that a total of 1.75 million people left the Soviet Union between 1919 and 1922. This figure includes a variety of ethnically non-Russian groups. Kulischer estimates the Russian emigration at 900,000.

²⁵⁵ Alessandra Roversi, “The Evolution of the Refugee Regime and Institutional Responses: Legacies from the Nansen Period” (2003) 22 *Refugee Survey Quarterly* 21 at 23.

²⁵⁶ Louise W. Holborn, “The Legal Status of Political Refugees, 1920-1938” (1938) 32:4 *The American Journal of International Law* 680 at 683.

²⁵⁷ Claudena M. Skran, “Profiles of the First Two High Commissioners” (1988) 1:3-4 *Journal of Refugee Studies* 277 at 277 [“Profiles”]. For a detailed review of Nansen’s life and work see “Special issue: Fridtjof Nansen and the International Protection of Refugees” (2003) 22:1 *Refugee Survey Quarterly*.

²⁵⁸ Torpey, *supra* note 251 at 128.

²⁵⁹ Convention Travel Documents (CTDs) pursuant to Article 28 of the 1951 Convention, *supra* note 1, and Executive Committee Conclusion No.13 now enable similar travel.

At the time of Nansen's appointment, the League of Nations adopted a series of resolutions in which it 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.²⁶⁰

The Nansen Passport facilitated this envisioned movement of the Russian refugees. Both Nansen and the League of Nations were also quite conscious of what Matthew Gibney now terms the "tyranny of geography."²⁶¹ The League's resolutions provide an early recognition of the importance of burden-sharing:

The Conference was also of the opinion that, as the problem was of interest to the entire world, it would not be just to leave the burden on relieving Russian refugees to the few nations which have hitherto borne it alone, both for philanthropic reasons and by reason of their geographical situation, a course which might involve them in sacrifices beyond their power; and that not only all the States belonging to the League of Nations, but all the States of the civilized world, ought to be invited to contribute support in proportion to their resources for this urgent and essential task in the interest of mankind.²⁶²

Nansen's 1922 High Commissioner's report refers to the passport in this burden-sharing language as "a great step towards a more equitable distribution of Russian refugees."²⁶³

Initially provided only to Russian refugees, the documents were extended to refugees from Armenia in 1924 and Assyrians and other Christians from the Ottoman Empire in

²⁶⁰ Fourteenth Council Session, Annexes 245 and 245a cited in Ivor C. Jackson, "Dr. Fridtjof Nansen a Pioneer in the International Protection of Refugees" (2003) 22 *Refugee Survey Quarterly* 7 at 8.

²⁶¹ *Ethics and Politics of Asylum*, *supra* note 74 at 195.

²⁶² Fourteenth Council Session, *supra* note 260 at 9.

²⁶³ "Russian Refugees: Report to the Council of July 20th, 1922 by Dr. Nansen" *Official Journal* (August 1922) C.472.M.297.1922, annex 384, 926 cited in *Refugees in Inter-War Europe*, *supra* note 248 at 105.

1928.²⁶⁴ 54 nations recognized the Russian passports, 38 approved the extension to Armenians,²⁶⁵ and 13 to the Assyrians and other Christians.²⁶⁶ The Nansen Passport has been cited as the “beginning of international refugee law.”²⁶⁷ It is significant to note that 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.²⁶⁸

Ideals and intention did not, however, immediately move “States of the civilized world...to contribute support...for this urgent and essential task in the interest of mankind.” In March 1922, Nansen reported that he had received few replies to enquiries directed at governments as to the categories of refugees they were willing to accept and that most of the received replies were negative and emphasized the global economic depression of the period.²⁶⁹ Undeterred, Nansen pushed to realize this refugee movement, and, 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

²⁶⁴ “Issue of Certificates of Identity to Russian Refugees” 5 July 1922, 13 LNTS 237; “Plan for the Issue of a Certificate of Identity to Armenian Refugees” 31 May 1924, LoN Doc. C.L. 72(a). 1924; “Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements” dated 5 July 1922 and 31 May 1924, signed on 12 May 1926, 89 LNTS 47; “Arrangement of Concerning the Extension of Other Categories of Refugees of Certain Measures taken in Favour of Russian and Armenian Refugees” 30 June 1928, 89 LNTS 63 cited in Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. 1 (Leyden, A. W. Sijthoff: 1966) at 13 and 122.

²⁶⁵ James C. Hathaway, “The Evolution of Refugee Status in International Law: 1920-1950” (1984) 33 *International and Comparative Law Quarterly* 348 at 353 [“Evolution of Refugee Status”].

²⁶⁶ Torpey, *supra* note 251 at 129.

²⁶⁷ *Refugees in Inter-War Europe*, *supra* note 248 at 105.

²⁶⁸ 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*).

Cited in Jackson, *supra* note 260 at 9.

²⁶⁹ LoN Doc. C.124 M.74, 15 March 1922 cited in Jackson, *ibid.* at 9.

refugees, the ILO coordinated the refugees' job-placements and emigration.²⁷⁰ Between 1925 and 1929 the ILO coordinated employment placements for approximately 50,000 refugees.²⁷¹

Rather than appointing a new High Commissioner, 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.²⁷² Hitler's rise to power in 1933, however, sparked an outpouring of new refugees, mostly Jews, from Germany. This new crisis pushed the League of Nations to direct the focus of its refugee protection and appoint an independent High Commissioner for Refugees coming from Germany.²⁷³

While the extension of the Nansen Passport to refugees from Germany was repeatedly debated during this period it was rejected due to France and Britain's hesitation to provoke Germany.²⁷⁴ The High Commissioner's task was therefore two-fold: to coordinate relief and settlement efforts and to negotiate and facilitate refugee travel and resettlement in third countries.²⁷⁵ 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.²⁷⁶ His British successor, Sir Neill Malcolm, returned to the issue of identity documents. At the same time as Malcolm was arguing for the issuance of identity documents, a special refugee committee report was presented to the League of Nations in January 1936 stressing the importance of burden-sharing,

²⁷⁰ "Profiles" *supra* note 257 at 284.

²⁷¹ *Ibid.*

²⁷² *Ibid.* at 289.

²⁷³ *Ibid.* at 289.

²⁷⁴ Torpey, *supra* note 251 at 138.

²⁷⁵ "Profiles" *supra* note 257 at 291.

²⁷⁶ Torpey, *supra* note 251 at 138.

whether by the provision of first asylum, resettlement or funds.²⁷⁷ The League of Nations in 1936 consequently adopted a *Provisional Arrangement concerning the Status of Refugees coming from Germany* (1936 Provisional Arrangement) whereby governments were authorized to issue travel documents to Germans and stateless persons coming from Germany.²⁷⁸

Two years later, in 1938, this arrangement was adapted into the *Convention concerning the Status of Refugees coming from Germany* (1938 Convention).²⁷⁹ The first *Convention relating to the International Status of Refugees* had been adopted in October 1933 (1933 Convention) but was ratified by only a few states.²⁸⁰ The 1938 Convention specifically addressed resettlement in Article 15:

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.²⁸¹

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 for All Refugees the League of Nations Protection was assigned the responsibility to oversee the application of the 1933 and 1938 conventions, assist governments and "...to coordinate in general

²⁷⁷ *Refugees in Inter-War Europe*, *supra* note 248 at 71.

²⁷⁸ *Provisional Arrangement concerning the Status of Refugees coming from Germany*, 4 July 1936, 3952 LNTS 77.

²⁷⁹ *Convention concerning the Status of Refugees coming from Germany*, 10 February 1938, 4461 LNTS 61.

²⁸⁰ *Convention relating to the International Status of Refugees*, 28 October 1933, 3663 LNTS. 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, "Britain and the 1933 Refugee Convention: National or State Sovereignty?" 11:4 *International Journal of Refugee Law* 597 at 600 and 603, and Roversi, *supra* note 255 at 27.

²⁸¹ *Supra* note 279 at Article 15.

humanitarian assistance along with resettlement and other solutions...”²⁸² 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.²⁸³ The two organizations were essentially amalgamated in February 1939 when Sir Herbert Emerson, the High Commissioner for all Refugees the League of Nations Protection concurrently became Director of the IGCR.²⁸⁴ Skran notes that this inter-war period was “a time of great creativity and innovation, a time when much was accomplished with minimal resources and a time when millions of refugees were helped to begin new lives.”²⁸⁵

Despite such successes, the League of Nations’ inability to prevent the Second World War signaled its downfall and it dissolved as the war drew to a close. The United Nations Relief and Rehabilitation Administration (UNRRA) was created in 1943 in an effort to repatriate the displaced persons of Europe following the war.²⁸⁶ At the conclusion of this second war, the world’s leaders sought to form a new international forum for world opinion. The United Nations was established on 24 October 1945 and came to acquire a “symbolic importance” never achieved by the League of Nations.²⁸⁷ The League of Nations’ dissolution caused the High Commissioner’s office to close on 31 December 1946.²⁸⁸ That same year, the International Refugee Organization (IRO)

²⁸² Roversi, *supra* note 255 at 28.

²⁸³ Torpey, *supra* note 251 at 135.

²⁸⁴ Roversi, *supra* note 255 at 29.

²⁸⁵ *Refugees in Inter-War Europe*, *supra* note 248 at 9.

²⁸⁶ Torpey, *supra* note 251 at 143.

²⁸⁷ Paul F. Diehl, “Introduction to Part 1” in Paul F. Diehl ed., *The Politics of Global Governance: International Organizations in an Interdependent World* (Boulder: Lynne Rienner Publishers, 1997) 1 at 4.

²⁸⁸ Grahl-Madsen, *supra* note 264 at 17.

was established by a resolution of the United Nations General Assembly.²⁸⁹ By mid-1947, the IRO had assumed the responsibilities of UNRAA, the IGCR and, indirectly the League of Nations' High Commissioner for Refugees.²⁹⁰ 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.]"²⁹¹ The IRO oversaw the resettlement of displaced Europeans to countries such as the US, Canada, and Australia. Between 1947 and 1951 the IRO resettled close to 1 million refugees, including 329,000 in the US, 182,000 in Australia, 132,000 in Israel, 123,000 in Canada and 170,000 in various European states.²⁹²

The 1951 Refugee Convention

The IRO was established as a specialized agency of limited duration to close in 1951. The massive population movement across Europe in the aftermath of the Second World War, with the number of displaced persons in Europe reaching 11 million at the end of the war,²⁹³ forced the United Nations to revisit the issue of refugee protection. By resolution on 3 December 1949 the United Nations General Assembly decided to establish a High Commissioner's Office for Refugees.²⁹⁴ The *Statute of the Office of the United Nations High Commissioner for Refugees* was adopted by the United Nations General Assembly on 14 December 1950.²⁹⁵ UNHCR began its work on 1 January 1951 with 33 staff and a budget of \$30,000.²⁹⁶ The *Convention relating to the Status of*

²⁸⁹ *Question of Refugees*, UNGA Res. (8/1), 12 February 1946.

²⁹⁰ Hathaway, "Evolution of Refugee Status" *supra* note 265 at 376.

²⁹¹ The Constitution of the IRO, Part I(C)(1) cited in "Evolution of Refugee Status" *ibid.* at 374.

²⁹² Gallagher, *supra* note 145 at 579.

²⁹³ Torpey, *supra* note 251 at 143.

²⁹⁴ *Refugees and Stateless Persons*, UNGA Res. 319(IV), 3 December 1949.

²⁹⁵ *Supra* note 16.

²⁹⁶ Erika Feller, "The Evolution of the International Refugee Protection Regime" (2001) 5 Washington University Journal of Law and Policy 129 at 131.

Refugees was adopted on 28 July 1951 and came into force on 22 April 1954.²⁹⁷ As was the case with the offices and organizations that had preceded it and worked only with specific groups of refugees, the scope of the 1951 Convention was limited to persons who became refugees as a result of events occurring in Europe before 1 January 1951.²⁹⁸ The accompanying 1967 *Protocol relating to the Status of Refugees* finally confronted the reality that refugee crises are chronic and worldwide, and expanded the 1951 Convention's temporal and geographic coverage.²⁹⁹ Not until December 2003 was the temporal limitation on the continuation of the High Commissioner's Office for Refugees removed so as to create a permanent framework for refugee protection "until the refugee problem is solved."³⁰⁰

The 1951 Convention focused refugee protection on the principle of *non-refoulement*.

Enshrined in Article 33(1), the principle states that:

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.³⁰¹

Skran notes that in the 1920s *refoulement* practices reflected the exception rather than the norm but that the reverse was true by the 1930s.³⁰² The 1933 Convention introduced the

²⁹⁷ *Supra* note 1.

²⁹⁸ Article 1(B)(a), paragraph (b) permits contracting states to make a declaration at the time of signature, ratification or accession specifying whether the geographical limit of Europe is to apply. Torpey, *supra* note 251 at 144, importantly notes that the geographic limitation was imposed despite the fact that two major refugee crisis had arisen outside of Europe since the war's end – the partition of India and Pakistan in 1947 causing the movement of some 14 million persons and the movement of hundreds of thousands of Palestinians following the creation of the state of Israel in 1948.

²⁹⁹ *Supra* note 159.

³⁰⁰ *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.

³⁰¹ *Supra* note 1.

³⁰² *Refugees in Inter-War Europe*, *supra* note 248 at 131.

notion that signatory states were obligated not to expel authorized refugees from their territories and to avoid “non-admittance [of refugees] at the frontier.”³⁰³ Only eight countries, however, ratified the 1933 Convention, and most of them imposed restrictions on their obligations.³⁰⁴ The concept of *refoulement* is not even mentioned in either the 1936 Provisional Arrangement or the consequent 1938 Convention. With the 1951 Convention, in contrast, *non-refoulement* has come to be considered the core of refugee protection. 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.”³⁰⁵ In addition to the impetus of guilt, there was “the new imperative to protect heroes of Western capitalist freedom in a world divided by the Cold War.”³⁰⁶ Beyond these guilts and goals was the “desire to promote regional and international stability”³⁰⁷ and the need of “labour for economic growth and people for demographic growth.”³⁰⁸

In their own ways, all of the 1951 Convention’s predecessors responded to the refugee crises in Europe by facilitating the movement of refugees to safe states. In particular, James Hathaway suggests that the 1938 Convention, the IGCR and the IRO “assumed that there was little likelihood that refugees would be accommodated in the first asylum

³⁰³ *Supra* note 280 at Article 3.

³⁰⁴ *Ibid.*

³⁰⁵ Peter Showler, *Refugee Sandwich: Stories of Exile and Asylum* (Montreal: McGill-Queen’s University Press, 2006) at 212. See also Arthur Morse, *While Six Million Died: A Chronicle of American Apathy* (New York: Random House, 1968).

³⁰⁶ Adrian Favell & Randall Hansen, “Markets Against Politics: Migration, EU Enlargement and the Idea of Europe” (2002) 28:4 *Journal of Ethnic and Migration Studies* 581 at 588.

³⁰⁷ Loescher, “UNHCR at Fifty” *supra* note 168 at 4.

³⁰⁸ Stephen Castles & Sean Loughna “Asylum Migration to Industrialized Countries” in George J. Borjas & Jeff Crisp eds., *Poverty, International Migration and Asylum* (New York: Palgrave MacMillan, 2005) 39 at 41.

country.”³⁰⁹ Writing in 1938, Louise Holborn commented specifically that one of the key issues facing Nansen upon his appointment was “the movement of refugees to overseas countries.”³¹⁰ However, unlike previous programs, Janet Dench notes that with the 1951 Convention “[t]he challenge of getting... into (or to the door of) a country of potential asylum is left up to the refugee.”³¹¹ In 1971, Professor Atle Grahl-Madsen wrote that “[i]n the post-IRO period, the practice of concluding resettlement agreements is no longer *en vogue* in Western Europe...the coming into force of the Refugee Convention, 1951, made it superfluous to conclude such detailed agreements.”³¹² While resettlement is indeed part of some countries’ current refugee schemes, Hathaway notes that a crucial difference between these programs and the earlier agendas of the IGCR and the IRO is that “these new initiatives have been conceived and operated by particular states, rather than by an international refugee agency.”³¹³ As the previous chapter on the current state of resettlement reviewed, this has meant *ad hoc*, inconsistent resettlement programs operated by a small number of countries and sometimes in an effort to self-select migrants and avoid obligations under the 1951 Convention. Put another way, resettlement is under-used. When it is used it is often abused.

Thus the 1951 Convention, while a positive step in the development and expansion of refugee protection, also caused a significant change in the direction of that protection. By no means the first attempt to confront the refugee problem, the 1951 Convention did mark the shift from refugee *issues* to refugee *law*. For the first time a definable

³⁰⁹ *The Rights of Refugees*, *supra* note 44 at 964.

³¹⁰ *Supra* note 256 at 683.

³¹¹ *Supra* note 173 at 34.

³¹² Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. 2 (Leyden, A. W. Sijthoff: 1966) at 233.

³¹³ *The Rights of Refugees*, *supra* note 44 at 964.

obligation, that of *non-refoulement*, was placed on signatory countries. Beyond this, countries were to ratify the 1951 Convention and incorporate this obligation into their own national laws. Catherine Dauvergne refers to the principle of *non-refoulement* as a “minimal constraint” of “mythic proportions.”³¹⁴ Much has been written on the extent and interpretation of this constraint on state sovereignty. What has been left unnoticed is the schism it has created in how two streams of refugee protection – resettlement and *non-refoulement* – are regarded. As Dauvergne notes, international law prescribes how refugees are to be treated once they have arrived at a border, and in doing so, “skirt[s] the direct question of humanitarian admissions entirely.”³¹⁵ Resettlement, she notes, is in contrast “rooted in moral or political suasion rather than legal requisite.”³¹⁶ Yet this division between moral and legal obligation is a false divide.

As Chapter 2 explored, refugee protection, in contrast to other migration, is based on a moral/humanitarian obligation. It is this obligation that compelled the League of Nations and later the United Nations to devote attention and resources to the refugee issue. And this development of refugee protection has historically been as much about bringing refugees to safe countries of asylum as not turning them away when they find safety on their own. That the latter has been *legalized* does not negate its humanitarian core. States that have signed the 1951 Convention and/or the 1967 Protocol have self-inflicted a legal obligation out of an arguably humanitarian compulsion. Following this logic, Gibney asserts that:

³¹⁴ “Sovereignty, Migration and the Rule of Law” *supra* note 28 at 596.

³¹⁵ *Humanitarianism, Identity and Nation*, *supra* note 37 at 74.

³¹⁶ *Ibid.* at 86.

...governments that claim that they recognize the moral importance of asylum – that are, in other words, respectful of the humanitarian principle – have a strong *ethical* reason for participating in and promoting cooperative schemes when and where they are possible.³¹⁷

This notion of cooperative schemes, however, takes one beyond the confines of the 1951 Convention.

Moving Forward: Does Convention Plus Add Anything?

The limitations of the 1951 Convention have been noted. Erika Feller points out that:

[The Convention] gives a voice and force to the rights of refugees. It does not, though, say how States should put it into practice. The Convention regime rests on notions of international solidarity and burden and responsibility sharing, but offers no agreed indicators, much less formulae, for such burden and responsibility sharing. At times, the content of the rights it sets out and of the attached responsibilities for States are not always so clear. The Convention foreshadows various types of solutions, as refugee status is by definition temporary, but again envisages no special arrangement to ensure they are realizable in a timely and durable manner. There are ambiguities.

In short, the Convention does not hold all the answers. If it is clear in terms of rights, it is close to silent about whose responsibility it actually is to protect them in the context of modern displacement situations and population movements.³¹⁸

Given such deficiencies, Gibney and Randall Hansen suggest that “[s]ome kind of international legal agreement, such as an additional protocol to the 1951 Refugee Convention, which could enshrine the resettlement obligation of states in law might be necessary in order to encourage compliance.”³¹⁹

Former UNHCR High Commissioner Ruud Lubbers did directly acknowledge that while the “1951 Refugee Convention remains the cornerstone of the international refugee

³¹⁷ *Ethics and Politics of Asylum*, *supra* note 74 at 247.

³¹⁸ Erika Feller, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come” (2006) 18:3-4 *International Journal of Refugee Law* 509 at 525 [“Asylum, Migration and Refugee Protection”].

³¹⁹ Matthew J. Gibney & Randall Hansen “Asylum Policy in the West” in Borjas & Crisp, *supra* note 308, 70 at 90.

protection regime,...it alone does not suffice.”³²⁰ 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 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 “plus” concerns the development of special agreements or multilateral arrangements to ensure improved burden sharing, with countries in the North and South working together to find durable solutions for refugees. This includes comprehensive plans of action to deal with mass outflows, and agreements on “secondary movements”, whereby the roles and responsibilities of countries of origin, transit, and potential destination are better defined. It also includes agreements aimed at better targeting development assistance in refugees’ regions of origin, and multilateral commitments for resettlement of refugees.³²¹

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. The unit worked with states to develop “generic agreements” on key focus areas including resettlement.³²² The core group on the “Strategic Use of Resettlement” was co-chaired by Canada and UNHCR. Canada’s role as facilitating state was to lead the process in crafting special agreements and coordinating discussion with other states and interested parties.

³²⁰ *Agenda for Protection*, *supra* note 25 at 6.

³²¹ *Ibid.* at 6-7; UNHCR, “Report of the Fifty-third Session of the Executive Committee of the High Commissioner’s Programme” Annex II, at 28, UN Doc. A/AC.96/973 (2002). (opening statement by Mr. Ruud Lubbers).

³²² UNHCR, “Convention Plus at a Glance (as of June 2005)”, online: <<http://www.unhcr.org/protect/406d21802.html>>.

The Canada-led core group reached agreement on the “Multilateral Framework of Understandings on Resettlement” (MFU) in June 2004.³²³ UNHCR’s Executive Committee welcomed the MFU and encouraged the full use of it by interested states, UNHCR, and other relevant partners in its General Conclusion on International Protection adopted on 8 October 2004.³²⁴ While extensive in its ambitions, the MFU falls short of comprehensively addressing the confines of the 1951 Convention. Far from enshrining the resettlement obligation of states in law as Gibney and Hansen recommend, the MFU explicitly notes in its second paragraph that the understandings are “not legally binding.”³²⁵ 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.³²⁶

The difficulty with the MFU’s formulation is that it is not in fact an *expansion* of the 1951 Convention to encompass resettlement obligations. Rather, it envisions situation-specific multilateral agreements that are not grounded in increased resettlement numbers. The strategic use of resettlement is the “planned use of resettlement that maximizes the benefit of resettlement, either directly or indirectly, *other than to those being resettled*. Those benefits accrue to other refugees, the host States, other States, and the international protection regime in general.”³²⁷ The focus is therefore on using resettlement as a tool to achieve durable solutions *other than* resettlement. An example provided in UNHCR’s

³²³ *Supra* note 31.

³²⁴ *General Conclusion on International Protection*, EXCOM (No.99 (LV) -2004) at para. (v).

³²⁵ *Supra* note 31 at para. 2.

³²⁶ 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>> [Informal Record].

³²⁷ Convention Plus Core Group on the Strategic Use of Resettlement, “Convention Plus: Framework of Understandings on Resettlement” FORUM/CG/RES/03, 3 November 2003 (emphasis added), online: <<http://www.unhcr.org/doclist/protect/408d17494.html>> [MFU Discussion].

The State of the World's Refugees 2006 is that of “when a small group represents a stumbling block in the way of peace negotiations or a wider repatriation agreement. Here resettlement, even of small groups, may serve as a catalyst in leveraging other solutions.”³²⁸

I do not mean to criticize the strategic use of resettlement. Its value as a tool of negotiation and compromise within specific agreements to achieve other durable solutions is indisputable. The concern is that resettlement will come to be used only as such a tool and not as an equally valued durable solution in its own right. In an NGO statement made during the discussion period of the MFU’s development, the importance that “resettlement countries continue to use resettlement as a durable solution for refugees who are not included in multilateral resettlement operations” was highlighted in bold font.³²⁹ The MFU does acknowledge these concerns, noting that:

47. In cases in which refugees are not selected or accepted for the multilateral resettlement operation, all parties to continue to respond to their asylum and assistance needs while actively seeking other durable solutions.

48. Resettlement countries to continue to address through resettlement the needs of other refugees who are not included in the multilateral resettlement operation but for whom resettlement is the appropriate solution and/or the only means to guarantee their protection.³³⁰

³²⁸ UNHCR, *The State of the World's Refugees 2006*, at 143, online: <<http://www.unhcr.org/publ/PUBL/4444d3cb11.html>>.

³²⁹ “NGO Statement on the Convention Plus Strand on the Strategic Use of Resettlement” United Nations High Commissioner for Refugees’ Forum, 12 March 2004, Agenda Item 2(i) at 2, online: <<http://www.unhcr.org/doclist/protect/408d17494.html>>.

³³⁰ *Supra* note 31.

In essence, these paragraphs express a rather passive continuance of the status quo. The lack of force in paragraphs 47 and 48 is reflective of the entire MFU, which intentionally “avoids being prescriptive and casts things in terms of aspirations.”³³¹

In being prescriptive, the MFU fails to address the 1951 Convention’s deficiencies as noted by Feller – that the Convention “offers no agreed indicators, much less formulae, for such burden and responsibility sharing.”³³² Preliminary discussions of the MFU did note that “[w]ith regard to the commitment to resettle, the drafters could prepare a paragraph that could have a commitment to resettle refugees until a durable solution is realized for the entire population and another with language that resettlement would be conducted over an “x” – year timeframe.”³³³ However, in terms of actual guidance on selection criteria, the MFU states only that:

18. UNHCR to continue to develop its methodology for identifying groups for resettlement based on common characteristics.³³⁴

It was further noted early in the discussion process that “resettlement countries should consult and to the extent possible, co-ordinate the allocation of resources, to ensure that a sufficient number and type (e.g. vulnerable cases, women-at-risk, urgent protection etc.) of resettlement places are available to address the needs in the context of comprehensive durable solution arrangements.”³³⁵ At the same time it was suggested that a main undertaking of the resettlement countries should be to “[e]ngage in regular consultations

³³¹ Rick Herringer, Director, Resettlement Department Citizenship and Immigration Canada “Update on status of Core Group on Resettlement” Speaking Notes for High Commissioner’s Forum, 12 March 2004, online: <<http://www.unhcr.org/doclist/protect/408d17494.html>>.

³³² “Asylum, Migration and Refugee Protection” *supra* note 318.

³³³ Informal Record, *supra* note 326 at para. 16.

³³⁴ *Supra* note 31.

³³⁵ MFU Discussion, *supra* note 327 at 3.

to determine the number of refugees and types of caseloads to be resettled by each country.³³⁶ Again, only a toned-down version of these suggestions is incorporated into the MFU:

11. Resettlement countries to cooperate in pledging places with the aim of meeting the identified resettlement needs and to provide undertakings regarding the number of refugees and profiles of populations to be resettled. In this regard, resettlement countries to consult with UNHCR and relevant resettlement partners so as to make best use of their respective expertise, in order to maximize the number of resettlement places being made available.³³⁷

The MFU is silent on the determination process for resettlement numbers. When one delegation inquired into available avenues to discuss issues such as how UNHCR would identify caseloads at the first meeting of the Convention Plus Core Group on the Strategic Use of Resettlement in November 2003, the UNHCR co-chair suggested that the Core Group “not get bogged down on question[s] of process.”³³⁸

As the previous chapter’s review of proposed resettlement models highlights, it is precisely the question of selection process that must be answered for any comprehensive and transparent resettlement scheme to be implemented. Tied to this, and the concluding recommendations of the last chapter, an early NGO suggestion that “[s]tates should be encouraged to recognize the international dimension of refugee protection by moving away from national selection criteria for resettlement and towards acceptance of international (UNHCR) criteria”³³⁹ is not addressed in the MFU. Moreover, returning once again to Gibney’s “tyranny of geography” yet another NGO suggestion that “the

³³⁶ *Ibid.* at 9.

³³⁷ *Supra* note 31.

³³⁸ Informal Record, *supra* note 326 at para. 38.

³³⁹ MFU Discussion, *supra* note 327 at 7.

response to humanitarian need is geographically balanced and non-discriminatory,” which seems so simple, obvious and important, is not found within the MFU.³⁴⁰

While the MFU was hailed as a success early in the overall Convention Plus process, little seems to have been achieved since. The most recent statement on UNHCR’s website is from the 2005 Convention Plus Progress Report immediately before the unit was mainstreamed. It merely states:

It is encouraging that the Norwegian Chair of the Working Group on Resettlement has identified as a priority the need to seize opportunities for the strategic use of resettlement in 2006, with the MFU as a central planning document.³⁴¹

There has been silence since and the emphasis on Convention Plus seems generally to have faded with the resignation of Ruud Lubbers as High Commissioner in February 2005.

Conclusion

The MFU is disappointing. Given the energy and enthusiasm that preceded and surrounded it, it fails to add any actual “plus” to the implementation of resettlement schemes. It lacks substantial guidance on how refugees for resettlement are to be selected, how the number of refugees to be selected should be calculated, or on how, as a burden-sharing mechanism, such refugees should be geographically distributed. The entire MFU provides little more than additional words to the statement in the Preamble to the 1951 Convention 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

³⁴⁰ *Ibid.* at 6.

³⁴¹ High Commissioner’s Forum, “Progress Report: Convention Plus” FORUM/2005/6, 8 November 2005, at para. 10, online: <<http://www.unhcr.org/doclist/protect/4289abb2.html>>.

without international co-operation.”³⁴² Moreover, by focusing on situation-specific agreements, the MFU is continuing with “initiatives [that] have been conceived and operated by particular states, rather than by an international refugee agency” which is, as Hathaway noted, the “crucial difference” between these programs and the earlier agendas of the IGCR and the IRO.³⁴³ In doing so, the MFU lacks the “institutional memory” and “historical perspective” noted by Skran and Loescher at the outset of this chapter.

And yet, despite the above criticisms, resettlement numbers have increased since the introduction of Convention Plus in 2002. The year 2002, however, is a statistical anomaly as the US initially suspended all resettlement following the events of 11 September 2001,³⁴⁴ and then introduced new resettlement screening requirements. In 2002, 82 UNHCR offices resettled 19,600 refugees, one third less than in 2001 (29,300), and one half the 2000 level (39,500), and 10 countries reported the resettlement of refugees.³⁴⁵ In 2003, 75 UNHCR offices resettled a total 25,900 refugees – 32% more than in 2002 but close to the average annual resettlement level during the period 1994-2003 (26,700), and 11 countries reported the resettlement of refugees.³⁴⁶ In 2004, 11 countries again reported the resettlement of refugees and 68 UNHCR country offices reported resettlement departures with resettlement numbers rising to 26,900, 14% more than in 2003, and 10% more than the average annual resettlement level during the period

³⁴² *Supra* note 1.

³⁴³ *The Rights of Refugees*, *supra* note 44 at 964.

³⁴⁴ Fredriksson, *supra* note 183 at 28.

³⁴⁵ UNHCR, *Statistical Yearbook 2002*, c.2 at 28 and 9, online:

<http://www.unhcr.org/static/home/statistical_yearbook/2002/toc2.htm>. The resettlement reporting of the 10 countries includes resettlement of non-UNHCR referred refugees. The total number of refugees resettled by these countries is 50,600. Total refugee resettlement numbers are deceptively high as the US includes family reunification in its resettlement numbers.

³⁴⁶ UNHCR, *Statistical Yearbook 2003*, c.2 at 27 and 28, online:

<<http://www.unhcr.org/statistics/STATISTICS/42aff7e84.html>>. The resettlement reporting of the 11 countries includes resettlement of non-UNHCR referred refugees. The total number of refugees resettled by these countries is 56,000.

1995-2004 (26,900).³⁴⁷ By 2005, 16 countries participated in resettlement and 83 UNHCR country offices were engaged in the resettlement of 30,500 refugees.³⁴⁸

While the numbers cannot be conclusive of any general trend, it does appear that resettlement is gaining slightly in popularity, with more countries willing to accept refugees for resettlement and increased overall resettlement numbers. Dialogue does seem to have some effect. What is now required is to combine this dialogue and enthusiasm with “institutional memory” and “historical perspective” to design a top-down model of international resettlement distribution.

UNHCR can and should provide leadership in the implementation of such a model. It is individual countries, though, that must be willing to incorporate the model and increase resettlement numbers. This is where the MFU offered so much potential and also where it failed. The countries that participated in the design of the MFU, and particularly Canada, who co-chaired the group, are obviously concerned with refugee protection and aware of the power and potential of resettlement as a durable solution. The question that remains is what can be done to persuade them to do more? The next chapter approaches resettlement from the national perspective and attempts to answer this question.

³⁴⁷ UNHCR, *Statistical Yearbook 2004*, c.3 at 32 and 33, online: <<http://www.unhcr.org/statistics.html>>. The resettlement reporting of the 11 countries includes resettlement of non-UNHCR referred refugees. The total number of refugees resettled by these countries is 85,000.

³⁴⁸ *2005 Global Refugee Trends*, *supra* note 153 at 5 and 6. The resettlement reporting of the 16 countries includes resettlement of non-UNHCR referred refugees. The total number of refugees resettled by these countries is 80,800.

CHAPTER FIVE

Humanitarianism and Half-Open Doors: Canada's Refugee Resettlement Policy

Canada is a leader in refugee resettlement. It consistently ranks as one of UNHCR's top three resettlement countries and co-chaired the resettlement strand of Convention Plus discussed in the previous chapter. Since the Second World War, Canada has resettled over 750,000 Convention refugees and persons in "refugee-like" situations.³⁴⁹ Canada is, moreover, a "land of immigration,"³⁵⁰ and Canadians generally support generous immigration and refugee policies in numbers significantly greater than other western countries.³⁵¹ Given this background, this chapter shifts from the international focus and uses Canada as a case study to understand how resettlement policy and practices play out on the national level.

³⁴⁹ Citizenship and Immigration Canada, *OP5: Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-Protected Persons Abroad Classes* (2006) at 12, online: <<http://www.cic.gc.ca/manuals-guides/english/op/index.html>> [OP5].

³⁵⁰ Analyzing the results of the 2006 Census, Statistics Canada predicts that international migration will be Canada's only source of population growth by the year 2030. Statistics Canada. 2007. *2006 Census, Portrait of the Canadian Population in 2006*. Statistics Canada Catalogue no. 97-550-XWE2006001. Ottawa. March 13, Analysis Series, 2006 Census, online: <<http://www12.statcan.ca/english/census06/analysis/popdwell/NatlPortrait1.cfm>>.

³⁵¹ Daniel Hiebert has noted, "[t]here is no Canadian counterpart to the antagonistic, anti-immigration movements elsewhere." He outlines two international public opinion polls, which indicate Canadians show more support for immigration than do the residents of any other country surveyed. Daniel Hiebert "Winning, Losing, and Still Playing the Game: The Political Economy of Immigration in Canada" (2006) 97:1 *Tijdschrift voor economische en sociale geografie* 38 at 39-41. See also *Humanitarianism, Identity and Nation*, *supra* note 32 at 124 where Catherine Dauvergne notes that "one Citizenship and Immigration Canada official stated that the department had tried to reduce the number of refugees admitted to be closer to the Australian scheme, but had simply not been as 'successful' because of citizen pressure."

Tradition, As Told

In the late 1990s Canada was reconsidering its immigration laws and policies. The authors of the legislative review began with the recognition that: “[m]any 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.”³⁵² The thread that links Canadian refugee policy from its inception to the present is acknowledgement of Canada’s “humanitarian tradition.” In her book *Humanitarianism, Identity, and Nation*, Catherine Dauvergne inverts this corollary and argues that humanitarian migration laws do not arise out of a humanitarian tradition but are constructed so as to create the mythology of a humanitarian nation. She suggests that humanitarian migration laws result from “the need to define and understand the nation as compassionate and caring,” as well as the “perhaps identical need to be perceived in this light.”³⁵³ Dauvergne’s study reviews the migration policies of Canada and Australia and finds, in particular, that “...the Canadian law has a more generous face. ... Humanitarianism is closer to the heart of the Canadian rhetoric about migration than it is in Australia, closer to the tradition Canadian lawmakers seek to construct, closer to the mythology that Canadians, as individuals, are willing to honour and reify.”³⁵⁴

While Dauvergne’s analysis is focused on refugee admissions through inland refugee determinations and only touches briefly on resettlement, humanitarianism plays an equal, if not greater role, given the absence of a legal obligation, in the framing of Canada’s

³⁵² Susan Davis, Roslyn Kunin & Robert Trempe, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 9.

³⁵³ *Humanitarianism, Identity and Nation*, *supra* note 32 at 75 and 163.

³⁵⁴ *Ibid.* at 164.

resettlement scheme where the rhetoric of humanitarianism is directly implanted. 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.³⁵⁵

The positioning of the resettlement scheme as "humanitarian" and "discretionary" fits precisely within Dauvergne's conclusions that "Canada's law is filled with humanitarianism and with discretion."³⁵⁶ And yet, Dauvergne's work is not a celebration of Canada's generosity but a recognition that humanitarianism is "vague enough that all nations can aspire to it while taking very different actions."³⁵⁷

Dauvergne does not, however, issue her observations as a warning. Rather, she suggests using her understanding of the humanitarian framework as a tool for advocacy and change. She argues:

Despite all of this, humanitarianism is the touchstone of consensus in liberal migration laws. It has theoretical and rhetorical weight across a wide range of liberal theory, and it resonates in popular discourses. For these reasons, it is the strongest mobilizing principle we have for rallying to alter the law. To seek change in migration law so that more people for more reasons may be admitted to share our prosperity, we must appeal to vanity through the mirror.³⁵⁸

³⁵⁵ *Supra* note 349 at 8.

³⁵⁶ *Humanitarianism, Identity and Nation*, *supra* note 32 at 218.

³⁵⁷ *Ibid.* at 219.

³⁵⁸ *Ibid.* at 164.

The ambitions of this chapter are therefore two-fold: Through a review of Canada's resettlement scheme – its origins, statutory framework, policies and jurisprudence – to “refute the myth” of the current humanitarian rhetoric that envelops the scheme. At the same time, while exposing the actual absence of humanitarianism in the resettlement scheme, to appeal to the humanitarian desire of both policy-makers and citizens for a revamping of resettlement to actually espouse rather than merely spout humanitarianism. In essence, I seek to strip the current scheme of its humanitarian veil to demonstrate the need for humanitarianism at its core.

Background & Beginnings

Since Confederation, Canadian officials have sought to populate Canada. At the time of the 1901 Census, Canada's population was a mere 5 million.³⁵⁹ Farmers and settlers were needed to populate the vast prairies and westward.³⁶⁰ As a consequence of this need for people, 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.”³⁶¹ And yet, Dirks notes many who settled in Canada during the first half of the twentieth century were indeed refugees fleeing persecution according to the international refugee definition – “fugitive slaves and Hutterites from the United States, Mennonites and Doukhobors from Czarist Russia, and Jews from Eastern Europe.”³⁶² Canada's first immigration acts, 1869,

³⁵⁹ Gerald E. Dirks, *Controversy and Complexity: Canadian Immigration Policy during the 1980s* (Montreal and Kingston: McGill-Queen's University Press, 1995) at 9 (emphasis added) [*Controversy and Complexity*]. According to the 2006 Census, *supra* note 350, Canada's population now stands at 31,612,897.

³⁶⁰ *Controversy and Complexity, ibid.*

³⁶¹ *Ibid.* at 61.

³⁶² *Ibid.*

1906 and 1910, contained no recognition of refugees as an immigrant class.³⁶³ Even by mid-century, when the international recognition and protection of refugees was well underway as reviewed in Chapter 4, Canada's new *Immigration Act, 1952* made no reference to refugees.³⁶⁴

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

³⁶³ *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.

³⁶⁴ *Immigration Act, 1952*, S.C. 1952, c.42.

*the countries which received two hundred cases or more, in a report issued by the Office of the United Nations High Commissioner for Refugees.*³⁶⁵

Throughout the 1950s, 1960s and 1970s, resettlement to Canada continued absent legislated refugee recognition. Admissions were based on *ad hoc* decisions and cabinet orders-in-council³⁶⁶ and decisions were “heavily ideological along a fairly crude Cold War axis”³⁶⁷ and generally strategic. As Soviet “escapees,” approximately 37,000 refugees were admitted to Canada from Hungary in 1956 and 1957, and 11,000 from Czechoslovakia in 1968.³⁶⁸ Sharryn Aiken contrasts the admission of “7,000 highly skilled and educated Asian refugees” following their expulsion from Uganda 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.”³⁶⁹ 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 1958,³⁷⁰ Canada did not ratify the 1951 Convention or its 1967 Protocol until 4 June 1969.³⁷¹ 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

³⁶⁵ David C. Corbett, *Canada’s Immigration Policy: A Critique* (Toronto: University of Toronto Press, 1957) at 198-199 (emphasis added).

³⁶⁶ Gerald E. Dirks, “A Policy within a Policy: The Identification and Admission of Refugees to Canada” (1984) 17:2 *Canadian Journal of Political Science* 279 at 280 [“A Policy within a Policy”].

³⁶⁷ Reg Whitaker, “Refugees: The Security Dimension” (1998) 2:3 *Citizenship Studies* 413 at 419.

³⁶⁸ Sharryn J. Aiken, “Of Gods and Monsters: National Security and Canadian Refugee Policy” (2001) 14:1 *Revue québécoise de droit international* 7 at para. 8.

³⁶⁹ *Ibid.* at para. 8.

³⁷⁰ “A Policy within a Policy” *supra* note 366 at 286.

³⁷¹ “UNHCR States Parties” *supra* note 163.

foreigner for any reason and make individual evaluations on admission.³⁷² 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."³⁷³

With the eventual decision to ratify the 1951 Convention, Canada was signaling to the world its commitment to refugee protection³⁷⁴ and required legislation to reflect this stance. The initial stage of legislative review was the preparation of a Green Paper to guide further consultations. Dirks reports that the Green Paper "presented a somewhat exaggerated view of the contributions Canada had made since the Second World War to the solution of the global problem and suggested future policy options. The document

³⁷² Dirks reports that at the time of the 1951 Convention's drafting, at 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." Gerald E. Dirks, *Canada's Refugee Policy: Indifference or Opportunism?* (Montreal and London: McGill-Queen's University Press, 1977) at 180 [*Canada's Refugee Policy*]. For a discussion of why the 1951 Convention's obligations do not challenge a nation's sovereignty see "Sovereignty, Migration and the Rule of Law" *supra* note 37 at 597.

³⁷³ While Canada was hesitating, the following countries became State Parties to the 1951 Convention: Denmark (1952), Belgium (1953), Germany (1953), Luxembourg (1953), Norway (1953), Australia (1954), Austria (1954), France (1954), Israel (1954), Italy (1954), Monaco (1954), Northern Ireland (1954), Sweden (1954), Ecuador (1955), Iceland (1955), Switzerland (1955), Holy See (1956), Ireland (1956), Morocco (1956), Netherlands (1956), Liechtenstein (1957), Tunisia (1957), Brazil (1960), Greece (1960), New Zealand (1960), Portugal (1960), Argentina (1961), Cameroon (1961), Colombia (1961), Côte d'Ivoire (1961), Niger (1961), Benin (1962), Central African Republic (1962), Congo (1962), Togo (1962), Turkey (1962), Algeria (1963), Burundi (1963), Cyprus (1963), Ghana (1963), Senegal (1963), Gabon (1964), Jamaica (1964), Liberia (1964), Peru (1964), United Republic of Tanzania (1964), Democratic Republic of Congo (1965), Guinea (1965), Gambia (1966), Kenya (1966), Madagascar (1967), Nigeria (1967), and Finland (1968). The United States of America, while never having signed the 1951 Convention did accede to the 1967 Protocol in November 1968, almost a year before Canada's accession to both the Convention and Protocol in June 1969. "UNHCR States Parties" *supra* note 163. See *Canada's Refugee Policy, ibid.* at 180-182 for a detailed account of the efforts within the Canadian government during this period to promote accession.

³⁷⁴ Without any reference to the embarrassing delay in signing, 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." *Annual Report of the Department of Manpower and Immigration, Year Ending March 31, 1968* (Ottawa) at 11 cited in *Canada's Refugee Policy, supra* note 372 at 182.

entirely ignored the pre-war and wartime years when Canada intentionally excluded virtually every European refugee who sought to escape the advancing wave of Nazism.”³⁷⁵ With this glorified version of Canada’s so-called “humanitarian tradition” the Green Paper recommended that the new immigration act contain specific provisions for the selection and processing of refugees.³⁷⁶ Following extensive consultations, the *Immigration Act, 1976*,³⁷⁷ was the first Canadian legislation to place government refugee policy in statutory form,³⁷⁸ recognize refugees as an immigrant class,³⁷⁹ and set out a process for refugee admissions.

While not part of the international legal obligation Canada had assumed, resettlement was an unquestioned, although problematic aspect of refugee protection together with *non-refoulement*. During the consultative phase of the legislative process, Dirks reports that “[e]xperienced immigration officials expressed concern regarding the administrative practicality of implementing guarantees for refugee admission and resettlement”³⁸⁰ and that “[d]ifficulties were foreseen *not only* because of individuals claiming to be refugees at Canadian immigration offices overseas but also because of aliens already in Canada...”³⁸¹ In the resulting legislation, resettlement was recognized but with lesser hype and commitment than inland refugee status determinations. Reviewing the legislation in 1984, Dirks wrote:

³⁷⁵ “A Policy within a Policy” *supra* note 366 at 283.

³⁷⁶ *Ibid.*

³⁷⁷ *Immigration Act, 1976*, S.C. 1976, c.52. The Act 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 are to the original 1976 Act.

³⁷⁸ Dirks, *Canada’s Refugee Policy*, *supra* note 372 at 253.

³⁷⁹ Convention refugees were defined in subsection 2(1).

³⁸⁰ “A Policy within a Policy” *supra* note 366 at 284.

³⁸¹ *Ibid.* at 285 (emphasis added).

The advisory committee [tasked with assessing the validity of inland 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.³⁸²

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.”³⁸³ While an addition to its international obligation, the inclusion of resettlement can also be interpreted as a reflection of Canada’s overall immigration policy, which has always been premised on overseas selection.³⁸⁴

The *Immigration Act, 1976* incorporated the 1951 Convention’s refugee definition and the principle of *non-refoulement*.³⁸⁵ 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.”³⁸⁶ The selection of refugees for resettlement was explicitly tied to humanitarianism:

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

³⁸² *Ibid.* at 290.

³⁸³ Dirks, *Controversy and Complexity*, *supra* note 359 at 25 (emphasis added). Dirks later notes, at 51, that it was not until the 1990 *Annual Report to Parliament on Future Immigration Levels* (*infra* note 416) that Canada “reluctantly acknowledged” that it “had become a de facto state of first asylum.”

³⁸⁴ Lorne Waldman, *Immigration Law and Practice*, 2nd ed. looseleaf (Markham, Ontario: LexisNexis Butterworths, 2005) at 13.1.

³⁸⁵ Subsection 47(3) stated: “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.”

³⁸⁶ Paragraph 3(g).

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.³⁸⁷

Even with this legislated recognition and humanitarian declaration, in Dirk's 1984 review of the application of Canada's first legislated refugee scheme, he 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..."³⁸⁸

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 people of Canada the Nansen Medal, named in honour of the first High Commissioner for Refugees Fridtjof Nansen.³⁸⁹ With the fall of Saigon in 1975 and the eruption of an Indochinese "boat people" crisis, Canada, and particularly individual Canadians and groups through private sponsorship, admitted approximately 60,000 Vietnamese, Laotian and Kampuchean refugees between 1979 and 1980 alone.³⁹⁰ In total, Canada resettled more refugees from overseas camps than any other country on a

³⁸⁷ Subsection 6(2).

³⁸⁸ "A Policy within a Policy" *supra* note 366 at 306.

³⁸⁹ The annual award, consisting of a medal and a \$100,000 monetary prize, recognizes a person or group for outstanding service in supporting the refugee cause. While past 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. UNHCR, "Nansen Refugee Award Flash® presentation", online: <<http://www.unhcr.org/events/3fb359bd4.html>>. This unique recognition is tied to the ability of individual Canadians to facilitate refugee resettlement through private sponsorship. See *infra* note 408.

³⁹⁰ Aiken, *supra* note 368 at para. 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.

per capita measurement, with over 150,000 refugees resettled between the eruption of the Indochinese crisis and Canada's receipt of the Nansen Medal.³⁹¹ Aiken however notes that "[j]ust a year after receiving the prestigious medal, Canadian generosity took a dramatic downturn."³⁹² Michael Casasola suggests that while the Indochinese resettlement program highlighted the value of resettlement as a durable solution, it also raised concerns that the availability of resettlement was acting as a "pull-factor" and encouraging people to flee.³⁹³ Beginning in the late 1980s and mirroring UNHCR's position at the time³⁹⁴ resettlement came to be viewed as a less preferred durable solution for refugees.

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 concerns be divided into two separate acts.³⁹⁵ 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.³⁹⁶ With the introduction of *Immigration and Refugee Protection Act*³⁹⁷ (IRPA) in 2001, Canada opted to continue instead with a single act encompassing both immigration and refugee issues. In the preface to their final

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ Michael Casasola, "Current Trends and New Challenges for Canada's Resettlement Program" (2001) 19:4 *Refugee* 76 at 77.

³⁹⁴ Troeller, *supra* note 147 at 85.

³⁹⁵ *Supra* note 352.

³⁹⁶ *Ibid.* at 1.

³⁹⁷ *Supra* note 190.

annotation of the *Immigration Act* in 2002 when *IRPA* was awaiting proclamation,³⁹⁸ Frank Marrocco and Henry Goslett 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.”³⁹⁹ “It may be,” they continued, “that the confusion of immigration and refugee law principles has impeded the development of the law in both areas.”⁴⁰⁰ Dauvergne however indicates that the legislation now has 25 separate “objectives” paragraphs resulting in “even more multiple and contradictory objectives than the previous legislation.”⁴⁰¹ She further argues that the maintenance of a single act is strategic because “[w]hile the logic of immigration and the logic of refugee protection may be separable, any government which does this loses its capacity to slide from refugee discourse to immigration discourse – and back – as the politics of the day demand.”⁴⁰² In arguing 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.”⁴⁰³ In maintaining a single act, the legislators chose instead to preserve and perpetuate the tangled roots of migrant selection and humanitarian protection.

IRPA continues the custom of framing Canadian refugee law within a “humanitarian tradition” but now ties this to proposals to be “tough on those who pose a threat to

³⁹⁸ *IRPA* came into effect on 28 June 2002.

³⁹⁹ Frank N. Marrocco & Henry M. Goslett, *The 2002 Annotated Immigration Act of Canada* (Toronto: Carswell, 2001) at vii.

⁴⁰⁰ *Ibid.*

⁴⁰¹ “Evaluating Canada’s New Immigration and Refugee Protection Act” *supra* note 136 at para. 13.

⁴⁰² *Ibid.* at para. 14.

⁴⁰³ *Supra* note 352 at 13.

Canadian security.”⁴⁰⁴ Reviewing the first incarnation of the legislation that eventually became *IRPA*,⁴⁰⁵ Casasola 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 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.’⁴⁰⁶

While professing the continuance of an imagined tradition, *IRPA* has in fact shed many of the pretences of humanitarianism in Canadian refugee law as the threat, but more so the fear, of terrorism grants the government justification and support for restrictive policies.

Canada’s Current Resettlement Scheme

Overview

The Canadian resettlement program consists of both government-assisted refugees who receive government support and sponsored refugees who are supported by private groups. Government-assisted refugees make up the majority of resettled refugees with privately sponsored refugees amounting to less than 30% of yearly resettlement.⁴⁰⁷ The process and policy behind private sponsorship, and the issue of the privatization of refugee

⁴⁰⁴ 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 & Bojan Korenic “Canada after 11 September: Security Measures and ‘Preferred’ Immigrants” (2004) 15:4 *Mediterranean Quarterly* 72 at 77.

⁴⁰⁵ 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.

⁴⁰⁶ *Supra* note 393 at 79. When tabling Bill C-31 on 6 April 2001, then 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, News Release 2000-09, “Caplan Tables New Immigration and Refugee Protection Act” (6 April 2000), online: <<http://www.cic.gc.ca/english/press/00/0009-pre.html>>.

⁴⁰⁷ In 2005, resettlement numbers totaled 10,392 with 7,416 (71%) government-assisted refugees and 2,976 (29%) privately sponsored refugees. Citizenship and Immigration Canada, *2006 Annual Report to Parliament on Immigration*, Section 3, Table 3, online: <http://www.cic.gc.ca/english/pub/annual-report2006/section3.html#3_1>.

protection that underlies this scheme, is relatively unique to Canada and beyond the scope of the current analysis.⁴⁰⁸

Officials at Citizenship and Immigration Canada (CIC) select government-assisted refugees for resettlement.⁴⁰⁹ There are three categories of persons eligible for government-assisted resettlement – the “Convention refugees abroad class,” and two classes of “humanitarian-protected persons” consisting of persons in need of protection in either a country of asylum or a designated source country but who do not meet the narrow Convention refugee definition.⁴¹⁰ The discussion will focus on the “Convention refugees abroad class” as this is the class that fits most squarely within the international

⁴⁰⁸ With respect to private sponsorship, 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.” *Humanitarianism, Identity and Nation*, *supra* note 32 at 93. As discussed in Chapter 2 “Theory’s Role in Real World Refugee Protection” at note 71, Donald Galloway views private sponsorship as enabling the fulfillment of the personal moral duties of citizens who “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.” *Supra* note 68 at 295. For more information on the current state of Canada’s private sponsorship program see Standing Committee on Immigration and Citizenship, *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-e.html> >.

⁴⁰⁹ CIC’s mandate comes from the shared jurisdiction of section 95 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, the *Citizenship Act*, R.S.C. 1985, c.C-29 and *IRPA*. An “officer” is defined in section 2 of the *Immigration and Refugee Protection Regulations*, *supra* note 190, as “a person designated as an officer by the Minister under subsection 6(1) of the Act.” Subsection 6(1) states:

6(1) The Minister may designate any persons or class of persons as officers to carry out any purpose of any provision of this Act, and shall specify the powers and duties of the officers so designated.

All further regulation references are to the *Immigration and Refugee Protection Regulations* unless otherwise indicated.

⁴¹⁰ See regulation 146(1):

146(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:

- (a) the country of asylum class; or
- (b) the source country class.

conception of a refugee eligible for resettlement. There is, however, little difference in the process and evaluation of applicants in the humanitarian protected persons class.⁴¹¹

A member of the Convention refugees abroad class is someone seeking resettlement to Canada from outside of Canada who meets the refugee definition in the 1951 Convention. He or she must not have another resettlement option within a reasonable time, cannot be repatriated to his or her home country, and cannot remain in his or her country of first asylum. Annual resettlement targets are established by the Minister of Citizenship and Immigration following consultations with CIC, provincial governments, Canadian NGOs, 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.⁴¹²

Just Numbers

The first paragraph of the Preamble to the MFU resulting from UNHCR's Convention Plus initiative recognizes the "need to expand resettlement opportunities."⁴¹³ The MFU later states "[e]xpanding resettlement opportunities is an ambition of this framework."⁴¹⁴ As co-chair of the resettlement strand of Convention Plus, Canada led the authorship of the MFU. Canada's annual government-assisted 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 has averaged 7,554 refugees per year between 1995 and 2005 – an average of 3.4 percent of

⁴¹¹ The applicant must establish membership in the class and meet the same requirements for the issuance of a permanent resident visa as members of the Convention refugees abroad class.

⁴¹² Government of Canada, "Country Chapter: CANADA" in *Resettlement Handbook*, *supra* note 17 ["Country Chapter: CANADA"].

⁴¹³ *Supra* note 31 at 1.

⁴¹⁴ *Ibid.* at 8.

the number of annual permanent resident visas issued.⁴¹⁵ Meanwhile, the Canadian population increased from 28,846,761 as measured in the 1996 Census⁴¹⁶ to 31,612,897 in the 2006 Census.⁴¹⁷

Table 1: Government-Assisted Refugee & Permanent Resident Admissions (1995-2005)⁴¹⁸

YEAR	Government-Assisted Refugees (GARs)	Permanent Residents (PR)	% of PR that GARs
1995	8,145	212,504	3.8
1996	7,863	225,773	3.5
1998	7,382	174,100	4.2
1999	7,444	189,922	3.9
2000	10,666	227,313	4.7
2001	7,324	250,346	2.9
2002	7,502	229,091	3.3
2003	7,503	221,352	3.4
2004	7,411	235,824	3.1
2005	7,416	262,236	2.8

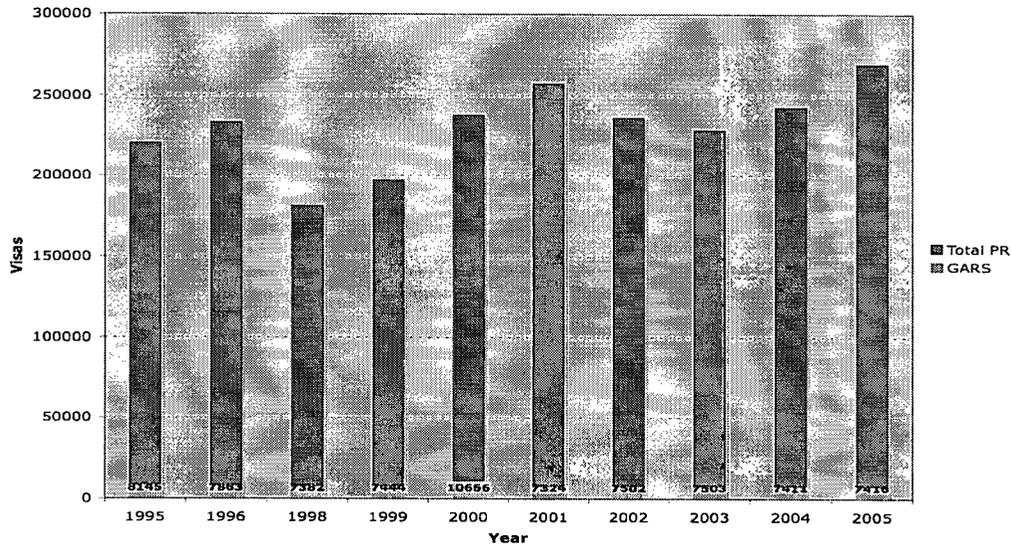
⁴¹⁵ *Infra* note 418. In calculating the averages, the data from the year 2000 has been excluded. In 2000, Canada resettled 10,666 government-assisted refugees – 41% more than the average yearly number of the other nine years surveyed. In 1999, Serb-Albanian conflict in the Serbian province of Kosovo escalated under the rule of President Slobodan Milosevic. Serbia’s atrocities in Kosovo and the consequent 24 March 1999 NATO bombing triggered a mass exodus of displaced Albanians from Kosovo into Macedonia. Macedonia, itself a fragily balanced ethnic state with one quarter of its population Albanian risked destabilization with the inflow of Albanians from Kosovo. 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 UNHCR’s request to provide asylum for some 750,000 Kosovars in Macedonian and Albanian refugee camps. Canada committed to accept 5000 Kosovars “over and above” the annual resettlement target. Citizenship and Immigration Canada, News Release 99-24, “Appeal To Canadians To Sponsor The Kosovar Refugees” (10 May 1999), online: <<http://www.cic.gc.ca/english/press/99/9924-pre.html>>.

⁴¹⁶ Statistics Canada, “1996 Census: Population and Dwelling Counts”, online: <<http://www.statcan.ca/english/census96/tables.htm>>.

⁴¹⁷ Statistic Canada, “2006 Census: Population and Dwelling Counts”, online: <<http://www12.statcan.ca/english/census06/data/popdwell/Table.cfm?T=101>>.

⁴¹⁸ Chart and subsequent graph created by author. All statistics taken from Citizenship and Immigration Canada, “Research and Statistics”, online: <<http://www.cic.gc.ca/english/research/index.html>>.

Graph 1: Government-Assisted Refugee & Permanent Resident Admissions (1995-2005)



In both 2006 and 2007 the annual target was again 7,300-7,500⁴¹⁹ – the same as it has been for at least the last decade.⁴²⁰ Canada’s Overseas Processing Manual acknowledges that first asylum countries “host hundreds of thousands, and in some cases millions, of refugees over long periods of time, thus incurring tremendous stresses and strains on the resources, environments and social fabric of their societies,” while Canada “facilitate[s] moderate resettlement of refugees from countries of first asylum.”⁴²¹ By its own

⁴¹⁹ 2006 Annual Report to Parliament on Immigration, *supra* note 407, Section 1, Table 1; Section 3, Table 8.

⁴²⁰ In the 1997 Immigration Plan the “range” for government-assisted refugees was 7,300. The subsequent immigration plans for 1998, 1999, 2000 and 2001 maintained the 7,300 “range.” In the 2002 plan, the “range” was raised to 7,500. In 2003 the “range” was raised to 7,700 but only because “[b]y agreement with the Province of Quebec, the increase in the number reflects 200 refugees destined for Quebec who were selected in 2002 and will become residents in early 2003.” In 2004 the “range” returned to 7,500 and by 2005 an actual range of 7,300-7,500 was given and has been maintained since. Citizenship and Immigration Canada, “Publications – Plans and Reports”, online: <<http://www.cic.gc.ca/english/pub/index-2.html>>.

⁴²¹ *Supra* note 349 at 8 (emphasis added).

admission, Canada is doing little to address the “tyranny of geography” discussed in the previous chapters.

Legislative and Policy Framework

Whether the numbers are understood as moderate or minute, the active resettlement of thousands of refugees per year nonetheless places Canada near the top of a small group of only 16 countries worldwide⁴²² willing to offer refugee protection through resettlement in addition to the promise of *non-refoulement* in the 1951 Convention. *IRPA*, like its predecessor act, takes Canada beyond the obligations of international law by enabling claims for refugee protection to be made outside of Canada. Subsection 99(1) of *IRPA* provides:

99(1) A claim for refugee protection may be made in or outside Canada.

Subsection 2 elaborates on claims made outside of Canada:

99(2) A claim for refugee protection made by a person outside Canada must be made by making an application for a visa as a Convention refugee or a person in similar circumstances, and is governed by Part 1.

Part 1 establishes the requirements to be met before entering Canada for all foreign nationals. Relevant to refugee resettlement are sections 11 and 12:

11(1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

12(3) A foreign national, inside or outside Canada, may be selected as a person who under this Act is a Convention refugee or as a person in similar circumstances, taking into account Canada’s humanitarian tradition with respect to the displaced and the persecuted.

⁴²² “Refugees by Numbers 2006” *supra* note 164.

It is unclear what would be involved in “taking into account Canada’s humanitarian tradition with respect to the displaced and the persecuted.” The phrase is a reassertion of Canada’s humanitarianism and offers no substantial selection guidance. The definition of a “Convention refugee” is, however, found in section 96:

96 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.

Section 96 imports the international refugee definition from the 1951 Convention directly into the Canadian legislation thereby strengthening its status. Section 97 provides the definition for the lesser threshold of a “person in need of protection.”⁴²³

A person recognized under section 99 of *IRPA* as a Convention refugee outside of Canada is considered a member of the “Convention refugees abroad class.” Regulations

⁴²³ 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.

144 and 145 set out the members of this class and their eligibility for a permanent resident visa:

144 The Convention refugees abroad class is prescribed as a class of persons who may be issued a permanent resident visa on the basis of the requirements of this Division.

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.

It is no longer possible for foreign nationals independently to apply directly for a permanent resident visa under the Convention refugees abroad class.⁴²⁴ An “undertaking” or “referral” is required as set out in regulation 150(1):

150(1) An application for a permanent resident visa submitted by a foreign national under this Division must be made at the immigration office outside Canada that serves the applicant’s place of residence and must be accompanied by either an undertaking or

- (a) a referral from a referral organization;
- (b) a referral resulting from an arrangement between the Minister and a government of a foreign state or any institution of such a government relating to resettlement; or
- (c) a referral resulting from an agreement relating to resettlement entered into by the Government of Canada and an international organization or a government of a foreign state.

The definition of “referral organization” is found in regulation 138:

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

“referral organization” means

- (a) the United Nations High Commissioner for Refugees; or
- (b) any organization with which the Minister has entered into a memorandum of understanding under section 143. (organisation de recommandation)

⁴²⁴ Regulation 150(2) does set out one exception: “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.”

Regulation 143 requires that such organizations have a working knowledge of *IRPA*'s protection criteria and the ability to locate and identify Convention refugees abroad.

UNHCR's statutory responsibility for refugees obviates the need for a memorandum of understanding.⁴²⁵ In 2005 almost 80% of Canada's government-assisted resettlement was through UNHCR referrals.⁴²⁶ UNHCR referrals come by way of a Resettlement Registration Form outlining the protection and resettlement needs on which the referral is based.⁴²⁷ Canada's Overseas Processing Manual instructs visa officers to "be proactive in requesting referrals of appropriate cases."⁴²⁸ 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 in regulations 143 and 150 is essentially revoked by the independent review then conducted by the visa officer.

Following a referral, eligibility for the permanent resident visa requires reference back to regulation 139, which outlines the requirements that must be met for such a visa to be issued:

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

⁴²⁵ *OP5*, *supra* note 349 at 33.

⁴²⁶ UNHCR reports that Canada accepted 5,811 resettlement referrals in 2005 (*Measuring Protection*, *supra* note 142 at 19) and, as already noted, Canada resettled a total of 7,416 GARs in 2005 (*supra* note 407). When one considers that GARs include humanitarian-protected persons that would not have been referred by UNHCR, the number of UNHCR referred Convention refugees is even larger.

⁴²⁷ The Resettlement Registration Form 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>>.

⁴²⁸ *Supra* note 349 at 28.

- (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, the foreign national and their family members included in the 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. Dauvergne reported that “[t]he Canadian government has been criticized for using its offshore program as an adjunct of its independent migration program, that is for choosing off-shore refugees who are well educated and able-bodied and therefore likely to quickly become contributors to the Canadian economy.”⁴²⁹ She followed this statement with a footnote referencing interviews with CIC officials in June 1997⁴³⁰ – the period during which legislative review was underway. Indeed, in its earlier incarnation the regulations did more closely reflect the immigration scheme. Section 7 of the former *Immigration Regulations*⁴³¹ 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
- (v) the personal suitability of the person and their accompanying dependants, including their adaptability, motivation, initiative, resourcefulness and other similar qualities;

⁴²⁹ *Humanitarianism, Identity and Nation*, *supra* note 32 at 93.

⁴³⁰ *Ibid.* at fn34.

⁴³¹ *Immigration Regulations*, SOR/78-172.

Evaluation under section 7 followed the “points system” assessment for independent immigrants.⁴³² In clear terms as asserted in the 1990 *Annual Report to Parliament on Future Immigration Levels*, refugees selected abroad were assessed on “their potential for eventual self-sufficiency in Canada.”⁴³³

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.⁴³⁴ 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 practically meaningless. Despite some reworking of the criteria, the successful establishment criteria in the new regulations continue to reflect the desired qualities of economic immigrants.

⁴³² Davies Bagambiire, *Canadian Immigration and Refugee Law* (Aurora, Ontario: Canada Law Book Inc., 1996) at 244.

⁴³³ Canada Employment and Immigration Commission, *Annual Report to Parliament on Future Immigration Levels, 1991-1995* at 10 cited in *Controversy and Complexity*, *supra* note 359 at 25.

⁴³⁴ “Country Chapter: CANADA” *supra* note 412 at 1.

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)

These regulations outline the legal framework for what CIC has labeled its “Urgent Protection Program” (UPP).⁴³⁵ In UPP cases, a 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.⁴³⁶ 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

⁴³⁵ Citizenship and Immigration Canada, “Urgent Protection Program”, online: <<http://www.cic.gc.ca/english/pub/ref-sponsor/section-3-03.html>>.

⁴³⁶ *OPS*, *supra* note 349 at 29.

emergency protection concerns [was] actually quite small.”⁴³⁷ He reports that in 1999 UNHCR referred only 114 urgent and emergency submissions across all resettlement countries.⁴³⁸

Since 1988 Canada also operated a women-at-risk (AWR)⁴³⁹ 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.”⁴⁴⁰ 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.”⁴⁴¹ While Canada touts the AWR program as a means “to provide women applicants with more equitable access to resettlement opportunities,”⁴⁴² the report by Dauvergne, Angeles, and Huang discussed in Chapter 3 indicates 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.⁴⁴³ The AWR program has now been absorbed into the UPP program,⁴⁴⁴ arguably diluting any attention directed at the specific challenges for women refugees.

Unlike economic migrants whose admission to Canada is overtly strategic and self-serving from a national need perspective, and family-reunification where the personal

⁴³⁷ *Supra* note 393 at 77.

⁴³⁸ *Ibid.*

⁴³⁹ The acronym AWR is imported from UNHCR’s program “assistance for women at risk.” *OP5, supra* note 349 at 30.

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.* (emphasis added).

⁴⁴² *Ibid.*

⁴⁴³ *Supra* note 220 at 51.

⁴⁴⁴ Citizenship and Immigration Canada, “Government-Assisted Refugee Program”, online: <<http://www.cic.gc.ca/english/refugees/resettle-gov.html>>.

interests of Canadian citizens are met, refugee admissions are premised on a vague humanitarian notion. Dauvergne writes that:

Of all the categories of people admitted under the migration laws to live in these nations [Canada and Australia], the label “refugee” describes those who, at least theoretically, differ most markedly from the members of the nation. While family and economic migrants are selected because they have something the nation values – family ties or a contribution to economic growth – refugees are accepted because of something they lack – the protection of another state.⁴⁴⁵

And yet, in requiring resourcefulness, relatives, employment potential and language skills, the successful establishment criteria of paragraph 139(1)(g), which still applies in the majority of resettlement cases,⁴⁴⁶ still closely mimics non-humanitarian migration selection in Canada.

Successful establishment remains the core and the conclusion of resettlement admission decisions. Given Canada’s acknowledgement that it performs only “moderate” resettlement of the “hundreds of thousands, and in some cases millions, of refugees”⁴⁴⁷ receiving inadequate protection in overwhelmed countries of first asylum, successful establishment maintains Canada’s ability to make migrant selections under a humanitarian guise. Canada’s tradition of propagating a humanitarian myth continues.

Jurisprudence: Opportunities for Review

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

⁴⁴⁵ *Humanitarianism, Identity and Nation*, *supra* note 32 at 81.

⁴⁴⁶ As noted in Chapter 3 “Resettlement’s Renaissance: A Cautionary Advocacy” in 2003 the Canadian Council for Refugees stated that “[m]ost refugees seeking resettlement in Canada still need to meet the ‘successful establishment’ requirement.” *Supra* note 191.

⁴⁴⁷ *OP5*, *supra* note 349 at 8.

Canadian court. 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."⁴⁴⁸ 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 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.⁴⁴⁹

More shrewdly, Matthew Gibney paraphrases a quote from a CIC official that "when our state confronts asylum seekers outside our territory, the onus is on the asylum seeker to prove why she should be admitted, whereas once she arrives the onus is on us to show why she should be removed."⁴⁵⁰

Canadian courts have confirmed that a legitimate legal distinction exists between asylum determinations and resettlement decisions premised on the individual's presence within

⁴⁴⁸ [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.

⁴⁴⁹ Canada, High Commissioner's Forum, "Resettlement and Convention Plus Initiatives" (Discussion Paper) FORUM/2003/02, 18 June 2003, at para. 13.

⁴⁵⁰ *Ethics and Politics of Asylum*, *supra* note 74 at 43-44.

or outside of Canada. In the landmark decision *Singh v. Canada (Minister of Employment and Immigration)* the Supreme Court of Canada considered the procedural rights of refugee claimants, and in particular whether claimants were entitled to oral hearings.⁴⁵¹ The Court split three-three on whether entitlement derived from protection under the *Canadian Charter of Rights and Freedoms*⁴⁵² or the stodgier *Bill of Rights*,⁴⁵³ but 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 redesign of its inland status determination system.⁴⁵⁴ However, when the argument was subsequently made in *Jallow v. Canada (Minister of Citizenship and Immigration)*⁴⁵⁵ that *Singh* should extend to the resettlement determinations by visa officers, it was flatly rejected at the Federal Court of Canada:

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 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.⁴⁵⁶

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

⁴⁵¹ [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 [*Singh*].

⁴⁵² *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.

⁴⁵³ *Bill of Rights*, S.C. 1960, c.44.

⁴⁵⁴ Following the 1985 decision in *Singh*, 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*.

⁴⁵⁵ [1996] F.C.J. No. 1452; 122 F.T.R. 40; 67 A.C.W.S. (3d) 128 [*Jallow*].

⁴⁵⁶ *Ibid.* at para. 17.

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.⁴⁵⁷

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)*.⁴⁵⁸ 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 of Canada 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."⁴⁵⁹

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. Yet, 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

⁴⁵⁷ *Singh*, *supra* note 451 at paras. 14 and 35; *Jallow*, *supra* note 455 at para. 17.

⁴⁵⁸ [1997] F.C.J. No. 788; 39 Imm. L.R. (2d) 39; 72 A.C.W.S. (3d) 140 [*Oraha*].

⁴⁵⁹ *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.

untrammelled discretion of the Minister or her officials.”⁴⁶⁰ 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.⁴⁶¹ There is no formal appeal process through either the visa office or within Canada. Judicial review is, however, provided for in subsection 72(1) of *IRPA*:

72(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

An application for judicial review of the visa officer’s decision to refuse resettlement can accordingly be brought before the Federal Court of Canada.

Procedural protections thus 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 emphasized:

the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.⁴⁶²

In particular, the Court 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

⁴⁶⁰ [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 [*Chiau*].

⁴⁶¹ “Country Chapter: CANADA” *supra* note 412 at 5.4.

⁴⁶² [1999] 2 S.C.R. 817 at para. 22; [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 [*Baker*].

its impact on that person or persons, the more stringent the procedural protections that will be mandated.”⁴⁶³

The Federal Court of Canada has repeatedly recognized that a visa officer deciding an application for permanent residence in Canada as a resettled refugee has a duty to act fairly.⁴⁶⁴ 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.

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.⁴⁶⁵

While a decidedly lesser threshold than inland 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

⁴⁶³ *Ibid.* at para. 25.

⁴⁶⁴ See *Jallow*, *supra* note 455; *Oraha*, *supra* note 458; *Smajic et al. v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1904; 94 A.C.W.S. (3d) 340.

⁴⁶⁵ *Supra* note 458 at para. 9.

that this decision is potentially of great importance in their lives.”⁴⁶⁶ 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.⁴⁶⁷

*Muhazi v. Canada (Minister of Citizenship and Immigration)*⁴⁶⁸ appears to be the first case to consider 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 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.”⁴⁶⁹ 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.”⁴⁷⁰

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

⁴⁶⁶ [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 [*Ha*].

⁴⁶⁷ *Ibid.* at para. 55.

⁴⁶⁸ [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 [*Muhazi*].

⁴⁶⁹ *Ibid.* at para. 36.

⁴⁷⁰ [1999] F.C.J. No. 1230 at para. 23; 173 F.T.R. 261; 90 A.C.W.S. (3d) 449.

search of “refugee” and “resettlement” and “visa officer” in the Quicklaw database “all Canadian judgments” resulted in 184 cases on 10 May 2007. Only 29 cases 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. Recalling that the Federal Court of Canada must grant leave under subsection 72(1) of *IRPA* in order for a judicial review application to be heard, and that leave is rarely granted, 29 challenges is a significant number.

Certain observations can be made about these cases and following the summary set out below are graphs that illustrate the differing ways to group the cases.⁴⁷¹ The 29 cases span the years 1994-2007 with the highest number of cases (5) being decided in 2003.⁴⁷² 10 of the 29 applications for judicial review, over one third, were allowed at the Federal Court of Canada with the cases being returned for redetermination by a new visa officer.⁴⁷³ 1 of the 19 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.⁴⁷⁴ All of the cases arise out of negative visa decisions by officers from only 15 countries where Canada has diplomatic missions abroad.⁴⁷⁵ 9 cases (32%) challenged the decisions of visa officers in Germany, 3 cases (11%) challenged the decisions of the visa officers in Kenya and 3 cases (11%) challenged the decisions of visa officers in England. Visa officers in Italy and Pakistan were each challenged in 2 cases (8%). The

⁴⁷¹ All graphs created by author and based on Quicklaw search results as compiled in appendices.

⁴⁷² See Appendix A: Federal Court of Canada Resettlement Cases by Year.

⁴⁷³ See Appendix B: Federal Court of Canada Resettlement Cases by Result.

⁴⁷⁴ *Ha, supra* note 466.

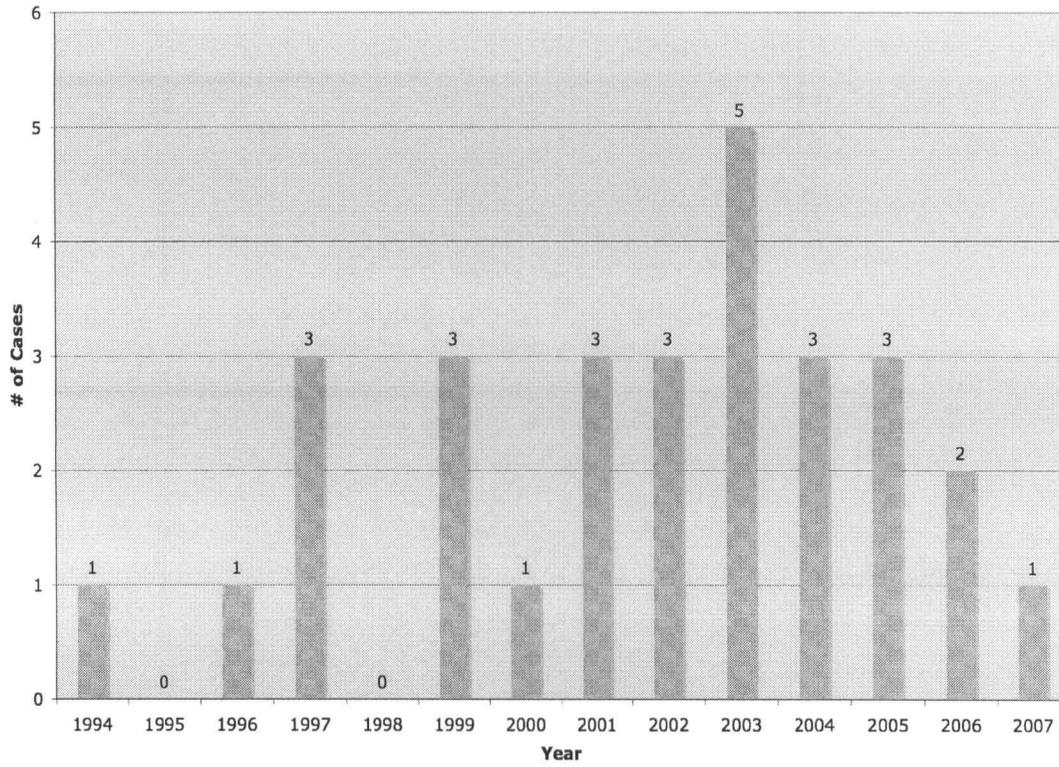
⁴⁷⁵ See Appendix C: Federal Court of Canada Resettlement Cases by Visa Application Country.

remaining 10 countries each had a single resettlement decision challenged. While the type of resettlement decision (Convention refugee, humanitarian-protected person, private sponsorship) was not always noted in the judgments, 16 of the cases (55%) were sponsored resettlement applications.⁴⁷⁶

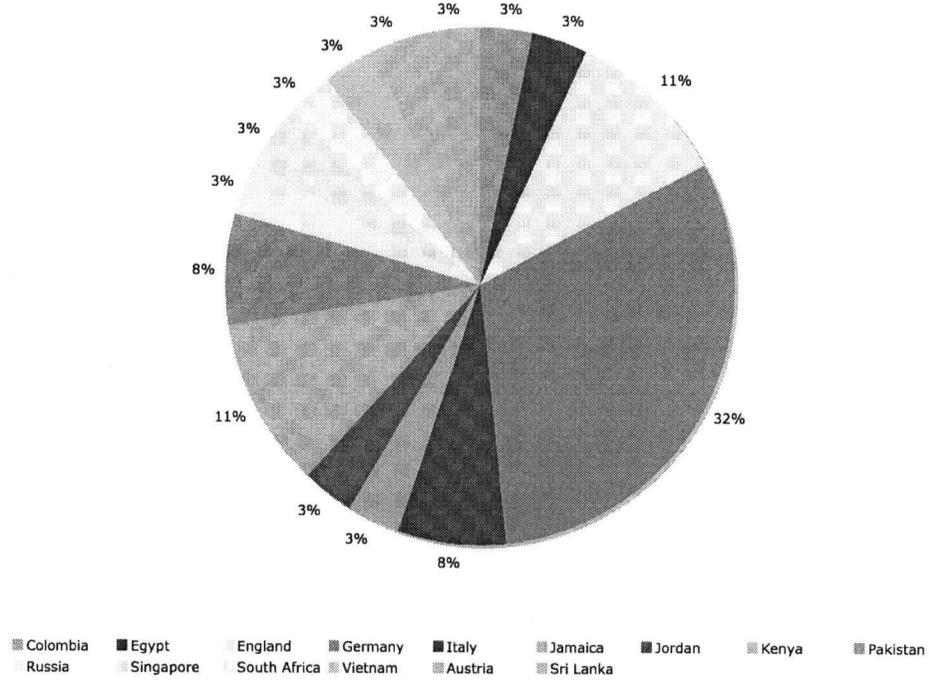
It is impossible to draw definitive conclusions from this data as the number of cases where the application for leave was denied is unknown. It does seem that refugees in certain countries (Germany) are more aware of the judicial review option and that applications for judicial review are much more likely 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 a concern for fairness in the Canadian legal system. 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 of Canada to breach procedural fairness should perhaps raise some alarm with respect to the thousands of negative decisions made by visa officers each year that are not reviewed.

⁴⁷⁶ See Appendix D: Federal Court of Canada Resettlement Cases by Application Type.

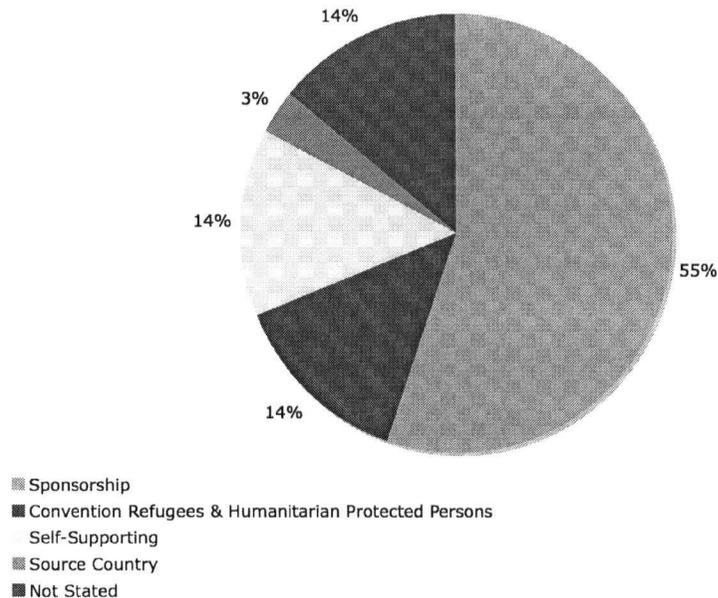
Graph 2: Judicial Review of Resettlement Cases by Year (Federal Court of Canada)



**Graph 3: Judicial Review of Resettlement Cases by Visa Application Country
(Federal Court of Canada)**



Graph 4: Judicial Review of Resettlement Cases by Type (Federal Court of Canada)



Conclusion

Canada has been singled out as a case study in an otherwise internationally framed argument. In part, this focus is because an intended audience for this thesis is Canadian government policy-makers. In part, the Canadian focus is so these same policy-makers cannot dismiss the overall argument of the thesis as not relevant to them as Canada is already one of the top three resettlement countries and has a “humanitarian tradition with respect to the displaced and the persecuted.” In 1957, Corbett concluded his critique of Canadian refugee policy with the following comment:

Canada’s international assistance and policies regarding refugees since the war do not inspire absolute confidence that we will play a generous role commensurate with our wealth. Nevertheless, our international conduct has been good enough on the whole, I think, to justify the hope that we would use increasing

international influence with restraint and with some regard to the rights of others.⁴⁷⁷

Another half-century has passed. Little has changed. I wish to echo Corbett's words. There is clearly a desire for and consciousness of humanitarianism in Canada's refugee policy. That awareness has yet to translate into tradition or an actual humanitarian program. Refugees are a global issue and a global responsibility. Real reform must take place at the international level. Canada, already a leader in refugee resettlement, can and should take the lead in increasing resettlement numbers and implementing the type of transparent, comprehensive resettlement model discussed in the previous chapters.

⁴⁷⁷ *Supra* note 365 at 199.

CHAPTER SIX

The End of A Beginning

In writing this thesis on “refugee resettlement,” the question I have repeatedly been asked is whether I am approaching resettlement from a national or international perspective. The answer, by now clear, is “both.” The term resettlement implies movement. To understand this movement from international protection to national recognition requires an examination of both schemes. To do otherwise would not present a fair picture or understanding of refugee resettlement. In tackling both, my analysis of each is necessarily limited. Thus, in closing I must note that this work is merely a beginning – the beginning of a much-needed examination and dialogue on resettlement – an attempt to make the invisible visible.

I do not mean to imply that there is no current focus on resettlement. Indeed, Chapter 2 serves as a literature review of theorists confronting resettlement directly. However, as Chapter 2 demonstrates, theory alone is inadequate to guide admission decisions and yet crucial in compelling increased admissions. While recognizing the need to bridge the gap and bring refugee protection more in line with theoretical ideals through arguments with “practical relevance” and “political purchase,” the recommendations offered by Gibney, Carens and Dauvergne remain vague and ultimately insufficient. They nonetheless point the way toward change. I have therefore left the moral and humanitarian arguments to the theorists but taken their direction and focused on a practical approach to resettlement. In concluding, I offer 12 recommendations based on the analysis in the preceding

chapters. The recommendations are intended to initiate dialogue leading to a comprehensive resettlement model.

Actors from several sides can aid visibility, promote real change, and increase resettlement numbers. In addition to UNHCR and the Canadian government, the two focuses of this work, other national governments, academics and activists can prompt action. The recommendations that follow are therefore directed either generally at these four groups, or when specified, to individual actors.

Recommendations

- 1) Resettlement must be recognized as a protection tool equal to that of *non-refoulement*.

Historically refugee protection schemes presumed the need to resettle refugees to safe countries. With the promise not to *refouler* refugees framed as a legal obligation of signatory states in Article 33 of the 1951 Convention, a schism was created in how the two streams of refugee protection – resettlement and *non-refoulement* – were regarded. The legalization of *non-refoulement* elevated it to a primary protection role while resettlement was relegated to an inconsequential secondary status. This is a false divide. Both routes arise from the same compulsion. Refugee protection must once again be understood to be as much about bringing refugees to safety as refusing to send them back to danger.

- 2) Resettlement and *non-refoulement* must be complementary tools of protection.

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*.

3) Global resettlement numbers should be increased.

The “tyranny of geography” and locational (dis)advantage mean that certain countries are unfairly bearing the responsibility for the majority of refugee flows, counter to the commitment in the 1951 Convention to burden-sharing. Heightened securitization in the face of increased terrorist threats since 2001 have concomitantly reduced access to western states. It is therefore becoming increasingly difficult for asylum seekers to reach safe states and trigger the legal obligation of *non-refoulement*. Legally legitimate reductions of asylum claims through increased border-monitoring add force to the argument that resettlement numbers should be increased to combat unfair and often crippling refugee distribution.

4) UNHCR should set and encourage resettlement quotas correlated to some agreed standard.

The current absence of any recognized resettlement quota is unacceptable. A more emphatic statement by UNHCR on ideal resettlement distribution, be it by population density, gross domestic product or some combination of measurements, would serve to highlight the low current resettlement numbers, even of the traditional resettlement countries. While UNHCR cannot oblige states to take on their recommended numbers, more direction on resettlement distribution could lead to an increased willingness by states, and their citizens, to undertake greater refugee resettlement.

5) Resettlement selection must reflect refugee protection and not national interests.

The appeal of resettlement is often tied to a nation's notion that it offers a degree of control over refugee protection in contrast to the unpredictable nature of *non-refoulement*. Unlike the obligation imposed by *non-refoulement* to accept those who arrive at the state's "door," resettlement provides the ability to select for whom the "door" will be opened. While selection is an unavoidable aspect of resettlement, mechanisms must be in place to ensure that selection is committed to refugee needs and not a nation's interest in selecting the "best" refugees – the healthiest, most educated, most compatible, most similar to regular and desirable immigrants.

6) UNHCR should design a top-down model and operational guidelines for resettlement selection.

While UNHCR cannot force compliance with its recommendations, it can and should provide a more comprehensive model and operational guidelines to which states can choose to subscribe. The appeal of such a structure is the simplicity, consistency and transparency of selection, reducing the scope for criticism, political influence and corruption. Moreover, such a model would provide a measure against which states could gauge their current selections and recognize gaps in their schemes.

7) A resettlement model should incorporate need-based, protracted and group resettlement.

UNHCR currently focuses resettlement on eight need-based criteria. While ideal for urgent and priority cases, the criteria fail to provide a comprehensive resettlement scheme. In addition to urgent need situations, protracted refugee groups exist in ever-

worsening and volatile conditions of limbo that must be addressed. Group resettlement that reduces processing time and creates ready-made support systems for arriving refugees deserves increased attention and coordination. A resettlement model should incorporate both need-based and protracted resettlement, the latter through group processing.

8) There is a need for increased research and discussion on designing a comprehensive resettlement model.

Little attention has been paid to comprehensive resettlement design. A few individuals working in the field including John Fredriksson, Erika Feller, and Joanne van Selm have initiated discussion, and Matthew Gibney has broached the issue from an academic and ethical perspective. Overall, however, inadequate attention has been paid to the question of resettlement. It has consequently continued as an *ad hoc*, abused and under-used tool of protection. That resettlement is not the appropriate solution in all instances is reason for increased research to understand its proper use, and not a justification for its subordinate status. UNHCR and other refugee agencies should consider funding specific resettlement research projects.

9) More attention should be paid to the historical review of past protection schemes.

Understanding how historical refugee flows were addressed and exploring earlier instances of international cooperation will demonstrate the past reality, current desirability, and future feasibility of global resettlement cooperation. While replication of earlier schemes is not advocated, their review can spark creative solutions and a willingness to push the boundaries of current schemes.

10) The 1951 Convention must be understood to sketch the core of refugee protection but not its boundaries.

The 1951 Convention alone is not a sufficient response to the refugee dilemma. While outlining rights, it provides little direction in terms of responsibility beyond *non-refoulement* and general burden-sharing. As such, the 1951 Convention is the core of refugee protection but should not be considered the concluding statement.

11) The 2004 MFU should be regarded as a positive but inadequate step in international resettlement cooperation.

The MFU reached in June 2004 is an excellent recognition by the international community of the need to move beyond the 1951 Convention and structure cooperative resettlement schemes. The MFU unfortunately fails to address the 1951 Convention's deficiencies, given its prescriptive nature and silence on the determination process for resettlement selection and numbers.

12) Canada should take the lead in increasing and coordinating cooperative resettlement schemes.

Canada is already a leader in refugee resettlement both in numbers and international coordination. Its resettlement scheme – its origins, statutory framework, policies and jurisprudence – are enveloped in humanitarian rhetoric. When closely examined, humanitarianism is in fact absent from this scheme and the rhetoric revealed as mere myth-making. Nonetheless reflective of the humanitarian desire of both policy-makers and citizens in Canada, the humanitarian rhetoric should be seen as a call to revamp Canada's resettlement program to actually espouse rather than merely spout

humanitarianism. Canada's leadership in this area would influence and encourage other states to follow and stimulate greater international cooperation.

Closing

Chapter 2 asserts that the invisibility of the majority of the world's refugees is a reflection of the 1951 Convention's silence on obligations to these refugees, the dearth of academic examination of resettlement, and media and government attention only in the celebratory act of making a small number of such refugees visible and legal through the act of bringing them within a protective state's borders. It is these same tools and actors that can create the visible reflection of a refugee in need. Convention Plus and the MFU have demonstrated that there is scope to expand upon the 1951 Convention. Increased academic work on resettlement and public focus on the fact that first asylum countries "host hundreds of thousands, and in some cases millions, of refugees over long periods of time, thus incurring tremendous stresses and strains on the resources, environments and social fabric of their societies"⁴⁷⁸ can do much to bring resettlement to the forefront of discussion.

Resettlement's renaissance has already begun, although it has been accompanied by some questionable intentions. For resettlement to offer a fair and complementary mode of protection parallel to *non-refoulement* and in tandem with voluntary repatriation and local integration, a comprehensive and global model of resettlement must be designed. Then it should be implemented. Such a model would serve as a bridge across the gap – promoting real action on resettlement by contemplating ideal distribution and making the invisible visible.

⁴⁷⁸ OP5, *supra* note 349 at 8.

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APPENDICES

Appendix A: Federal Court of Canada Resettlement Cases by Year

2007

Sutharsan v. Canada (Minister of Citizenship and Immigration) [2007] F.C.J. No. 294 (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)

2005

Velautham v. Canada (Minister of Citizenship and Immigration) [2005] F.C.J. No. 1385 (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)

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 B: Federal Court Of Canada Resettlement Cases By Result

Application for Judicial Review Allowed - Returned for Re-Determination by New Visa Officer

- Sutharsan v. Canada (Minister of Citizenship and Immigration)* [2007] F.C.J. No. 294 (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

- 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)
- 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 C: 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) - Canadian Embassy in Vienna

Colombia

Beltran v. Canada (Minister of Citizenship and Immigration) [2005] F.C.J. No. 1007 (TD) (source country applicant) - Canadian Embassy in Bogotá

Egypt

El Karm v. Canada (Minister of Citizenship and Immigration) [2006] F.C.J. No. 1225 (TD) (Palestinian applicant) - Canadian Embassy in Cairo

England

Sutharsan v. Canada (Minister of Citizenship and Immigration) [2007] F.C.J. No. 294 (TD) (Sri Lankan applicant) - Canadian High Commission in London

Velautham v. Canada (Minister of Citizenship and Immigration) [2005] F.C.J.

No. 1385 (TD) (Sri Lankan applicant) - Canadian High Commission in London

Atputharajah v. Canada (Minister of Citizenship and Immigration) [2003] F.C.J. No. 332 (TD) (Sri Lankan applicant) - Canadian High Commission in London

Germany

Beganovic v. Canada (Minister of Citizenship and Immigration) [2004] F.C.J. No. 406 (TD) (applicant from former Yugoslavia) - Canadian Embassy in Berlin

Horvat v. Canada (Minister of Citizenship and Immigration) [2003] F.C.J. No. 354 (TD) (Bosnian applicant) - Canadian Embassy in Berlin

Sarkissian v. Canada (Minister of Citizenship and Immigration) [2003] F.C.J. No. 489 (TD) (Iranian applicant) - Canadian Embassy in Berlin

Haljiti v. Canada (Minister of Citizenship and Immigration) [2001] F.C.J. No. 500 (TD) (unidentified applicant) - Canadian Consulate in Bonn

Bahitjari v. Canada (Minister of Citizenship and Immigration) [2001] F.C.J. No. 976 (TD) (applicant from former Yugoslavia) - Canadian Consulate in Bonn

Phan v. Canada (Minister of Citizenship and Immigration) [2000] F.C.J. No. 728 (TD) (Vietnamese applicant) - judgment wrongly indicates "Canadian Embassy in Bonn" and is therefore unclear whether application made to the Embassy in Berlin or Consulate in Bonn

Mohamed v. Canada (Minister of Citizenship and Immigration) [1999] F.C.J. No. 1230 (TD) (Ethiopian applicant) - Canadian Consulate in Bonn

Smajic v. Canada (Minister of Citizenship and Immigration) [1999] F.C.J. No.

1904 (TD) (Bosnian applicant) - unclear where in Germany application was made

Knarik v. Canada (Solicitor General) [1994] F.C.J. No. 816 (TD) (Iranian applicant) - judgment wrongly indicates "Canadian Embassy in Bonn" and is

therefore unclear whether application made to the Embassy in Berlin or Consulate in Bonn

Italy

Oraha v. Canada (Minister of Citizenship and Immigration) [1997] F.C.J. No. 788 (TD) (Iraqi applicant) - Canadian Embassy in Rome

Jallow v. Canada (Minister of Citizenship and Immigration) [1996] F.C.J. No. 1452 (TD) (Iraqi applicant living in Malta and applying through Italy) - Canadian Embassy in Rome

Jamaica

Mengesha v. Canada (Minister of Citizenship and Immigration) [1999] F.C.J. No. 1322 (TD) (Ethiopian applicant) - Canadian High Commission in Kingston

Jordan

Zia v. Canada (Minister of Citizenship and Immigration) [1997] F.C.J. No. 784 (TD) (Iraqi applicant) - Canadian Embassy in Amman

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) - Canadian High Commission in Nairobi

Muhazi v. Canada (Minister of Citizenship and Immigration) [2004] F.C.J. No. 1670 (TD) (Rwandan applicant) - Canadian High Commission in Nairobi

Abdi v. Canada (Minister of Citizenship and Immigration) [2003] F.C.J. No. 219 (TD) (Somali applicant living in Ethiopia and applying through Kenya) - Canadian High Commission in Nairobi

Pakistan

Mahzooz v. Canada (Minister of Citizenship and Immigration) [2002] F.C.J. No. 1203 (TD) (Afghan applicant) - Canadian High Commission in Islamabad

Ayubi v. Canada (Minister of Citizenship and Immigration) [1997] F.C.J. No. 777 (TD) (Afghan applicant) - Canadian High Commission in Islamabad

Russia

Khwaja v. Canada (Minister of Citizenship and Immigration) [2006] F.C.J. No. 703 (TD) (Afghan applicant) - Canadian Embassy in Moscow

Sri Lanka

Rudi v. Canada (Minister of Citizenship and Immigration) [2003] F.C.J. No. 1220 (TD) (Afghan applicant) - Canadian High Commission in Colombo

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) - Canadian High Commission in Singapore

South Africa

Alemu v. Canada (Minister of Citizenship and Immigration) [2004] F.C.J. No. 1210 (TD) (Ethiopian applicant) - unclear where in South Africa application was made

Vietnam

Dang v. Canada (Minister of Citizenship and Immigration) [2002] F.C.J. No. 910 (TD) (Cambodian applicant) - unclear where in Vietnam application was made

Appendix D: Federal Court Of Canada Resettlement Cases By Application Type

Sponsorship

- 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)
- 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)

Convention Refugees/ Humanitarian Protected Persons

- Khwaja v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 703 (TD)
- Velautham v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1385 (TD)
- Asmelash v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 2145 (TD)
- Bahtijari v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 976 (TD)

Self-Supporting

Beganovic v. Canada (Minister of Citizenship and Immigration) [2004] F.C.J. No. 406 (TD)

Horvat v. Canada (Minister of Citizenship and Immigration) [2003] F.C.J. No. 354 (TD)

Mujezinovic v. Canada (Minister of Citizenship and Immigration) [2001] F.C.J. No. 1487 (TD)

Haljiti v. Canada (Minister of Citizenship and Immigration) [2001] F.C.J. No. 500 (TD)

Source Country

Beltran v. Canada (Minister of Citizenship and Immigration) [2005] F.C.J. No. 1007 (TD)

Not Stated

Atputharajah v. Canada (Minister of Citizenship and Immigration) [2003] F.C.J. No. 332 (TD)

Sarkissian v. Canada (Minister of Citizenship and Immigration) [2003] F.C.J. No. 489 (TD)

Smajic v. Canada (Minister of Citizenship and Immigration) [1999] F.C.J. No. 1904 (TD)

Knarik v. Canada (Solicitor General) [1994] F.C.J. No. 816 (TD)