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ESSAYS

STATE-CENTERED REFUGEE LAW: FROM RESETTLEMENT TO CONTAINMENT

by *T. Alexander Aleinikoff* *

In a world that abhors the presence of unadministered spaces or people, the presence of forced migrants must be treated as abnormal. Government authorities invariably react to refugee situations by trying first to contain them and later to eliminate them.¹

[R]efugee law as it exists today is fundamentally concerned with the protection of powerful states.²

The concept of refugee both reflects and problematizes the modern construction of an international system of states. That system is premised upon an understanding of the world as divided into legally equal, sovereign states, where sovereignty is taken to mean the legal right to govern demarked portions of the territory of the globe. In such a world, individuals need to belong to a state both to ensure their protection and acquisition of rights and to permit the system of states to ascertain which particular state has responsibility for (or control over) which persons.³ In short, the modern world operates under the motto of a state for everyone and everyone in a state.⁴

The idea of a system of states does not entail closed borders or immutable memberships. States may work out rules for the transnational movement of persons, the protection of citizens of one state in another state, and even the transfer of loyalties from one state to another. Indeed, these kinds of practices—issues of immigration and

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1. LEON GORDENKER, *REFUGEES IN INTERNATIONAL POLITICS* 125 (1987).

2. James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 *J. REFUGEE STUD.* 113, 113-14 (1991).

3. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 290-302 (2d ed. 1962).

4. This is not to say that the world lives up to its motto, but it is precisely those situations in which the actual deviates from the ideal that present such deep problems for the international regime (e.g., the Palestinians and the Vietnamese boat people in Hong Kong).

naturalization—dutifully reinforce the notion of state control over membership decisions.

Refugees, however, represent a failure of the state system, a “problem” to be “solved.” As “involuntary migrants,”⁵ refugees evidence a breach of the relationship between the citizen and the state-of-origin, calling into question the legitimacy of a system that, in practice, relegates people to the largely unfettered exercise of sovereignty of a state over its citizens.⁶ The acts of the country of origin, then, constitute an injury to both the refugee and other states. The existence of refugees, and the weight of their moral claim to protection, also put pressure on a basic premise of international law that state sovereignty entails plenary power to determine admissions policies. Yet affirmation of the authority of states to exclude refugees may well leave the refugee virtually stateless, unable to enter a country of asylum, and unable or unwilling to return to the country of origin. The result appears to be a logical contradiction: “solution” of the “refugee problem” within the existing system of states threatens a first principle (state control over admissions) of that system.

This paper will explore the international regime of refugee law, seeking to show how legal “solutions” to the “refugee problem” are profoundly state-centered. I will argue that discussions of “solutions” in refugee law and policy have taken a dramatic turn in recent years, replacing an *exilic bias* with a *source-control bias*. This new orientation focuses attention on countries of origin, supporting repatriation and human rights monitoring before and after return. I suggest that the shift in emphasis, albeit grounded in part in humanitarian concerns, presents real risks when realized within a system committed to the protection of human rights in theory more than practice. Ultimately, *source-control* measures may end up being more about *containment* of migration than about improved protection of refugees. I will also argue that the state-centeredness of legal discourse has shown disturbingly little concern for the actual experiences and desires of refugees themselves. Whether, and how, the voices of refugees can find a place in the conceptualization of refugee law remains a task for the future.

I. STATES AND REFUGEES

From a sociological perspective, refugees are most broadly concep-

5. See *infra* part I.

6. Joseph H. Carens, *States and Refugees: A Normative Analysis*, in *REFUGEE POLICY: CANADA AND THE UNITED STATES* 18, 23 (Howard Adelman ed., 1991).

tualized as involuntary migrants—persons forced to leave their habitual place of residence because of conditions that make life there intolerable. The causes of flight may be human-made (persecution, civil disorder, and economic crisis) or acts of nature (floods and droughts). Some scholars have suggested narrower definitions,⁷ but what is significant about the social science conceptualizations is that notions of statehood, sovereignty, and boundaries play subsidiary roles in defining persons in need of assistance (although any complete analysis of causes and solutions could not be wholly indifferent to the forms and structures of political power).

The legal concept of refugee, on the other hand, is closely related to understandings of the state, state sovereignty, and state membership. The earliest notions of sanctuary and asylum followed directly from the idea of a polity having exclusive sovereignty over specified territory: when an individual fled from his or her native land to another country, presence in the receiving state offered protection because the country of origin could make no claim that its laws could control within the territory of another state.⁸

The situation of millions of displaced persons after both world wars, coupled with a new emphasis on human rights protection, supplied a humanitarian basis for emerging international refugee law norms, but the legal thinking remained state-centered. Refugee status was predicated on the requirement that a person be outside his or her country of origin and that he or she be without the protection afforded by state membership (where “protection” was understood not to refer to assistance, but rather to the acquisition of a legal status).⁹ Clearly, persons who had been denationalized, and were therefore stateless, qualified. But postwar humanitarianism expanded the circle to include the de facto stateless as well: persons whose bonds with their societies had been so disrupted, such as victims of persecution, that they had been effectively denied protection by their home countries.¹⁰

The legal concept of refugee was rendered concrete in the 1951 Geneva Convention relating to the Status of Refugees.¹¹ The Conven-

7. See, e.g., ARISTICLE R. ZOLBERG ET AL., *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* 29-33, 269-72 (1989) (focusing on “violence” as a cause for flight).

8. David Kennedy, *International Refugee Protection*, 8 HUMAN RIGHTS Q. 1, 23-25 (1986).

9. Interestingly, the earliest international measures sought to provide refugees with travel documents (in lieu of a national passport that their situation made unavailable to them). Atle Grahl-Madsen, *Protection of Refugees in International Law*, 11 YALE J. INT'L L. 362, 373 (1986).

10. *Id.*

11. More than one hundred states have ratified the Convention, which is considered the foundation of modern international refugee law today. Ivor C. Jackson, *The 1951 Convention*

tion was drafted to deal with the situation of post-World War II Europe, where millions of persons found themselves outside their countries of origin and unable or unwilling to return. It defined "refugee" as a person who:

As a result of events occurring before 1 January, 1951 and 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹²

The definition is quite clearly based on the idea that a refugee is someone who has lost the protection of his or her state, is now located outside that state, and is in need of a new guarantee of protection. That is, the "problem" to be solved is the *de jure* or *de facto* loss of membership, as measured by the likelihood of persecution on the specified grounds. In his classic treatise, Professor Grahl-Madsen explains the Convention's concept of refugee this way:

[I]t is characteristic of the situation of political refugees that the normal mutual bond of trust, loyalty, protection, and assistance between an individual and the government of his home country has been broken (or simply does not exist) in their case, and that they are afraid of returning to that country lest they shall have to make a complete political submission to a government which they consider repugnant and maybe also "illegal."¹³

Similarly, Hathaway argues that the status of refugee is based on a notion of "disfranchisement or breakdown of basic membership rights. . . ."¹⁴ Refugees are distinguishable from other persons "at risk

relating to the Status of Refugees: A Universal Basis for Protection, 3 INT'L J. REFUGEE L. 403, 407 (1992).

12. Geneva Convention relating to the Status of Refugees, July 28, 1951, art. 1(A)(2) [hereinafter Geneva Convention]. The Convention also included in the definition of refugee persons who had been considered refugees under earlier international agreements. *Id.* art. 1(A)(1).

13. 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 79 (1966).

14. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 135 (1991). See also Andrew E. Shacknové, *Who Is a Refugee?*, 95 ETHICS 274, 277 (1985) ("It is [the] absence of state protection which constitutes the full and complete negation of society and the basis of refugeehood.").

It is intriguing that a concept that appears so directly linked to humanitarian concerns nonetheless is explained in membership terms. This demonstrates the hold that state-centeredness has on refugee law scholarship. Furthermore, it seems to me that the dominant metaphor said to underlie the notion of refugeehood—a "severed social bond"—is not up to the task. Societies and social relations are far too complex for any easy statement of when a person has experienced the "full and complete negation of society." Refugees usually flee before this point is reached, and recognition as a refugee does not demand such a showing of complete negation. For example, the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status states that discriminatory measures against a person or group may constitute "persecution" if they "lead to consequences of a substantially prejudicial nature

of serious harm" because "[t]heir position within the home community is not just precarious" but also accompanied by "an element of fundamental marginalization. . . ."¹⁵

Although refugee status is grounded in the idea of loss of membership, refugee law does not guarantee attainment of membership elsewhere. Recognizing the fundamental international law norm that states have complete control over the entrance of aliens into their territory,¹⁶ the Convention carefully fails to establish any duty upon states to admit refugees.¹⁷ Its central protection is the guarantee of *non-refoulement*—the right of refugees not to be returned to a country in which they would suffer persecution.¹⁸ Subsequent attempts to conclude an international treaty on territorial asylum have failed.¹⁹

Furthermore, the Convention neither mandates that states adopt procedures for refugee status determinations nor does it create an international body to make such decisions. It also fails to establish any formal reporting requirements or monitoring devices for investigating state compliance. Thus, the adjudication of who is a refugee—upon which all the protections of the Convention turn—is left entirely to state authorities.

for the person concerned, e.g. serious restrictions on his right to earn a livelihood, his right to practice his religion, or his access to normally available educational facilities." U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, para. 54 (1979). Clearly these kinds of deprivations, even if systematic and severe, fall far short of the severing of social bonds; indeed, the phrase sometimes used to describe these measures—"second-class citizenship"—implicitly suggests that some form of tie to the state and society still exists. (We could develop measures of deprivation and construct a scale that identifies particularly egregious deprivations as constituting evidence of dissolution of the social bond. But then the "social bond" metaphor provides no explanatory power; it is merely the conclusion we attach to inflictions of injury that are generally considered intolerable.)

15. HATHAWAY, *supra* note 14, at 135.

16. *But see* James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983). Of course, control over entry does not mean that aliens whom the state chooses to admit are without rights, either under domestic or international law. *See generally* RICHARD B. LILLICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* (1984) (suggesting that the traditional nation-state approach to protecting the rights of aliens no longer applies to contemporary international law).

17. And for those refugees whom states admit, the Convention imposes no duty to permit their naturalization; rather, in precatory language, it states "States shall as far as possible facilitate the assimilation and naturalization of refugees." Geneva Convention, *supra* note 12, art. 34.

18. Even this fundamental principle yields to state interests. Article 33(2) provides that protection against non-refoulement does not extend to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." Geneva Convention, *supra* note 12, art. 33(2). *See also* Kay Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT'L L. 857, 866 (1986) ("[T]he non-refoulement provision of the [Geneva] Convention indicates that states do not lightly divest themselves of their right to control their borders, a fundamental aspect of state sovereignty.").

19. *See, e.g.*, ATLE GRAHL-MADSEN, *TERRITORIAL ASYLUM* (1980).

In a deep way, therefore, the Convention fails to solve the problem that refugee status poses for the state system. The premise of state control of its borders blocks recognition of a right to asylum, yet the humanitarian norm of non-refoulement bars return of a refugee to a place where he or she would suffer persecution. It should hardly be surprising, then, to find literally millions of refugees around the world languishing in "temporary" arrangements, not forced to return to their countries of origin but denied permanent resettlement in countries of asylum.²⁰

II. STATE-CENTERED "SOLUTIONS": FROM EXILIC BIAS TO SOURCE-CONTROL BIAS

It is commonly said that there are three "durable solutions" for refugees: voluntary return to their countries of origin, settlement in the country of asylum, and resettlement in a third country.²¹ The underlying reasoning is straight-forward. If refugee status constitutes dissolution of "social bonds," then unmaking refugees demands the creation or reestablishment of "social bonds"—either in the country of origin or elsewhere.²² In short, a durable solution repairs the tear in the state system fabric by ensuring that no individual lacks membership in some state.

For roughly three decades following adoption of the Convention, it was generally assumed that external settlement of refugees was the durable solution of choice. This view—which Coles labels the "exilic bias" of refugee law²³—reflected geopolitical realities (World War II refugees would not be asked to return home), Cold War doctrine (the West scored ideological points by welcoming refugees from the East), and Eurocentric humanitarianism (surely refugees were better off if they could settle in the civilized, developed West). As long as the

20. See generally David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in *REFUGEE POLICY: CANADA AND THE UNITED STATES* 30 (Howard Adelman ed., 1991) (suggesting that most forced migrants in developed states end up with de facto asylum because, whether or not they are determined to meet the Convention's definition of refugee, few are ever returned).

21. Barry N. Stein, *The Nature of the Refugee Problem*, in *HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW* 50 (Alan E. Nash ed., 1988).

22. The goal of reestablishment of the social bond is not usually stated in "membership" terms. To so characterize the goal would be a move toward recognition of a "right to asylum," which would undermine the premise that states have unfettered authority to determine admissions policies. The careful hedging here is evident in Article 34 of the Convention, enjoining contracting states to "as far as possible facilitate the assimilation and naturalization of refugees." Geneva Convention, *supra* note 12, art. 34.

23. Gervase J.L. Coles, *The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry*, in *HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW* 195, 209 (Alan E. Nash ed., 1988).

numbers of refugees remained small, governments could proclaim generous policies of asylum. Legal advocates for refugees, too, contributed to the exilic bias, urging expansive programs of resettlement and broad interpretations of the Convention's definition of refugees. The idea that refugees would seek return to their native lands—at least any time soon—seemed almost inconceivable.

In the past decade or so, we have witnessed the breakdown of the exilic approach to refugee law. A legal regime constructed to handle the problems of European refugees already settled in European countries of asylum (and individual East bloc "defectors") began to witness mass flows of refugees in the Third World and large numbers of asylum-seekers arriving in Western developed nations from the Third World and former communist states in Eastern Europe. Short-term assistance to refugees in countries of first asylum began to look more long-term, as few refugees received offers of permanent resettlement from the developed world.²⁴ Moreover, because it was believed that many of those displaced over national boundaries were not "true" refugees (that is, did not meet the rather narrow criteria of the Convention), the need for permanent resettlement seemed less clear; once the political violence ceased, innocent victims who had not been targeted before flight could return to pick up their lives where they had left off. And, as recent events in Eastern Europe and Afghanistan demonstrate, even targeted individuals may be able to return following a change in regime.

Resettlement was challenged on consequentialist grounds as well. The exilic bias was said to unjustifiably relieve countries of origin of responsibility to their citizens and other states burdened by refugee flows, to undermine a refugee's right to seek the support of the international community in obtaining safe return, and to institutionalize exile at the expense of the fundamental right to return to one's home country.²⁵

24. The lack of resettlement opportunities is startling. The High Commissioner for Refugees reported last year that, of the 15 million global refugees in 1990, the UNHCR requested resettlement for just under 150,000, and of these, the Office registered only 52,000 departures. The report noted that the major reason for the low level of resettlement was the limited number of countries offering annual refugee admission quotas (only 10 of the 159 members of the United Nations establish and announce annual refugee resettlement quotas). EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME, SUB-COMMITTEE OF THE WHOLE ON INTERNATIONAL PROTECTION, RESETTLEMENT AS AN INSTRUMENT OF PROTECTION, U.N. Doc. EP/SCP/65 (1991). See also Robert L. Bach, *Third Country Resettlement*, in REFUGEES AND INTERNATIONAL RELATIONS 313, 317-22 (Gil Loescher & Laila Monahan eds., 1989).

25. There are counter-arguments here, however, which must be taken seriously: in today's world, most returns are to areas still involved in civil strife or serious rights abuses; policies of host countries often make returns less than fully voluntary; the UNHCR and non-governmental organizations lack resources and access to effectively monitor human rights protections for returnees; and focusing on repatriation undercuts assistance efforts and may lead to a watering

These pragmatically based considerations were supported by theoretical developments, as arguments grounded in both liberal and communitarian perspectives began to challenge the traditional case for resettlement. From a liberal, human rights approach, the fundamental wrong done to refugees was a denial of their right to live freely in their home countries. Furthermore, forced exile violated the internationally recognized right of citizens to return to their countries of origin. From this perspective, resettlement can never be the primary remedy because it does not restore the right; rather, the "basic solution" must solve the problem of the denial of freedoms attending exile, either by preventing the conditions that compel flight or remedying those conditions after flight.²⁶ Preference for resettlement, it may also be argued, fails to appreciate the importance of ties of persons to organic communities in which they resided prior to flight. Lawyers may be able to conceive of membership as a legal status that may be easily shed and acquired. But human beings do not so effortlessly cast off a sense of belonging, roots, and ties to the land of one's ancestors (a sociological conception of membership). These communitarian considerations would favor a solution of repatriation, so that refugees can reestablish themselves within the social setting that is constitutive of their sense of self.²⁷

Shrinking hopes of resettlement, combined with these theoretical considerations, have produced a fundamental rethinking of "solutions" to the refugee problem, with voluntary repatriation now considered the preferred durable solution.²⁸ Thus, in 1980, the Executive

down of the refugee definition. Barbara E. Harrell-Bond, *Repatriation: Under What Conditions Is It the Most Desirable Solution for Refugees? An Agenda for Research*, 32 AFR. STUD. REV. 41, 44-45 (1989); Barry N. Stein, Policy Challenges Regarding Repatriation in the 1990s: Is 1992 the Year for Voluntary Repatriation? (1992) (on file with the *Michigan Journal of International Law*); Gervase J.L. Coles, *Approaching the Refugee Problem Today*, in REFUGEES AND INTERNATIONAL RELATIONS 373, 391 (Gil Loescher & Laila Monahan eds., 1989).

26. According to Coles, "external settlement" can constitute a permissible solution only when (1) the basic solution is not possible, and (2) the refugee freely acquires the nationality of another country and enjoys the protection of that country. Coles, *supra* note 23, at 201.

27. Guy S. Goodwin-Gill, *Voluntary Repatriation: Legal and Policy Issues*, in REFUGEES AND INTERNATIONAL RELATIONS 255, 270 (Gil Loescher & Laila Monahan eds., 1989) ("Return is the objective to which international law aspires; it derives from the conception of nationality in international law, being coterminous with the notions of attachment and belonging. . ."). *But see* Bach, *supra* note 24, at 314 (arguing that repatriation is not a return home, but rather "a process of creating a new home" in a changed society).

28. New focus has also been placed on making settlement in countries of first asylum more secure and permanent through policies of development-oriented assistance which seek to help refugees become self-sufficient in host communities. Executive Committee of the UNHCR Programme, 36th Sess., Conclusion no. 40 (1985) [hereinafter Conclusion no. 40]; Barry N. Stein, *Refugee Aid and Development: Slow Progress Since ICARA II*, in REFUGEE POLICY: CANADA AND THE UNITED STATES 143, 156-57 (Howard Adelman ed., 1991); Jacques Cuenod, *Refugees: Development or Relief?*, in REFUGEES AND INTERNATIONAL RELATIONS 219, 240-42 (Gil Lo-

Committee of the UNHCR Programme adopted a resolution stating that "voluntary repatriation constitutes generally . . . the most appropriate solution for refugee problems"²⁹—a conclusion it reaffirmed five years later, noting "[t]he basic rights of persons to return voluntarily to the country of origin" and urging that "international co-operation be aimed at achieving this solution and should be further developed."³⁰ The 1980s witnessed massive returns of refugees; large numbers of Mozambicans, Afghans, Ugandans, Salvadorans, Kurds, Ethiopians, and Nicaraguans went home (under varying kinds of arrangements with varying degrees of coercion). Thus in 1991, UN High Commissioner for Refugees Ogata could proclaim that 1992 would be "the year for voluntary repatriation."³¹

The real-world conditions that precipitated the new thinking about durable solutions also led the international community to focus attention on ways to prevent mass refugee flows from occurring. The reasoning here is that an ounce of prevention is worth a pound of remedy. One obvious solution—simply closing borders—was rejected as an impermissible abridgment of the principle of non-refoulement (although the U.S. interdiction and return of Haitian boat people is an example of a flagrant violation of international law).³² But refugee flows could

scher & Laila Monahan eds., 1989). For a powerful critique, see BARBARA E. HARRELL-BOND, *IMPOSING AID: EMERGENCY ASSISTANCE TO REFUGEES* 7-8 (1986).

29. Executive Committee of the UNHCR Programme, Conclusion no. 18, 31st Sess. (1980).

30. Conclusion no. 40, *supra* note 28.

31. See also UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *NOTE ON INTERNATIONAL PROTECTION* 10, U.N. Doc. A/AC.96/777 (1991) [hereinafter UNHCR 1991 Report] ("Voluntary repatriation is the most desirable of all durable solutions to the refugee problem, and remains a priority for UNHCR within the context of the limited resources available to the Office.")

The head-long rush towards repatriation needs some careful scrutiny. As has been recently argued by Barry Stein:

[T]he conventional wisdom regarding repatriation is wrong and activities based upon it are likely to be irrelevant at best or harmful and wasteful at worst. . . .

A new "conventional wisdom" regarding voluntary repatriation needs to recognize that most repatriation is refugee-induced and occurs under conditions of conflict. In many situations "repatriation" is the wrong term, because there has been no restoration of the bond between citizen and fatherland. . . . Similarly, "voluntary" is suspect, because far too many refugees go home under pressure or threat or to flee attacks by host elements in their country of asylum.

Stein, *supra* note 25, at 1-2.

32. *Cf. Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992) (President Bush's order mandating return of Haitian boat-people violates § 243(h) of the Immigration and Nationality Act, which provides protection co-extensive with Article 33 of the Geneva Convention).

The case for policies of "pushback," "interdiction," and (the Orwellian sounding) "humanitarian deterrence" can be made only upon the (unrealistic) assumption that all persons so deterred do not come within the Convention's definition of refugee or that processing in the country of origin is a viable alternative (perhaps true in the former Soviet Union, but not in Haiti).

be staunched, it was argued, by undertaking efforts to ameliorate the "root causes" of mass flight across borders. In 1981 the U.N. General Assembly, expressing "grave concern" over the "continuing massive flows of refugees in many parts of the world," established a Group of Governmental Experts charged with producing a report on "International Co-Operation to Avert New Flows of Refugees."³³ The report, issued in 1986, identifies a number of political, socio-economic and natural causes of mass flows. It not unsensibly recommends that states "refrain from creating or contributing by their policies" to causes of such flows by respecting human rights, non-discrimination norms, and international law.³⁴ Efforts at removing root causes, it was suggested, could also be aided by the establishment of "early warning" monitoring mechanisms that could identify for the source country and the international community conditions likely to produce flows of refugees in the near future.³⁵

So far, the discussion has concerned theoretical developments at the international level. But it should be apparent that the exilic bias has also lost its appeal to most of the governments of the developed West. The reasons are complicated and varied, but surely include (1) a sharp rise in the number of asylum-seekers (estimates for Germany this year top 350,000), which has produced virulent antialien movements in Europe; (2) cultural differences between refugees and their host countries; (3) large increases in outlays for refugee support programs and adjudication procedures³⁶; and (4) an end to the Cold War, which removed the ideological attractiveness of liberal resettlement policies.³⁷ These developments have led Western states to view the "refugee problem" as triggering not humanitarian concern, but rather policies of control and deterrence. States, as matters of domestic law, have adopted narrow readings of the Convention's definition of refu-

33. G.A. Res. 36/148, U.N. GAOR, 36th Sess., Supp. No. 51, at 91, U.N. Doc. A/36/51 (1981). See also Sadruddin Aga Khan, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Study on Human Rights and Massive Exoduses*, U.N. ESCOR, Hum. Rts. Comm., 38th Sess., U.N. Doc. E/CN.4/1503 (1981).

34. The Report, which is short on specific recommendations, clearly reflects a compromise between developed and developing nations: states are called upon to refrain from domestic policies that create refugees and to abide by principles of non-intervention whose violation is "particularly prone" to cause new massive flows of refugees. Luke T. Lee, *Toward a World without Refugees: The United Nations Group of Governmental Experts on International Co-Operation to Avert New Flows of Refugees*, 1986 BRIT. Y.B. INT'L L. 317, 322.

35. GORDENKER, *supra* note 1, at 174-77.

36. Hathaway reports that developed states currently spend between \$5 and \$8 billion a year on refugee determination schemes, more than ten times the annual budget of UNHCR. Hathaway, *supra* note 2, at 129.

37. David A. Martin, *The New Asylum Seekers*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s I* (David A. Martin ed., 1988).

gee, established policies of detention of asylum-seekers, instituted new visa controls, and sought to impose sanctions on carriers who transport asylum-seekers. Serious proposals have been made to amend the German Constitution, which alone among Western constitutions guarantees a right of asylum. And measures are currently being drafted that seek a united European approach to adjudicating asylum claims.³⁸ Refugee law has become immigration law, emphasizing protection of borders rather than protection of persons.

The international preference for voluntary repatriation and concern with root causes, coupled with deterrent measures adopted by states, have produced a dramatic shift in the focus of refugee law and policy. As resettlement possibilities become more remote and "temporary" arrangements become depressingly long-term, primary attention is now being directed to the countries of origin of refugee flows. In short, in the past decade the *exilic bias* has been superseded by a *source-control bias*.

III. A RECONCEPTUALIZATION OF THE PREMISES OF REFUGEE LAW?

Does the move from an exilic bias to a source-control strategy indicate a fundamental shift in the premises of refugee law? From one view, the new bias remains profoundly state-centered. The deterrent policies of the West are quite clearly attempts to stop the kinds of movements of people that create practical and theoretical problems for the state system. And a preference for repatriation—whether or not conceptualized in human rights terms—is grounded in restoring the citizen to his or her state.³⁹ Facilitating the return of refugees removes the challenge to the sovereignty of the receiving states that the humanitarian claims of refugees inevitably pose. Indeed, once states invoke their sovereign right not to resettle refugees—an exercise of power, it should be recalled, not condemned by the Convention—then repatria-

38. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, *reprinted in* 2 INT'L J. REFUGEE L. 469 (1990); Convention on the Application of the Schengen Agreement of 14 June 1985 relating to the Gradual Suppression of Controls at Common Frontiers, between the Governments of States Members of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, June 19, 1990, tit. II, ch.7, *reprinted in* 3 INT'L J. REFUGEE L. 773, 780-86 (1991); Treaty on European Unity, Feb. 7, 1992, tit. VI, 31 I. L. M. 253, 327 (1992), and Declaration on Asylum, *id.* at 373; David A. Martin, Restrictive Practices Affecting Asylum Seekers: A Preliminary Report 8 (1992) (unpublished manuscript prepared for the Committee on the Legal Status of Refugees of the International Law Association; on file with the *Michigan Journal of International Law*); Iain Guest, *The United Nations, UNHCR, and Refugee Protection: A Non-Specialist Analysis*, 3 INT'L J. REFUGEE L. 585, 597 (1991).

39. Development-oriented assistance also seeks to further community attachment.

tion becomes the only viable durable solution.⁴⁰

Interventionist strategies in countries of origin aimed at ameliorating root causes of flight or guaranteeing safe return may be more difficult to place within the conventional model of sovereign states. Traditionally, refugee law has dealt with the sending states as it found them: refugees were persons outside their countries of origin, and receiving states either chose to admit them or send them to a third country. Only persons who could not meet the standards for establishing refugee status were returned home; and because returnees did not come within the protection of the Convention, refugee law stopped at the border of the home country.

With a little ingenuity, a source-control model can be explained as consistent with a state-centered approach premised on the notion of equal and independent states. First, as noted by the Group of Governmental Experts, mass flight "may affect the political and social stability, as well as the economic development, of the receiving States, and also carry adverse consequences for the economies of the countries of origin and entire regions, thus endangering international peace and security."⁴¹ On this account, the creation of refugees may be characterized as an offense against the system of states warranting remedial measures by the international community.⁴² State abuse of its citizens also produces problems for the state system as a whole because it threatens to undermine the legitimacy of the state system by calling into question the justness of the principle that assigns citizens to states and states to citizens.⁴³ In other words, the recognition of a state's sovereignty by the community of states could be deemed to be predicated upon the humane treatment of the citizens assigned to the state by the state system. Thus, interventionist efforts to protect human rights or civil order would be a permissible infringement on state sovereignty if it could be reasonably justified in system maintenance terms.

On the other hand, source-control strategies might be viewed as a dramatic reformulation of refugee law, replacing an emphasis on states and membership with a humanitarianism concerned with persons, not

40. Other suggestions by commentators, while innovative, likewise reaffirm state-centeredness. See, e.g., Jack I. Garvey, *Toward a Reformulation of International Refugee Law*, 26 HARV. INT'L L. J. 483 (1985) (state responsibility); Hathaway, *supra* note 2, at 124 (international efforts to achieve resettlement by appealing to self-interest of states).

41. Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees [hereinafter Report], U.N.GAOR 41st Sess., Prelim. List Item 78, at 16, U.N. Doc. A/41/324 (1986).

42. See Garvey, *supra* note 40.

43. See Carens, *supra* note 6; Hathaway, *supra* note 2.

borders. The theoretical groundwork for a paradigm shift has begun. Hathaway has proposed conceptualizing the definition of refugee in human rights terms;⁴⁴ and Coles has suggested a human rights approach to solutions.⁴⁵ Demands that states respect the human rights of their citizens in order to prevent refugee flows may more easily be characterized as concerned with the welfare of human beings than with maintenance of the state system.

International practice may also be interpreted as moving in such a direction. Under recent repatriation arrangements, the UNHCR has agreed to accompany the refugees back and monitor their protection after return (certainly a role unanticipated by the drafters of the Convention).⁴⁶ The creation of a safety zone for Kurds in Iraq following the Gulf War represents the zenith of intrusions into the sovereignty of refugee-producing nations and has reinvigorated the debate on humanitarian intervention.⁴⁷

The implications of a paradigm shift would be considerable. Replacing state-centeredness with a robust humanitarianism would call into question the Convention's definition of refugee, which covers only a small portion of involuntary migrants. Refugee law, under such an account, would be grounded on a "principle of refuge"⁴⁸ that seeks to ameliorate the suffering of all those forced to leave their home countries. The new paradigm would also put significant pressure on the requirement that a person be "outside the country of his [or her] nationality" to qualify as a refugee. From a human rights perspective, the internally displaced are at least as needy (and perhaps more vulnerable) than those who have managed to flee across national borders.⁴⁹ Indeed, it may be those who are unable to flee who are most in

44. Hathaway, *supra* note 2.

45. See Coles, *supra* note 23; Coles, *supra* note 25.

46. Development assistance for returnees also aids the local population. LAWYERS COMMITTEE FOR HUMAN RIGHTS, UNCERTAIN HAVEN: REFUGEE PROTECTION ON THE FORTIETH ANNIVERSARY OF THE 1951 UNITED NATIONS REFUGEE CONVENTION 156 (1991); Guest, *supra* note 38.

47. James A.R. Nafziger, *Self-Determination and Humanitarian Intervention in a Community of Power*, 20 DENVER J. INT'L L. & POL. 9, 30-31 (1991); Howard Adelman, *Humanitarian Intervention: The Case of the Kurds*, 4 INT'L J. REFUGEE L. 4 (1992).

48. The phrase is Goodwin-Gill's:

The "principle of refuge" is used here to signify the multifaceted duty to accord aid to those in distress, varied though its content may be. In the present context it covers, in particular, refugees in both [a] broad and narrow [sense] . . . ; those in danger of torture if returned; or [those] who face serious discrimination; or cruel, inhuman or degrading treatment. But the principle is potentially much wider; *a priori*, it does not exclude the shipwrecked, the victim of natural disaster, the conscientious objector or the deserter. What the law has yet to do is to contribute to the next generation of answers.

Guy S. Goodwin-Gill, *The Language of Protection*, 1 INT'L J. REFUGEE L. 6, 15 & n.43 (1989).

49. Sadruddin Aga Khan, *Looking Into the 1990s: Afghanistan and Other Refugee Crises*, INT'L J. REFUGEE L. 14, 26-27 (Spec. Issue, 1990).

need of assistance. At this point, refugee law would collapse into human rights law, and the shift would be complete. The possibility that refugee law could do serious human rights work in countries of origins helps account for the current political strength of the preference for repatriation. Both human rights advocates and governments of countries of asylum—for very different reasons—can support policies of return.⁵⁰

* * *

Whether the new emphasis on source-control strategies represents a corollary of a state-centered approach or instead constitutes movement towards a new paradigm may ultimately be a moot question if practical politics in the real world block serious efforts at breaching the borders of the states of origin. I fear this is likely to be the case. The work of legal scholars to the contrary notwithstanding, state authorities charged with interpreting and implementing the Convention hardly appear interested in expanding the Convention's definition of refugee.⁵¹ As to the willingness of states to take measures in states of origins to prevent refugee flows, consider the statement in the report of the Group of Experts that "the task of averting massive flows of refugees requires improved international co-operation at all levels . . . *in full observance of the principle of non-intervention in the internal affairs of sovereign states.*"⁵² In this respect, the unwillingness of European nations to intervene in the former Yugoslavia, which has created more than two million refugees, may represent the norm to which the intervention in Iraq on behalf of Kurds is the rare exception.

Furthermore, the empirical evidence on repatriations is decidedly mixed. As Cuny and Stein note, "[i]n the literature on voluntary repatriation the assertion that voluntary repatriation is the 'most desirable' durable solution is often closely followed by pessimistic evaluations of its prospects."⁵³ While some repatriations have been successful, these are usually in states in which the refugee-creating conflicts have ended, either by way of a regime change or a cease fire.⁵⁴ Most recent repatri-

50. This is not to say that refugee advocates approve of deterrent measures adopted by receiving states. They clearly do not, given the serious risk that such measures deter bona fide asylum seekers and make no attempt to guarantee protection in the country of origin. See B. S. Chimni, *Perspectives on Voluntary Repatriation: A Critical Note*, 3 INT'L J. REFUGEE L. 541 (1991); Coles, *supra* note 23, at 216-18.

51. See, e.g., *I.N.S. v. Elias-Zacarias*, 112 S.Ct. 812 (1992).

52. Report, *supra* note 41, at 16 (emphasis supplied).

53. Fred Cuny & Barry N. Stein, *Prospects for and Promotion of Spontaneous Repatriation, in REFUGEES AND INTERNATIONAL RELATIONS* 293 (Gil Loescher & Laila Monahan eds., 1989).

54. Two examples would be Namibian repatriations following independence in 1990, and Chilean returns following the fall of Pinochet. See also Stein, *supra* note 25; UNHCR 1991 Report, *supra* note 31.

ations, however, have occurred within the context of continuing civil disorder; and the ability of international organizations to ensure the security of the returnees has been sorely tested.⁵⁵ Certainly, the early news from Cambodia is cause for considerable concern. It appears that state sovereignty is more easily transcended in theory than practice.

Rather than a paradigm shift, then, we may well be witnessing the troubling use of a humanitarian discourse to mask a reaffirmation of state-centeredness.⁵⁶ That is, the emphasis on repatriation and root causes will help developed states justify the new strategies adopted to "solve" their asylum "crises," yet deeply entrenched practices of non-intervention will prevent serious measures to improve human rights situations in countries of origin. If this analysis is correct, then the story of change is not about the melding of refugee law into human rights law; rather, it is the exchange of an exilic bias for policies of *containment*—detention of asylum seekers, visa requirements, closing opportunities for resettlement, pushbacks, and return. These policies are grounded less in a desire to breach the walls of state sovereignty than an attempt to keep Third World refugee problems from inconveniencing the developed states. The significant risk here is that a politics of containment will have the ugly result of abandoning refugees to the very states from which they fled in search of assistance and protection. If this is so, then refugee advocates who see recent repatriation efforts as vehicles for doing human rights work within the sending countries may be unwitting allies in reinforcing the very state-centered model they seek to overthrow.

IV. CONCLUSION: THE VOICES OF REFUGEES

If the preceding analysis is correct, then refugee scholars and advocates would do well to stay off the repatriation bandwagon until there are far stronger reasons to believe that the international regime stands ready and able to keep its human rights commitments to returnees and other victims of persecution.

Other proposals worth investigating include non-source control strategies that both avoid the current problems plaguing resettlement efforts and appeal to the self-interest of states. For example, Garvey suggests that norms of state responsibility be invoked to hold sending

55. Two recent cases involve the UNHCR's continuing assistance to *masivas* in Salvador, and the short-lived nature of Tamil repatriation.

56. Or, as Eric Stein has suggested to me, a use of humanitarian talk to mask the pursuit of an interventionist foreign policy.

states liable to countries of asylum.⁵⁷ And Hathaway has proposed an internationalized burden-sharing scheme that would strike "a reasonable accommodation between the inevitability of special claims [of refugees] and the sovereignty of states."⁵⁸

Another alternative that neither concedes the field to unbridled state power nor simply appeals to pie-in-the-sky humanitarianism might focus on developing strategies at the intra-regional level through collaboration of countries of origin and countries of asylum.⁵⁹ Such efforts include expanded definitions of "refugee" (under the Organization of African Unity Convention and the Cartagena Declaration) and multilateral security and repatriation arrangements (International Conference on Central American Refugees (CIREFCA)).⁶⁰ Regional approaches, based on shared cultural and historical perspectives, may be able to tolerate a kind of flexibility in approach and ambiguity in status not usually deemed appropriate for universal instruments and arrangements.⁶¹ Interventionist strategies may also appear less threatening when carried out in the name of intra-regional norms rather than universal principles enforced by powerful states outside the region.

Finally, it would be wise to bring the knowledge, experience and goals of refugees to bear on the search for alternatives. Legal scholars have generally written from a state-centered perspective, betraying a preoccupation with questions of membership that may or may not be in the best interest of refugees. Lawyers, like states, find the idea of persons unattached to political communities problematic, because such membership is believed to be the only basis for secure possession and protection of rights. Thus legal academics in the developed states have primarily focused their attention on obtaining some form of membership for refugees who have made their way to the West. Temporary protection devices (such as the European "B" status or the U.S. "temporary protected status") are seen as acceptable only when domestic politics makes full membership impossible or when it is clear

57. Garvey, *supra* note 40. As Hathaway notes, Garvey's solution might lead to an increase in human rights abuses if states of origin take efforts to prevent escape of the persecuted in order to reduce liability to countries of asylum. Hathaway, *supra* note 2, at 119.

58. Hathaway, *supra* note 2, at 114.

59. Compare James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L. J. 129, 183 (1990).

60. Roberto Cuellar et al., *Refugee and Related Developments in Latin America: Challenges Ahead*, 3 INT'L J. REFUGEE L. 482 (1991); Eduardo Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 INT'L J. REFUGEE L. 185 (1991).

61. Contrast the willingness of Western European states to provide temporary safe haven to hundreds of thousands of persons fleeing warfare in the former Yugoslavia and the deterrent policies imposed by the same states on asylum-seekers from the Third World.

that those sought to be protected do not come within the Convention definition.

What is so curious about the membership bias is that it has been developed (and, in fact, imposed) by the lawyers and the legal system with little consultation with the refugees themselves. Lawyers seem to view membership as a coat that can be taken off and replaced rather than as a constitutive part of identity;⁶² and the law's unexamined preference for membership rarely considers the serious consequences it poses for refugees—frequently to make return far more difficult and therefore to officially break ties with family and community in their countries of origin. In the United States, for example, many forced migrants apply for official status because they seek work authorization (not “membership”) or because they have been apprehended and placed in deportation proceedings and seek to forestall return home. The law, in this fashion, forces refugees to (re)construct their identities in order to gain the status that the law determines is most appropriate for them.⁶³ It is at least plausible that refugees might prefer an ambiguity and flexibility that does not compel an immediate consideration of identity questions and that keeps options open for future return or resettlement.

While I am fairly confident of my characterization of lawyers, I am quite unsure of my representation of the experiences and objectives of refugees. To say this is to identify a basic problem with the existing state-centered model: it has been developed by and for states and lawyers. Speaking the language of sovereignty and membership, it has viewed refugees as helpless objects of pity who must be assigned to some political community in order to have an identity at all (even the word “protection” suggests a paternalistic relationship between the powerful protector and the needy protected).⁶⁴ Few Western legal academics have any deep appreciation for, or knowledge of, the refugee experience; yet in an area where they ought to feel ill at ease imposing categories and perspectives, they have made themselves the

62. Perhaps the assumption is that since refugees have no membership, they will eagerly accept membership in a country of resettlement. But this ignores that refugees are *involuntary* migrants who may want to maintain membership in their home communities. They are not immigrants who have chosen to replace one home with another. Rather, they are people who have been evicted and who are in immediate need of shelter. Whether or not they want to move their official residence must remain an open question.

63. The asylum application process compels forced migrants to construct themselves to fit domestic law categories. The process of legal definition seeks a coherent, unambiguous story that resonates with domestic policy objectives (consider the different treatment that the United States has accorded asylum-seekers from El Salvador and Nicaragua).

64. See Barbara E. Harrell-Bond, *Humanitarianism in a Straitjacket*, 84 AFR. AFFAIRS 3 (1985).

"insiders" by adopting a discourse that keeps the discussions on their home turf.⁶⁵

A shift to a humanitarian approach, it should be clear, does not automatically put the refugees' voices front and center. Indeed, the power of the humanitarian appeal is precisely that such refugees are stateless, helpless and voiceless.⁶⁶

I am suggesting, therefore, that refugee issues might be considered from the bottom up, with participation by refugees in the definition of both "the problem" and acceptable "solutions." For instance, it has been proposed that the tripartite repatriation commissions consisting of the countries of origin and asylum and the UNHCR be expanded to include representatives of the repatriating refugees.⁶⁷ Interestingly, the vast majority of refugees who repatriate do so not as a part of an internationally sponsored effort; rather, they do so on their own. As Stein notes:

The refugees are the main actors in the contemporary practice of voluntary repatriation. They are the main decision-makers and determine the modalities of movement and the conditions of reception. Refugee-induced repatriation is a self-regulating process on the refugees' own terms. The refugees apply their own criteria to their situation in exile and to conditions in their homeland and will return home if it is safe and better by their standards. Many of the returnees are in desperate circumstances—in part because their return receives woefully inadequate international support, but they do not flee again.⁶⁸

The point here is not that international involvement in repatriation is unnecessary, but that perhaps the purpose of international assistance

65. Cf. HARRELL-BOND, *supra* note 28. As a thoughtful and empathic observer of refugee situations, she nonetheless concedes that "however serious were my efforts to explore a social process from the insiders' point of view, I was always a spectator and as such I was limited by my own categories of thought in what I could see." *Id.* at 25.

Consider, in this regard, the Declaration written at the close of a colloquium of lawyers and refugee advocates from 25 countries held to mark the 40th Anniversary of Convention. While the document urges "facilitating the involvement of refugees in the resolution of their problems," it makes no specific recommendations on how this might be done. With the lawyers' attention focused on states, international law, and UNHCR, the refugee is virtually absent from the document.

66. Consider the telling response of one refugee, invited to participate in an international conference in England on refugee issues, when asked how refugees would like to be portrayed in the media: "Why not publicize our energy and our power to help ourselves?" Harrell-Bond, *supra* note 64, at 4.

67. Goodwin-Gill, *supra* note 27, at 284. See also SUSAN FORBES MARTIN, *REFUGEE WOMEN 72-75* (1991). Cf. Arthur C. Helton, *The Role of the Refugee, Humanitarian and Human Rights Law in Planning for the Repatriation of Kampuchean Asylum Seekers in Thailand*, 3 INT'L J. REFUGEE L. 547 (1991). Helton, in an otherwise admirable examination of humanitarian aspects of the Kampuchean repatriation effort, suggests adding non-governmental organizations to the tripartite commission. He notes that currently "there is no systematic involvement of non-governmental organizations (or refugees) in such arrangements." *Id.* at 562. The use of a parenthetical, I would argue, is a telling indication of the international lawyer's perspective.

68. Stein, *supra* note 25, at 8.

should be conceptualized as *facilitative* (focused on aiding refugees in effectuating their choices) instead of *control-based* (helping asylum countries contain refugee flows).⁶⁹ Such an approach, it should be stressed, would not necessarily adopt a preference for repatriation; thus it would be skeptical of current arguments that a human rights approach entails return as the “basic solution.”⁷⁰ The definition and prioritizing of solutions is exactly what should be left open.

Clearly, further research is needed here to inform legal discussions. In the meantime, legal academics might do well to focus more on the worlds refugees inhabit and construct and less on membership and new modalities for international paternalism.

69. The Salvadoran *masivas* provide an example of refugee-led, UNHCR assisted, return programs. Patricia Weiss Fagen & Joseph T. Eldridge, *Salvadoran Repatriation from Honduras*, in *REPATRIATION UNDER CONFLICT IN CENTRAL AMERICA* 117, 149-64 (Mary Ann Larkin et al. eds., 1991). See also Cuny & Stein, *supra* note 53, at 306 (“[S]pontaneous repatriation restores a refugee’s sense of his own effectiveness and importance, while organized repatriation excludes refugees from tripartite commissions and gives them little voice in the modalities and conditions of their return.”).

70. Cf. Coles, *supra* note 23.