NOTE TO USERS

Fortress North America:
A Cosmopolitan Perspective on Safe Third Country Agreements

by
Rafeena Rashid, B.A., Hons.B.A.

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Department of Law
Carleton University
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Abstract

Over fifty years since the *1951 Convention Relating to the Status of Refugees* came into being, the world is experiencing a retreat from states' commitment to uphold the human rights of the most vulnerable in our global community, refugees. Increasingly barriers are being erected to stymie the flow of asylum seekers to the frontiers of receiving states. The most recent phenomenon of such barriers is the Safe Third Country Agreement entered into between Canada and the United States. This Agreement mirrors those already in force amongst states of the European Union. A cosmopolitan ethical perspective will be used to analyse the effects of Safe Third Country Agreements on access to asylum in North America in a post-September 11, 2001 era.

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Introduction

The refugee[1] in international law occupies a legal space characterized by competing principles. On the one hand, the refugee is characterized by the principle of state sovereignty and the related principle of territorial supremacy while, on the other hand, by competing humanitarian principles deriving from general treaty obligations. Refugee law nevertheless remains an incomplete legal regime for the protection of refugees. Although this regime goes some way to alleviate the plight of those affected by breaches of basic human rights, by the collapse of an existing social order in the wake of revolution, civil strife, or aggression, it nonetheless remains incomplete since it is still possible for refugees and asylum seekers to be denied even temporary refuge or protection.

While the international system is state-centred and states have been endowed with the responsibility of promoting and protecting the human rights of their citizens, the mere fact that refugees exist attests to the inadequacy of such a system. States do not choose who will show up at their borders to make a refugee claim. The state's choice is in how it chooses to deal with these individuals. States could choose to open their borders to individuals seeking protection from human rights violations in their country of origin. However, increasingly refugee receiving states are erecting barriers, like safe third

[1] A refugee is defined as "any person who owing to well founded fear of being persecuted for seasons of race, religion, nationality, membership of a particular social groups 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, is unable, or owing to such fear, is unwilling to return." 1951 Convention Relating to the Status of Refugees, 189 UNTS 137, *adopted* 28 July 1951, *entered into force* 21 April 1954, Art. 1 A(1).

country agreements, making it more difficult for asylum seekers to access their refugee status determination systems. Refugee protection is a problematic area for a cosmopolitan model of global governance[2] due to the inherent power of states to control their own borders and thwart international efforts (Barnett, 2002: 238).

The cosmopolitan ethical framework adopted in this thesis advances the notion of equality of all human beings, which was developed in the Universal Declaration of Human Rights[3] (UDHR). This framework will be used to demonstrate that states evade their legal obligations under the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) as well as other international human rights instruments that comprise the international refugee regime, and their moral obligation to provide protection to a vulnerable group of the human family by continuously erecting barriers to hinder asylum seekers' ability to access refugee determination procedures in refugee receiving states. Barriers, such as safe third country agreements, are inherently contrary to a cosmopolitan ethic because they treat all migrants the same. Asylum seekers are a unique group. They are fleeing due to the fact that the authorities in their country of origin are unwilling or unable to protect them from persecution. When this occurs, cosmopolitan ethics would argue that it is the responsibility of the state where the asylum

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[2] According to the Commission on Global Governance, governance is the continuing process through which different interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal compromises between people and institutions. So far, global governance has been viewed primarily as intergovernmental relationships, but due to globalization processes, other important actors must be taken into consideration now: nongovernmental organizations (NGOs), citizens' movements, multinational enterprises, global capital market and the mass-media. Commission on Global Governance (1995) "Our Global Neighbourhood," New York: Oxford University Press, p. xvi-xvii, 2-3, 335-336.

[3] G.A. res. 217A (III), U.N. Doc A/810 at 71, *adopted* 10 December 1948.

seeker requests refugee protection to provide refuge until it can be established that this individual is not a *bone fide* refugee. This argument still holds true notwithstanding the fact that since September 11th, 2001, refugees and asylum seekers have been conceptualized as threats to national security.

This thesis is built on three general premises. The first is that refugees have rights. These rights are rooted in both domestic and international law; the most important of the refugee-specific rights flow from obligations that states willingly undertook when they became parties to refugee and human rights conventions. These rights attach the moment the person in fact meets the definition of refugee, which is once an individual has crossed national borders due to fear of persecution because of one of the five Convention grounds.[4] Any subsequent recognition of refugee status is merely declaratory.[5] The second assumption is that Article 33 of the 1951 Refugee Convention prohibits the *refoulement* of refugees to the frontiers of territories where their lives or freedom would be threatened owing to any of the five Convention grounds. The third assumption is that every state has the sovereign power to regulate the admission and stay of non-citizens within its own territory. Like any other state power, however, these must be exercised compatibly with international law, including norms that protect the rights of refugees. The obligations that states owe to refugees and asylum seekers vis-à-vis international human rights instruments will be examined through the lens of cosmopolitan ethics.

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[4] *Supra*, note 1 Article 1A(2). The five Convention grounds are: (1) race; (2) religion; (3) nationality; (4) membership of a particular social group; (5) political opinion.

[5] These principles are well settled. *See*, e.g. United Nations High Commissioner for Refugees (1979) Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, para. 28.

In the post-Cold War era, the litmus test for the commitment to human rights by affluent states is their willingness to provide asylum. This is so because few other policies so starkly place in question the immediate commitment of affluent states to the welfare and human rights of identifiable individuals (Shacknove, 1993: 531). Many governments profess the importance of upholding refugee rights while ~~in~~ practise, devote their energies to keeping refugees away from their borders so that they do not have to honour their obligations. In particular, governments avoid their obligations to refugees by physically preventing asylum seekers from reaching their borders. Alone, or in regional blocks, states are fortifying their borders. Some states off-load their obligations by sending asylum seekers to a "safe third country."[6]

Access to safety remains vital for the world's refugees. This thesis explores the effect that the safe third country agreement between Canada and the United States will have on access to asylum in North America when examined against the backdrop of the use of a similar mechanism in the European Union. Chapter one outlines the evolution of the international refugee regime. It begins with an examination of the right to seek asylum in Article 14 of the UDHR and the culmination of this right as articulated in the 1951 Refugee Convention. This chapter also lays the framework for the cosmopolitan ethical perspective from which asylum policy, in particular the safe third country mechanism will be assessed. Chapter two highlights Canadian and American immigration and refugee policies from the interwar period to the signing of the safe third country agreement between these two countries. This chapter provides insight into the underlying factors that shape each of these two country's refugee policies. Chapter three

[6] A country designated as a safe third country is one that an asylum seeker has travelled through before attempting to seek asylum in the receiving country.

sheds light on the effect that the safe third country agreement will have on the access to asylum in North America by examining how that mechanism has been utilized in the European Union. The European use of the safe third country mechanism will be used to foreshadow the future of accessing asylum in North America. The cosmopolitan ethical framework established in the first chapter will be used to critique states' response to providing refugee protection notwithstanding their obligations under international human rights instruments.

I

Laying the Foundation: The International Refugee Regime and Cosmopolitanism

I. Introduction

In order to critique the December 2001 Safe Third Country Agreement between Canada and the United States through a cosmopolitan ethical lens, this thesis shall first explore Article 14 of the Universal Declaration of Human Rights[7] (UDHR) and the 1951 Convention Relating to the Status of Refugees[8] (1951 Refugee Convention) which form the basis of international refugee protection. The thesis also discusses the implications of international human rights law and the international asylum regime for state sovereignty. The thesis relates the intersection of human rights and migration issues, as embodied in the transborder movement of refugees, to cosmopolitanism. In the following chapters, variants of cosmopolitanism are used to critique the standards of treatment of asylum seekers in Canada and the United States as well as to speculate on the fate of asylum in North America in light of the Safe Third Country Agreement. This thesis argues that states are bound by their international obligations to treat asylum seekers with the same dignity and respect as that afforded their own citizens.

To situate this critique, I note the current shifts in the inter-state system propelled by the phenomenon of globalization in which the pursuit of goals through the exercise of control has transnational repercussions. Globalization underpins a transformation in the organization of human affairs, linking together and expanding human activity such that it encompasses frameworks of interregional and intercontinental change and development

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[7] G.A. res. 217A (III), U.N. Doc A/810 at 71, *adopted* 10 December 1948.
[8] 189 UNTS 137, *adopted* 28 July 1951, *entered into force* 21 April 1954.

(Held & McGrew, 2000: 429). Globalization has created a sense of universal connectedness. Held defines globalization as a widening, intensifying, speeding up and growing impact of worldwide interconnectedness (2002: 307). Globalization refers to the shrinkage of distance but on a large scale. What happens at one corner of the world or at one level may have consequences for what occurs at every other corner and level. It does not, however, imply universality (Koehane and Nye, 2000: 2). Koehane and Nye point out, for example, that at the turn of the millennium, a quarter of the American population used the World Wide Web compared with one hundredth of one percent of the population of South Asia (2000: 2).

All too often globalization is defined strictly in economic terms. It is a multidimensional phenomenon, which challenges approaches to dealing with environmental, military, social, cultural and political issues. Migration has been a long-standing global phenomenon (Koehane and Nye, 2000: 3). The situation now is quite serious because developments in military technology, population growth, bankrupt economies, and in Eastern Europe and Central Asia, a half-century of dormant political development, mean that the potential for violence and forced migration has increased. Asylum is not just a means for assisting people in need; it is also a method, albeit an imperfect one, for regulating and controlling refugee populations whose situation is a threat to the stability of the entire inter-state system.

Immanuel Kant, the eighteenth-century German philosopher, noted over two centuries ago:

> [t]he peoples of the earth have...entered in varying degrees into a universal community, and it had developed to the point where a violation of laws in *one* part of the world is felt *everywhere*. The idea of a cosmopolitan law is therefore not fantastic and overstrained; it is a

> necessary complement to the unwritten code of political and international law, transforming it into a universal law of humanity (1991: 107-08).

Kant was writing during the birth of the modern nation-state after the American and French Revolutions. Little did he contemplate the significant transformation this eighteenth century system of temporal-spatial relations and interactions would undergo due to contemporary advances in technology and globalization. Issues of global concern are becoming part of everyday local experiences. People living in different societies around the world are increasingly interdependent. This implies a shift in the form of human organization and activity to transcontinental or interregional patterns of activity, interaction and the exercise of power (Held *et al.*, 1999).

This thesis argues that the overarching and guiding principle underlying the ethical response to refugee movement must be the idea that every human being be treated humanely, notwithstanding their citizenship or nationality, which means in accordance with "inherent dignity and of the equal and inalienable rights" of all human beings.[9] The individual belongs to the wider world of humanity; moral worth cannot be specified by the yardstick of a single political community. However, contra this cosmopolitan position, refugee policy in the post-Cold War era has involved a diminished commitment on the part of affluent states to providing protection to refugees and asylum seekers. The transformation of international politics since the demise of the Soviet bloc means that refugee advocates must offer a new justification for refugee protection suitable to these evolving circumstances. In the face of economic instability and increased security concerns, states are finding it difficult to convince their citizens of the benefits of aiding refugees.

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[9] Preamble to the UDHR.

II. Foundation and Framework of the existing International Refugee Regime

The authoring of the UDHR was not without its political baggage. As will be illustrated later, the lessons learned during the Second World War were not enough for states to relinquish any power that would threaten their sovereignty, even if it meant protecting the inalienable rights of fellow humans. The tension between state sovereignty and international human rights is evident from the origins of international human rights policy making. States' commitment to upholding the inalienable human rights of each individual appears questionable when state sovereignty is threatened.

The UDHR marks the first time in history that the members of an international organization agreed on a list of basic human rights. Rosas holds that "[t]he Universal Declaration offers a paradigmatic challenge to the Westphalian legacy, which views the international system as a horizontal inter-state system based on the sovereign equality of states" (Rosas, 1995: 63)[10]. International human rights law is part of the general regime of international law in that its sources stem from treaty law, customary international law and general principles of law. International human rights law, however, differs from other areas of international law in that the implementation of the provisions found in treaties or norms of customary international law establishes a relationship between a state and those who reside within its borders rather than simply between states. Thus, this is

[10] The Peace of Westphalia, signed 24 October 1648, recognized the full territorial sovereignty of the member states of the empire. The states were empowered to negotiate treaties with one another and with foreign powers. It is often said that the Peace of Westphalia initiated the modern fashion of diplomacy as it marked the beginning of the modern system of nation-states. The nation-state would be the highest level of government, subservient to no others. *Encyclopaedia Britannica* 2002, Expanded Edition DVD.

mostly a vertical relationship between a state and its subjects rather than a largely horizontal relationship among states (Rosas, 1995: 61).

The Brazilian delegate to the Third Session of the General Assembly of the United Nations (UN) observed that, "the draft Declaration of human rights was based on...the concept that the power of the state must rest on the respect for the human person" (Morsink, 1993: 362). The UDHR reflects the philosophy of respect for the individual in every article. This intention is also articulated in the Preamble of the UN Charter,[11] which

> reaffirm[s] the faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

Respect for the human person is also avowed in Article 1 of the UDHR, which states that all human beings "are born free and equal in dignity and rights." Neither the Preamble to the UN Charter nor Article 1 of the UDHR refers to nationals or citizens of any given state. They are proclamations and interpretations of universal values, rather than a negotiated compromise between the different interests of states (Rosas, 1995: 63). On a more general level, the Vienna Declaration and Programme of Action[12] confirms that

> [t]here is a need for States and international organisations, in cooperation with non-governmental organisations, to create favourable conditions at the national, regional and international levels to ensure the full effective enjoyment of human rights (Part I, para. 13).

Thus, although individual states are responsible for the promotion and protection of the human rights of the individuals who reside within their borders, the Vienna Declaration and Programme of Action acknowledges that cooperation amongst governmental and

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[11] *adopted* 26 June 1945, *entered into force* 24 October 1945.
[12] *adopted* 12 July 1993 by the Vienna World Conference on Human Rights and Development, Vienna 14-25 June 1993, G.A. A/CONF.157/23.

non-governmental bodies is necessary to ensuring that the human rights of all human beings are recognized and protected, regardless of their of residency or citizenship. This statement made at the Vienna World Conference on Human Rights and Development underlies the realities of global interdependence. Actions undertaken in one state have repercussions in other states, near and far.

There are a number of treaty provisions that are of further relevance in international human rights law. The most prominent instruments from which transnational human rights obligations may be established are the International Covenant on Economic, Social and Cultural Rights[13] (ICESCR) and the International Covenant of Civil and Political Rights[14] (ICCPR). The general obligation provisions can be found in Article 2 of both Covenants. Article 2 of the ICESCR provides:

> 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation...with a view to achieving progressively the full realization of the rights recognised in the present Covenant.

Article 2 of the ICCPR is rather different in that it provides:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.

These texts indicate that the obligations upon the ratifying states are tied more firmly to national borders in terms of civil and political rights than for economic and social rights. Civil and political rights are guaranteed within the ratifying state's territory and for individuals over whom it exercises jurisdiction. On the other hand, economic, social and

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[13] *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 *entered into force* 3 Jan. 1976.
[14] *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 *entered into force* 23 Mar. 1976.

cultural rights shall be achieved individually and "through international assistance and cooperation," without specifying a territorial or jurisdictional limitation.

One possible explanation for the difference in approach to civil and political rights when compared to economic and social rights is the intensification of the Cold War during the writing of the Covenants and its impact on multilateralism within the UN. Even prior to the adoption of the UDHR, human rights had become a weapon in the ideological warfare between East and West (Samnøy, 1999: 9). The British government working group on human rights stated two motives for its participation in the drafting of the UDHR. First, they regarded it as a "means for securing progress in the raising of human rights standards;" and second, "it was a weapon of political warfare" (Samnøy, 1999: 9).

Most delegates, however, had little difficulty voting for most of the rights in the UDHR, for more often than not, their own national constitutions included the particular right voted upon (Morsink, 1993: 381). Most national constitutions, however, do not include what Morsink calls 'international rights' (1993: 381). These are rights whose implementation would require the cooperation of more that one state, such as the right to move between countries (Article 13), the right to asylum (Article 14) and the right to nationality (Article 15) (Samøy, 1999: 10). These rights test the state's commitment to upholding human rights beyond its borders. They also challenge the notion of state sovereignty since they involve a state's relationship with individuals other than the members of a state's political community.

Attention will be focused on the drafting of Article 14 of the UDHR since it pertains directly to the issue of asylum and refugees. First, it is necessary to look at

Article 13 of the UDHR. Article 13 grants the individual the right to "leave any country, including his own, and return to his country." Nevertheless, one cannot leave one's country without eventually entering another one. The right to leave is hollow without the right to enter. Article 14 (1) states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Asylum means the entry into another country (Morsink, 1993: 383). Article 14 of the UDHR is thus the meeting place of national sovereignty and international human rights (Morsink, 1993: 383). The notion of asylum challenges the states right to limit who can enter and remain within its territory.

In the draft version of Article 14 the phrase "and to be granted" appeared instead of the current version "and to enjoy." The former statement is a clear and unambiguous statement (Morsink, 1993: 383). The change was suggested by the delegate from the United Kingdom, where he asserted, "one of the most jealously guarded rights of a state was the right to prevent foreigners from crossing its border" (Samøy, 1999: 282). Another United Kingdom delegate explained the rationale behind their amendment as a "desire to make it clear that [the] intention was not to grant to a person fleeing persecution the right to enter any and every country but to ensure for him the enjoyment of the right of asylum once that right has been granted him" (Morsink, 1993: 387). Moreover, she stated that, "no foreigner could claim the right of entry into any state unless that right were granted by treaty" (Morsink, 1993: 387). This rationale could be interpreted as a guarded concern for sovereignty. In addition, it signifies the prioritizing of sovereignty over protecting the human rights of non-nationals. Article 14 now provides that everyone has the right to seek asylum and to enjoy that asylum, but it does not endorse an obligation on states to offer asylum. In other words, while Article 13 of

the UDHR grants the right to leave one's country of origin, Article 14 does not say that persons fleeing persecution have a right to be granted asylum when they seek it. Thus individuals who flee persecution are left in a precarious situation. What comes closest to a right of entry under the 1951 Refugee Convention is the protection offered by the doctrine of *non-refoulement*[15] – the prohibition against forcible return to a country where one would risk persecution (Grahl-Madsen, 1966: 277).

The UDHR is a declaration of rights. It does not create legal obligations on states. In particular it creates no obligation on state parties to grant asylum to anyone arriving at their frontiers in search of protection. The principle of *non-refoulement* has, however, been incorporated into a number of binding and non-binding international conventions.[16] Specifically, the 1951 Refugee Convention, the Convention against

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[15] Article 33(1) of the 1951 Refugee Convention provides 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."

[16] Article 1(1) of the 1967 Protocol Relating to the Status of Refugees, 606 UNTS 267, *adopted* 31 January 1967, *entered into force* 4 October 1967; Article 3(1) of the United Nations Declaration on Territorial Asylum, G.A. res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967); Article II(3) of the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, CAB/LEG/24.3, *adopted* 10 September 1969, *entered into force* 20 June 1974, 1001 U.N.T.S 45; Article 22(8) of the American Human Rights Convention O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/ II.82 doc.6 rev.1 at 25 (1992); and recommended in the Resolution 14 (1967) on Asylum and Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe.

Torture and other Cruel, Inhumane or Degrading Treatment or Punishment [17] (CAT) and the ICCPR impose *non-refoulement* obligations on states.

The 1951 Refugee Convention is based on humanitarian ideals embellished in the concept of human rights (Weis, 1995: xvii). Indeed, the Preamble to the 1951 Refugee Convention affirms the principle enunciated in the UN Charter that all human beings shall enjoy fundamental rights and freedoms without discrimination. The 1951 Refugee Convention regularized the status of refugees and set out a series of rights and obligations, establishing the fundamental elements of the international refugee regime. The prohibition on *non-refoulement* is the key provision of the 1951 Refugee Convention since it is silent on the issue of state obligations to grant asylum. Article 33(1) of the 1951 Refugee Convention prohibits sending a refugee to any country where he or she has a well-founded fear of being persecuted on Convention refugee grounds, not just return to his country of origin (Taylor, 1996: 199). A state party to the 1951 Refugee Convention is, therefore, under an obligation to refrain from removing an asylum seeker to any country in which he or she will face a real risk of being expelled or returned to a persecuting country.

Article 3 of CAT provides that no state party "shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture." The Committee Against Torture made clear in

[17] *adopted* 10 Dec. 1984, UNGA Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51, *entered into force* 26 June 1987, Article 3. Canada signed CAT on 23 August 1985 and ratified it on 24 June 1987. The United States signed CAT on 18 April 1988 and ratified it on 21 October 1994.

Mutombo vs. Switzerland[18] that Article 3 of CAT encompasses an obligation to refrain from removing a person to a third country in which he or she will face a real risk of being expelled or returned to a country where there are substantial grounds for believing that he or she would be subjected to torture (Boed, 1994: 18). This means that the person can only be sent back to countries where there is, firstly, no danger of torture, and secondly, effective protection against refoulement.

As well, Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture, cruel, inhumane or degrading treatment or punishment." No derogation is permitted from Article 7.[19] The *non-refoulement* obligation is implicit in Article 7. It is argued that this obligation extends to an obligation to refrain from removing an asylum seeker to a third country in which he or she will face a real risk of being expelled or returned to a country where there are substantial grounds for believing that he or she would be exposed to a real risk of being subjected to torture or cruel, inhumane or degrading treatment or punishment. The Human Rights Committee, a body of experts established by the ICCPR to provide authoritative guidance on the interpretation of its provisions, has asserted that refouling a person to a country where that person will be placed at risk of torture or inhuman and degrading treatment or punishment by another country will constitute a breach of Article 7.[20] It is a fundamental principle of international law that treaties are to be honoured in good faith and their provisions are to be carried out. While there is no formal enforcement mechanism for the ICCPR, it is a

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[18] Committee against Torture, Communication No. 13/1993, U.N. Doc. A/49/44 at 45 (1994).
[19] Article 4(2) of the ICCPR.
[20] Office of the High Commissioner for Human Rights (1992) "General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)," Forty-fourth session, para. 9.

fundamental rule of international law that governments do in fact abide by their treaty obligations. Were countries to begin to ignore their treaty obligations and not consider themselves bound by them, the entire treaty base of international law would start to erode, which would not be in the interests of most states. Bassiouni asserts that when a significant number of states representing the major legal systems of the world have adhered to a given convention, it may become part of customary international law . . . and therefore become binding upon state parties under Article 38(1)(b) of the Statute of the International Court of Justice (1993: 249). As of October 2005, there were 154 state parties to the ICCPR.

According to Achermann and Gattiker, a similar proposition holds true in the case of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[21] (European Convention) (1995: 26). There appears no good reason why Article 7 of the ICCPR, which is almost identical to Article 3 of the European Convention, should be interpreted in a manner at odds with the interpretation of Article 3 of the European Convention. In international law therefore, if a state is bound by a *non-refoulement* obligation with respect to a given individual, and there is no place to which that individual can be removed without the obligation being breached, the state in question has no choice but to tolerate the presence of that individual within its territory. Thus, the crucial norm of the international refugee regime today is not the right to asylum as such, but the obligation of states not to return individuals demanding protection to countries where they were at risk of serious human rights violations.

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[21] 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

The 1951 Refugee Convention remains the foundational document of the international refugee regime. It was adopted in the immediate post-World War II period, when the refugee problems confronting the international community were mainly those of European origin. It is for this reason that the 1951 Refugee Convention contained a deadline, which limited its application to persons affected by events occurring before 1 January 1951.[22] It has been argued that the 1951 Refugee Convention was not concerned with non-European refugees and entirely ignored the fact that groups of people outside Europe were also in need of legal protection (Chimni, 1994). It has been pointed out that although the drafters of the Convention were aware of the refugee crisis in the Middle East, China and the Indian subcontinent, they feared that a general refugee definition could imply too many obligations on the resettlement states (Cells, 1989: 189). Therefore, the 1951 Refugee Convention limited the term refugees to those who fled persecution in Europe prior to 1951. Refugees from elsewhere became a concern to the West when they could be used as pawns to contain Soviet influence in the Third World (Chimni, 1994: 324).

The Eurocentric focus of the 1951 Refugee Convention also manifests itself in the manner in which it defined a refugee. In the words of Hathaway, "by mandating protection for those whose civil and political rights are jeopardized, without at the same time protecting persons whose socio-economic rights are at risk, the Convention continued the lopsided and political biased human rights rationale for refugee law of the immediate post-war years" (1990: 150). Chimni argues that the one-sided definition found support in the West because it also served the purpose of limiting their share of the

[22] Office of the United Nations High Commissioner for Refugees (1979) Handbook on Procedures and Criteria for Determining Refugee Status, paras. 6-7.

refugee burden (1994: 331). At the time of the adoption of the 1951 Refugee Convention, states were optimistic that the refugee situation would be resolved quickly.

With the passage of time and the emergence of new refugee situations, the need was increasingly felt to make the provisions of the 1951 Refugee Convention applicable to these new refugee situations. As a result, the 1967 Protocol Relating to the Status of Refugees (1967 Protocol) was enacted. The 1967 Protocol removed the dateline found in the 1951 Convention. Although the 1951 Refugee Convention and the 1967 Protocol significantly regularized the status of refugees and set out a series of rights and obligations for both the asylum seeker and the receiving state, thereby establishing the fundamental elements of the refugee regime, they still do not grant the refugee the right to obtain protection (Barnett, 2002; Goodwin-Gill, 1996).[23]

Having been devised at the height of the Cold War, the refugee definition clearly favoured the protection of the 'political' refugee fleeing persecution. Consequently, it does not accommodate or recognize many of the emerging and largely non-political causes of refugee movements, which include under-development and poverty, environmental degradation, inept or corrupt government, natural disasters and diminishing resources (Castro-Magluff, 2001: 68). Hence, the 1951 Refugee Convention has been criticized for being too narrow in scope. For example, it protects a certain type of refugee: someone, who, for political reasons, is forced to cross a state border.

[23] There are four key elements to the refugee definition: (1) that the asylum seeker be outside of her country of nationality or country of habitual residence; (2) that the asylum seeker have a well-founded fear; (3) that state protection is not reasonably available to the asylum seeker in her country of nationality or country of habitual residence and (4) that the harm feared amounts to persecution. Future references to the 1951 Refugee Convention in this thesis includes the removal of the dateline provided by the 1967 Protocol.

Focusing on crossing borders excludes the many people who are displaced within countries (referred to as "internally displaced persons"). Also, the 1951 Refugee Convention sets out five grounds for which one must fear persecution in order to be found a (Convention) refugee, namely race, nationality, religion, political opinion and membership of a particular social group. Economic reasons for leaving one's country of origin do not qualify under this definition. Rather, individuals who leave their country of origin due to the economic measures in place in their home country, which may lead to such outcomes as high unemployment and/or high crime rates and corruption within various government bodies, are referred to as economic migrants.[24] As well, the 1951 Refugee Convention does not apply to individuals who find their lives at risk due to natural disasters.

Political, economic and social concerns specific to certain regions have led to the promulgation of regional agreements addressing refugee issues not recognized by the 1951 Refugee Convention. The 1960s and 1970s, for example, witnessed anti-colonial insurgency and conflict in Africa and Asia, which produced vast numbers of refugees. Indeed, during the 1960s, most of the world's refugees were located in Africa. That decade saw the growth of the numbers of refugees from about 400 000 to well over one

[24] An example of such situations would include Argentina following a recession that began in 1998, which deepened. Production and consumption dropped sharply after the banking system was paralysed, the government defaulted on loan obligations and the local currency lost seventy percent of its value. Per capita gross domestic product dropped from $7 418 in 2001 to approximately $2700 and unemployment rose to 21.5 percent. Income disparities increased and over fifty percent of the population lived below the poverty line. (United States Department of State Country Report on Human Rights Practices for 2002– Argentina, p.1). These people would not be considered refugees.

million on the African continent.[25] The Organization of African Unity (OAU) created a regional refugee Convention (OAU Convention) to handle the specific needs of the African continent. In Article 1(2), the OAU Convention extended the definition in the 1951 Refugee Convention:

> [t]he term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The OAU Convention definition is wide enough to embrace virtually all victims of man-made disasters. The OAU Convention also recognizes that government policies combined with economic hardships and/or natural disasters may underlie the compulsion to flee one's state.

Similarly, the Organization of American States (OAS) adopted the Cartagena Declaration on Refugees[26] (Cartagena Declaration) in 1984, primarily to deal with the situation in Central America. It also extends the 1951 Refugee Convention definition in Article 3(3):

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[25] *See* Hania Zlotnik (2004) "International Migration in Africa: An Analysis Based on Estimates of the Migrant Stock," *available at* <http://www.migrationinformation.org/USfocus/display.cfm?ID=252 > accessed on 13 January 2005. The colonization of vast territories, particularly in Africa and Asia, by various European powers, and the formation of new states as a result of the decolonization, present unique dimensions in terms of the causes and consequences of forced migration. The creation by imperial powers of artificial borders, new ethnic and national minorities, as well as the rise of political reactions to tyranny contributed to past conflicts, and may well have laid the groundwork for future conflicts. This is a subject beyond the scope of this thesis.

[26] Cartagena Declaration on Refugees, *adopted* by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984, *entered into force* November 1984. This Declaration was signed by 18 Latin American governments.

> ...persons who have fled their country because their lives, safety, or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed pubic order.

Although not formally binding, the Cartagena Declaration has become the basis of refugee policy in the Central and South American region and has been incorporated into the national legislation of a number of OAS member states. The refugee definition of the Cartagena Declaration builds upon the OAU definition, and addresses the concern of victims of man-made disasters. Unlike the OAU definition, under the Cartagena Declaration, a person claiming refugee protection must show a link between her or himself and the real risk of harm. This demand is similar to the 1951 Refugee Convention, which requires the basis of the fear of persecution to be personal rather than shared amongst the general population of the individual's community or country. Although I have contrasted regional refugee instruments, I will be relying on the 1951 Refugee Convention for the rest of this thesis because the countries that will be examined have adopted this definition into their national refugee policies.

The principle of *non-refoulement* constitutes the cornerstone of the institution of asylum. It represents the central limit posed by human rights considerations upon states' prerogative to decide on the entry and stay of person in need of protection. Asylum has been defined as "the protection which a state grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it."[27] The right to asylum is a corollary to the right to life for a refugee. However, *non-refoulement* has been interpreted to apply only once a person has set foot in the territory of a receiving

[27] Article 1 of the Resolution adopted by the Institute of International Law in September 1950 45 A.J.I.L. (Supp.) 15 (1951).

state. Therefore, interdiction methods that prohibit the asylum seeker from reaching the border of a receiving state renders the rule regarding *non-refoulement* mute. A considerable number of rejections at the border have led to the forced return of individuals to situations of danger. For example, in 1991, thousands of refugees fled Haiti after the overthrow of the democratically elected President Jean-Bertrand Aristide. From 1991 to 1992, the United States Coast Guard interdicted over forty thousand Haitians, sending approximately thirty-four thousand to Guantanamo Bay after a temporary court order had prevented their immediate repatriation (Castro-Magluff, 2001: 74). In 1992, the United States Supreme Court upheld the right of the United States government to forcibly repatriate those interdicted at sea since they had not 'entered' the United States territory and could therefore not invoke protection against *refoulement*.[28] When the United States invoked this policy, the countries of Southeast Asia followed with similar policies towards the Vietnamese.

Refugee policy is changing fundamentally in the post-Cold War world. As well, the nature of refugee movements is very different today than it was when the Convention was adopted fifty-four years ago. The causes of refugee flows have undergone extensive transformations. These movements occur on a global scale and in much greater

[28] *Sale v. Haitian Centres Council*, 509 U.S. 155, 113 S.Ct. 2549, 125 L. Ed. 2d 128, 61 USLW 4684.

numbers.[29] During the 1960s and 1980s, massive refugee movements could be attributed to the independence struggles in the Third World and the proxy wars of the Cold War in Indo-China, Central America, Afghanistan and Southern Africa (Castro-Magluff, 2001: 65). With the end of the Cold War, the main political and ideological motivation for accepting refugees, namely to embarrass and discredit communist regimes, has disappeared (Castro-Magluff, 2001: 70), and states are reluctant to be fully bound to grant asylum. Article 14 of the UDHR, therefore, refers to the right to seek and enjoy asylum rather than the right to obtain it. Similarly, the 1951 Refugee Convention does not mention a right to obtain asylum, it frames states' obligations as negative – to not send back – rather than positive – to grant asylum.

The humanitarian response is evolving from one of providing asylum in Western countries to containment of refugee movements and humanitarian intervention as a means of addressing the proximate causes of displacement in the states of origin of would-be refugees. Increasingly, repressive and restrictive measures to restrain the migration

[29] In 1950, the UNHCR was mandated to help resettle 1.2 millions European refugees. During 1980-1999, 8.4 million asylum applications were lodged in Europe, North America, Australia, New Zealand and Japan. During the 1990s, the number of applications submitted reached 6.1 million, from applicants representing all regions of the world. These numbers neither include nearly four million Palestinians who are covered by a separate mandate of the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), nor the refugees housed in camps in developing countries. (UNHCR, 2001: 9).

movements from Africa, Asia, the Caribbean and Latin America are being imposed.[30] The predominantly wealthy states of North America, Europe and Australia endeavour to protect themselves from what they believe are imminent threats to their territorial integrity and arguably, their privileged lifestyles. The Safe Third Country Agreement between Canada and the United States is one such example of this trend. A 'safe third-country' is 'a country in which the asylum seeker has either found protection, or reasonably could have done so' (Bryne & Shacknove, 1996: 219). The underlying assumption of this type of provision is that a person in fear for her life will seek protection at the first available opportunity. Accordingly, asylum seekers coming from countries deemed "safe" can be returned to that transit country for their asylum application to be processed there. However, safe third country provisions do not take into account the fact that all refugee determination systems are not the same. There is considerable variation from state to state in the interpretation of the 1951 Refugee Convention definition that was meant to be universal. Also, the social and economic resources that are available in one country may not be available in another. Consequently, states with more liberal policies are claiming their refugee determination systems are overburdened with claims for refugee protection.

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[30] See generally International Symposium on Migration, The Bangkok Declaration on Irregular Migration (April, 1999), *available at* <http://www.iom.int/documents/officialtxt/en/Bangkok_decl.htm> accessed on 13 January 2005; Mathew J. Gibney and R. Hansen, *Asylum Policy in the West: Past Trends, Future Possibilities*, United Nations University, World Institution for Development Economics Research, Discussion Paper No. 2003/68 (September 2003) at 5, *available at* <http://www.wider.unu.edu/publications/dps/dps2003/dp2003-068.pdf > accessed on 13 January 2005.

In the post-Cold War era of non-entrée and containment, a safe third country provision amounts to a burden-sharing mechanism that two or more states enter into. It has the effect of limiting the choice of the asylum seeker as to where she can ask for protection. Usually the asylum seeker is restricted to countries that lack a well-developed and structured refugee determination system or that impose harsh penalties on individuals caught using false documentation. This in turn will make the asylum seeker think twice before leaving her country of origin.

III. Challenges Asylum Poses to State Sovereignty

Sovereign states claim exclusive jurisdiction over a territory and a population. The fact that a state is sovereign does not mean, however, that it controls all those factors that may affect domestic life. The contemporary global interconnectedness in the world economy is evidence of this. For example, regional trading blocks are established with the intent to encourage barrier-free trade, even though domestic industries and employment are at times adversely affected. Moreover, upon the ratification of the UN Charter, human rights became an issue of legitimate international concern. There is little question that, in an interdependent world in which countries have universally accepted the commitment to observe human rights, the notion of domestic jurisdiction should be viewed flexibly (Falk, 1998: 69).

The question becomes: how far can human rights penetrate state sovereignty? The internationalization of human rights is necessarily at odds with a commitment to respect the territorial supremacy of sovereign states (Franck, 1992). It is now accepted that gross human rights violations receive widespread international attention and

condemnation by the UN. Economic sanctions, in the case of South Africa, and humanitarian intervention, as illustrated in the controversial NATO intervention in Kosovo, have become increasingly accepted as reactions to severe human rights violations. In addition, obligations undertaken under international law may restrain a state's decision-making power. For example, state parties to the CAT are restrained from using torture as a means of intentionally inflicting pain on a person for such purposes as obtaining from him information or a confession.

Notwithstanding that sovereignty is a fundamental element of the Westphalian system, states, as they exist today, are committed to a limited conception of sovereignty owing to numerous political and economic commitments. Krasner argues that control over transborder movements, domestic authority and control, international recognition, and the autonomy of domestic structures do not necessarily go together (2001: 2). At a time of significant and widespread deterritorialization and erosion of state authority and legitimacy, control over borders is often seen as one of the last remaining symbols of state sovereignty. The ability of states to regulate their transborder flows has no logical relationship to their status as independently recognized states or their ability to exclude external authority structures. In practice, however, loss of a state's ability to regulate its transborder flows might lead it to compromise the amount of influence external authority structures will have on its domestic policies (Krasner, 2001: 8).

The growing preoccupation with state sovereignty, particularly in the area of immigration and refugees, must be analyzed in conjunction with the growing trend towards globalization and integration (Castro-Magluff, 2001: 72). States are finding it difficult to reconcile the need to control their borders with their international obligations

to assist and protect refugees. Domestic forces such as the state of the national economy, unemployment levels, national security and xenophobia contribute to pressures that states have to address when they try to justify offering protection to asylum seekers. States justify entering into economic and trade agreements as ways of building the national economy. However, it is more difficult for states to argue that providing asylum to refugees enriches that national fabric when asylum seekers are characterized as a burden on resources and stealing jobs as well as being "potential terrorists."

State sovereignty is involved in a tug-of-war with international human rights law (Henkin, 1990). While the UDHR articulates rights for the individual, these rights are intended to be upheld and protected by states. One of the most basic ideas underlying the idea of human rights is that they are not relative to state boundaries. Human rights are rights that one holds simply by virtue of being human, regardless of nationality or citizenship. The international instruments providing for the protection of refugees are seen as restraining states' jurisdictions to control the admission of foreign nationals into their territory. Even though human rights are not tied to nationality or citizenship, the individual is still dependent on a state to ensure that her human rights are protected.

According to the Vienna Declaration of 1993

> ...[a]ll human rights are universal, indivisible and independent and interrelated...While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[31]

[31] *Supra* note 6, para. 5.

Who, then, safeguards the rights of those whose government has failed in this duty, or those who reside in a "failed state"?[32] Because such situations do exist, it is necessary to overcome the inclination to think within the confines of the state. We need to conceptualize transnational arrangements that outline states' duties and obligations to all human beings – even non-nationals.

The realization of this need is evidenced in a recent White Paper issued by the Norwegian government, which calls for a strengthening of Norway's promotion of internationally recognized human rights beyond its own borders. It stated,

> Human rights are for all individuals, whether or not they live in Norway or in other parts of the world. This universality principle gives a moral and legal imperative for all to contribute to global human rights protection.[33]

Differing slightly from this is a Swedish 1998 White Paper, which strongly conceptualized human rights in a transnational setting, is even more extensive.[34] The Swedish White Paper emphasizes that an integrated human rights policy shall be an integral part of Swedish foreign policy. Both White Papers illustrate that some states recognize that the promotion of human rights implies more than ensuring that human

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[32] Failed state is a controversial term intended to refer to a state that has been rendered ineffective (i.e., has nominal military/police control over its territory only in the sense of having no armed opposition groups directly challenging state authority) and is not able to enforce its laws uniformly because of high crime rates, extreme high-level corruption, an extensive informal market, impenetrable bureaucracy, judicial ineffectiveness, military interference in politics or cultural situations in which traditional leaders wield more power than the state over a certain area but do not compete with the state, to list a few indicative factors. A failed state may be subject to involuntary restrictions of its sovereignty, such as political or economic sanctions, the presence of foreign military forces on its soil, or other military constraints, such as a no-fly zone. T. Langford (1999) "Things Fall Apart: State Failure and the Politics of Intervention," 1.1 *International Studies Review* 59 at 61.

[33] The Norwegian Parliament, "Human Dignity in Focus," White Paper No. 21 1999-2000, Chapter 2.

[34] The Swedish Government, "Human Rights in Swedish Foreign Policy," White Paper No. 4 March 1998.

rights are not violated within each state's domestic setting. The governments of Canada and Japan recently initiated independent commissions that engaged in collaborative efforts with experts in the fields of health, human rights, labour and trade to author two separate reports on the responsibility of states to protect the human security of each individual.[35] Both of these reports call on the international community to "broaden its focus from the security of borders to the security of lives of people and communities inside and across those borders" (CHS, 2003: 6). As well, the UN Secretary-General, Kofi Annan, reiterated the notion of global responsibility toward the protection of human rights of non-nationals when he stated in the General Assembly that,

> [i]n addition to the separate responsibilities each state bears toward its own society, states are, collectively, the custodians of our common life on this planet – a life the citizens of all countries share...(2000: 11).

The cosmopolitan perspective supports such global responsibility to all citizens of the world. Leading cosmopolitan theorists seek to challenge the inter-state framework of the UN Charter period, which prioritized the principles of sovereign equality (Chandler, 2003: 332). They argue that rather than the rights of states being the founding principles of international society, it should be the rights of individual citizens. Bianchi argues that the values and principles governing international law are under challenge:

> The two opposite poles of the spectrum are evident. On the one hand, there stands the principle of sovereignty with its many corollaries. . .on the other, the notion of fundamental human rights should be respected. While the first principle is the most obvious expression and ultimate guarantee of

[35] The Government of Canada established the International Commission on Intervention and State Sovereignty (ICISS) in September 2000. The ICCIS authored the "The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty," Ottawa: International Development Research Centre which was published in 2001. The Commission on Human Security (CHS) was an initiative of the government of Japan. In 2003 it authored the report "Human Security Now: Protecting and Empowering People," New York: Commission on Human Security.

> a horizontally-organized community of equal and independent states, the second view represents the emergence of values and interests. . .which deeply [cut] across traditional precepts of state sovereignty and non-interference in the internal affairs of other states (1999: 260).

In the post-Cold War era, the litmus test for commitment to human rights by affluent states is their willingness to liberalize asylum (Shacknove, 1993: 531). This is so because few other policies challenge the commitment of affluent states to the welfare of human rights of identifiable individuals. I will examine the commitment to providing asylum in North America (in particular) through a cosmopolitan ethical framework.

IV. Cosmopolitanism – An Elusive Term?

Cosmopolitanism does not yield a singular ethic; rather it is a framework within which different forms of social ethics can compete (Penz, 2001: 43). The promotion and protection of fundamental human rights of the individual are central to cosmopolitan values. Cosmopolitanism recognizes the interconnectedness of global issues, thus demanding that decision-makers think broadly and recognize the linkages between issues rather than dissecting the whole for the sake of the parts (Smith, 2001: 77).

Generally, an ethical cosmopolitan perspective stresses the idea that every human being is equally a moral being regardless of citizenship or nationality. Although political communities create relations of reciprocity between their citizens, as Pogge claims, all cosmopolitan positions are marked by three features: individual human beings are what ultimately matter; they matter equally; and nobody is exempted by distance or lack of a shared community from potential demands arising out of the counting of everybody equally (1992: 48). These basic cosmopolitan principles are the foundation of cosmopolitan theory. Cosmopolitan theorists distinguish themselves by giving more

emphasis to one or another of the following categories: (1) maximally promoting human well-being worldwide; (2) providing for distributive justice worldwide; or (3) protecting the self-determination and freedom of individuals worldwide (Penz, 2001: 43). This categorization is not new; cosmopolitan theorists however apply these familiar principles on a global scale across state borders.

Cosmopolitan theorists who promote human well-being worldwide and global distributive justice structure their argument around John Rawls' core ideas found in *A Theory of Justice*. Although, himself not a cosmopolitan theorist, Rawls acknowledges that his theory is highly Kantian in nature (1971: viii). Kant's essay, *Perpetual Peace*, published in 1795, is viewed widely as the philosophical origin of modern cosmopolitan thought. Rawls, however, advocates for distributive justice within a nation state framework instead of on a global level.

Rawls' conception of justice consists mainly of two principles. The first principle postulates that certain liberties are basic and are to be equally provided to all. The second principle of justice, the difference principle, regulates permissible differences in rights, powers and privileges. The difference principle implies that a just economic system distributes income and wealth so as to make the class of least advantaged persons better off than they would be under an alternative economic system. Rawls contends that, taking the two principles of justice together, a just society maximizes the worth to the least advantaged of the basic liberties shared by all (1971: 205).

Rawls (1999) does extend his original position, where everyone is equally situated by a hypothetical "veil of ignorance", to the international domain in *The Law of Peoples*. The parties to his global original position are to be thought of as representatives of

peoples (or states), not individual citizens of the world. *The Law of Peoples* does not support a cosmopolitan regime; in fact it affirms the importance of state sovereignty. Rawls assumes that people should be understood as groups within a political community. Therefore, while cosmopolitanism is concerned with the well-being of individuals, *The Law of Peoples* is concerned with the justice of societies within the confines of a state rather than across state borders.

In contrast, cosmopolitans such as Charles Beitz (1999) and Thomas Pogge (1989) take Rawls as their starting point and advance a global distributive theory arguing that there is an international basic structure just as there is a domestic basic structure, with political, economic, military, and cultural institutions linking citizens of different countries together in a worldwide system of social cooperation. Moreover, this global basic structure has deep effects on the life chances of the people within it. Pogge gives the example that "the current distribution in national rates of infant mortality, life expectancy and disease...[can] be accounted for, in large part, by reference to the existing world market system" (1989: 237). Pogge contends that what is needed is a theory to specify what counts as a fair distribution of the benefits and burdens of global cooperation. Beitz and Pogge claim that Rawls' domestic justice as fairness can be transformed directly into a theory of international justice.

Beitz and Pogge propose a cosmopolitan reformulation of domestic justice as fairness where the protagonists are not citizens of a liberal society but instead are all human beings who are regarded as "citizens of the world." They contend that the fact that one human being is born in an affluent and abundant country while another is born in an impoverished and barren land is just as arbitrary from a moral point of view as are the

facts that fellow countrymen are born in different genders, races and classes. This cosmopolitan perspective would endorse a global original position. Cosmopolitan distributive justice requires that international redistribution amount to more than mere transfers from rich states to poor states; that is, it must perform certain functions, for example, alleviating poverty. These cosmopolitans claim that inequalities of income and wealth should be allowed only if it works to the greatest benefit of the world's worst-off individuals. Beitz, in particular, championed such an international difference principle, which would require drastic restructuring of the world's economic institutions. Pogge also supported a globalized difference principle, but he suggests instead a global resource tax as a step toward an egalitarian world order. This implies the necessity of an overarching global political authority or world government (Beitz, 1999: 183). This form of cosmopolitanism advances the taxation of individuals according to their income and wealth. In the absence of appropriate cosmopolitan institutions, the next best approach is a system of progressive levies on countries (Beitz, 1999: 147).

The form of cosmopolitanism represented by the third principle focuses on self-determination. In contrast to the first two principles this one is based on the assumption that important objectives, such as the control of the use of force, respect for human rights and self-determination, will be obtained only through the extension and development of democracy worldwide. This view differs from the general approach to cosmopolitanism in that it does not merely call for global responsibility but actually attempts to apply the principles of democracy internationally (Archibugi, 2000: 143). Held advances the view that at the core of cosmopolitan democracy is the belief that contemporary patterns of globalization and regionalization are undermining existing national forms of liberal

democracy (1995: 156). Central to the achievement of democratic autonomy is the necessity for a cosmopolitan democratic law that transcends the particular claims of nations and states and extends to all in the "universal community" (Held, 1995: 228). It involves a powerful radical notion of legal authority, which allows 'international society, including individuals, to interfere in the internal affairs of each state in order to protect certain rights' (Archibugi, 1995: 233). The implications for the nation-state are profound. Cosmopolitan democrats propose the end of sovereign statehood as conventionally understood.

V. Critiques of Cosmopolitanism

Cosmopolitanism has been criticized for its false promises associated with global redistribution. Also, it is criticized for suppressing particularity and promoting hegemonic universality. It is associated with the decadence of local elites and social injustices and is portrayed in the international scene as responsible for perpetuating old power hierarchies between First World and Third World countries. I will discuss each in turn.

O'Neill, in pointing out recent challenges to the existing world order, asserts that the exclusions that borders create are further injustices, and that they should be addressed by abolishing borders, or at least reducing the obstacles they present to movements of people, goods, or capital (2001: 188). Lomasky, by contrast, supports the view that borders are intrinsic to the establishment of morally-secure zones such that individuals are able to pursue their various ends free from incessant predations by others (2001: 61). In my view, calling for the total abolition of state borders is unrealistic. States remain the

prime decision makers in international affairs, whatever the degree of erosion in sovereign national power affected by globalization. It is representatives of states who sit at the table to negotiate multilateral and regional economic, environmental and human rights agreements. Recently, representatives of corporations, lobby groups and non-governmental organizations have been invited to sit at the table also; however their role is merely figurative, they lack any formal decision making power. Cosmopolitan ethics, then needs to address how to overcome any barriers that borders pose. In the area of asylum policy, borders are used to keep the unwanted and security threats out. Examples of these barriers are visa requirements, detention and, more recently, safe third country agreements. Cosmopolitan ethics needs to embrace the reality of the international state system and be incorporated into the political fabric of states such that it is embodied in the domestic and foreign policies that states adopt.

Another critical perception of cosmopolitanism is that it fosters aspirations of a universal state and attempts at world conquest (Lu, 2000: 251). Lu cites Wight as understanding that cosmopolitanism begins with an ideal of human unity and because humankind is not a unity, a politics of coercion is necessary to bring about human harmony (2000: 251). This criticism brings with it charges of imperialism. This is a rather parochial understanding of cosmopolitanism. Cosmopolitan ethics acknowledges the differences across and within states with regard to language, religion and governing institutions, and it provides a starting point from which dialogue can take place not in hopes of imposing one view on everyone but to bring about a common understanding of humanity based on the beliefs of one's own society. Cosmopolitanism does not necessarily adopt a view of humankind as a cohesive unit with all humans acting and

believing the same thing. Instead, I argue that cosmopolitanism is a conception of humankind that envisions respect for difference premised on a common understanding that everyone in our global village deserves respect regardless of their gender, social class, sexual orientation, religious beliefs, ethnicity or race. To impose one particular outlook on everyone would be ethnocentric and, I argue, contrary to cosmopolitan ethics.

One also needs to be cautious of an imperialist/ethnocentric advancement of cosmopolitanism cloaked in principles of humanitarian intervention. Rather than a selective use of humanitarian intervention, as witnessed by the controversial NATO intervention of Kosovo while virtually ignoring the atrocities being committed in Darfur, Sudan, a cosmopolitan democratic perspective would have to advocate for non-discriminatory humanitarian intervention when states are unwilling or unable to stop the commission of human rights abuses against their citizens if the ideal is that all people are equal in worth and dignity. I would argue that humanitarian intervention applied within a cosmopolitan framework would not tolerate another Rwanda. The ICISS advances the argument that the debate should be reframed from the "right to intervene" to the "responsibility to protect" (Evans and Sahnoun, 2002: 101). The ICISS accepts that although this responsibility is owed by all sovereign states to their own citizens in the first instance, it must be picked up by the international community if the first-tier responsibility is abdicated or if it cannot be exercised (Evans and Sahnoun, 2002: 101).

The current state of affairs shows that not every state is a democracy. Imposing democratic institutions through the use of force by an external/foreign source would not ensure that democratic principles will become rooted in the state that was invaded. It is necessary to first recognize the differences that exist amongst and within states. But it

also involves a willingness to come to a compromise that recognizes the foundational principles within and across societies. In turn, this requires states and societies to transform and let go of particular practices that infringe on the rights of certain parts of their population.

As human rights has been criticized for being relative and Western in its perspective, so too can this ethical cosmopolitan perspective be criticized. That is to say, cosmopolitan ethics is open to being criticized for presenting the value system of one region of the world as applicable to the whole world and for imposing this on other regions. In some states the community's interests are given priority over those of the individual (see Waltzer, 1983). The cosmopolitan strategy, however, is not to deny the role of culture in the constitution of human life, but to question first, the assumption that the social world divides up neatly into particular distinct cultures, one to every community, and second, the assumption that what everyone needs is just one of these entities – a single coherent culture – to give shape and meaning to his life (Waldron, 1995: 105).

It is important for people to have the freedom to form, reform and revise their individual beliefs about what makes life worth living. To sustain that freedom, one needs a certain amount of self-respect, and one needs the familiar protections, guarantees, opportunities and access to a means of life. In order to make the case that culture is also one of these primary goods, Kymlicka (1989) argues that people cannot choose a conception of the good for themselves in isolation, but that they need a clear sense of an established range of options to choose from. Kymlicka argues that choice takes place in a cultural context, among options that have culturally defined meanings (1989: 69).

Cosmopolitan ethics is not disputing that people are formed by attachments and involvements by culture and community. It acknowledges that each person has or can have a multiplicity of different and perhaps disparate communal allegiances.

Cosmopolitan ethics gives voice to a belief in moral equality of the life of every human being. It is not necessarily committed to the idea that we should attempt to construct forms of political organization that transcend and override local and national forms of political or institutional organization. The cosmopolitan ethical perspective relied on for this thesis recognizes the differences in individual situations and formulates an ethical perspective on how "others" ought to be treated given our gender, cultural, religious and linguistic differences. Moreover, this cosmopolitan ethical perspective outlines the moral underpinnings as to why the "other" should not be treated differently and recognizes that the individual is not wholly defined by her location, her ancestry, her citizenship or her language. She is a creature of modernity, conscious of living in a interdependent mixed-up world and having a mixed-up self. Such a life challenges the claims of modern communitarians about the need people have for involvement in the substantive life of a particular community as a source of meaning, integrity and character (Waldron, 1995: 95).

Tension stems from membership in multiple politico-social associations, each of which yields duties of justice to different groups of belonging. The existence of multiple belongings suggests the possibility of conflicting claims of justice: what one owes by virtue of membership in one association may be incompatible with what another person owes by virtue of membership in another (Moellendorf, 2002: 39). For example, our duties to members of our immediate community may seem to conflict with our duties to

persons or relations outside of our immediate community. General and special moral duties can be justified and reconciled: while a state has the general obligation to promote and protect the human rights of its own citizens, it also has a special moral duty to individuals who are not citizens, but whose human rights are being violated in their country of origin. This special moral duty can be found in the UDHR. The UDHR is not a legally binding document but it does lay out the fundamental principles that ensure a quality of life each individual is entitled to by virtue of our common humanity. Justification of this statement can be found in the fact that the UDHR was written in the aftermath of states closing their borders to Jews who were seeking protection from atrocities committed during World War II. Therefore, certain responsibilities of justice require that the *duties* to non-members be given priority over *interests* of members of a community (Moellendorf, 2002: 41).

Carens contends that one requirement of an ethics of migration is that it not place too much strain on the state and that it not require too many sacrifices from current citizens (1996: 106). The cosmopolitan ethic that I propose would require states to balance the interests of its citizens with their international obligations, especially in the case of refugees. Cosmopolitan ethics would hold that state action should be rooted in a concern for such moral-legal principles as human rights. The costs of administering a refugee determination system cannot justify declining commitment toward offering protection to a vulnerable group in the international community. Accordingly, the principle that "compatriots take priority" cannot be accepted given the duties to others who are deprived of their basic rights (Beitz, 1999: 182). As a foundational moral thesis, the principle of giving priority to fellow citizens is to be rejected. Since the demands for

equal respect for every single individual is seen as basic to a cosmopolitan ethic, nationality appears only as a morally contingent fact (Pogge, 1989: 247). Given that the global economy has had a substantial impact on the moral interests of persons in virtually every corner of the world, duties of justice exist between persons globally and not merely to members of the same community. As Beitz puts it,

> [t]hat we inhabit one moral world, regardless of difference in social position or religion, gender or race, or nationality; any person's standing in that world, as a possible subject of rights and obligations, is the same as anyone else's. As the most fundamental level of morality, your neighbour is not more important than a compatriot who is a stranger, and a compatriot is not more important than the most distant foreigner (1994: 129).

The safe third country agreement between Canada and the United States and the effect this agreement will have on the institution of asylum in North America will be analyzed through the lens of cosmopolitan ethics. All nations act in professed compliance with, and reliance on, the notion that when a state enters into a treaty it has a duty to comply, an obligation, moreover, which is superior to its sovereign will (Franck, 1992: 188). It must act in accordance with the obligations it has assumed: not only for as long as it is in agreement but until the agreement is amended or terminated. When the rules are disregarded it is not on the footing that they are not binding; instead, efforts are made to conceal the facts (Franck, 1992: 185). It will be demonstrated that the safe third country agreement between Canada and the United States violates each country's obligations under the 1951 Refugee Convention.

Drawing on the three basic features of an ethical cosmopolitan perspective, I argue that in the case of refugees and asylum seekers, states not only have a legal but also a moral obligation to provide access to protection. This perspective insists that state

borders[36] cannot be seen as justifiable limits to legal and moral obligations. I am concerned with the obligations owed by states to refugee and asylum seekers who present themselves at their frontiers seeking protection from human rights abuses in their country of origin.[37] Cosmopolitan ethics would require that all states protect the human rights of citizens and non-citizens alike because all human beings matter equally and no one is exempt by distance or lack of a shared community. The reality is that not all states uphold their obligation to protect the human rights of their citizens, hence the need for the institution of asylum within the refugee regime. How to deal with states that commit human rights abuses and the root causes of refugee flows is beyond the scope of this thesis.

The cosmopolitan ethical perspective I propose can be pursued within a sovereign-state framework. Ethical cosmopolitanism is neither superior nor inferior to the state, rather it exists alongside the state. Cosmopolitanism seeks to regulate relations between individuals who enter into contact outside the mediation of the state, including relations between individuals who belong to a state and those who do not. In this sense,

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[36] Borders referred to in this thesis are those of the receiving state.

[37] This thesis addresses primarily the moral obligations that states owe to refugees and asylum seekers who present themselves at ports of entry of a state signatory to the 1951 Refugee Convention, versus the refugee who is selected from a refugee camp by a state government or an asylum seeker who presents themselves at an inland immigration office of a state to make a refugee claim. The reasons for addressing this group of refugees is because the safe third country agreement between Canada and the United States addresses only those refugees and asylum seekers who make claims for refugee protection at the port of entry (i.e. a border crossing or airport) and not inland. Moreover, refugees who are selected from refugee camps do not go through the domestic refugee determination process. In Canada, this group of refugees are processed through the immigration system and granted records of landing with which to travel to Canada.

cosmopolitanism imposes legal obligations both on individuals and on states, and in so doing becomes an attempt to provide a legal foundation for the rights of the individual regardless of the state to which he or she belongs. If these rights are recognized, they are valid not only vis-à-vis individuals of other states or stateless individuals, but also inside the state which effects the recognition (Archibugi, 1995: 449). Citizens in undemocratic states lack representation, but they have not lost their rights. It follows that agreements creating obligations that benefit individuals should be respected regardless of their nationality. Such agreements include conventions inspired by elementary considerations of humanity.

Cosmopolitanism can be viewed as a moral frame of reference for specifying rules and principles that can be universally shared (O'Neill, 1991). One such frame of reference would be to look for morally significant constraints on action (i.e. a decision or procedure to establish rightness or obligatoriness) rather than for an algorithm for producing optimal results (O'Neill, 1991: 284). This approach to justice could begin with identifying the claims of right-holders against others. Beginning with rights rather than obligations has two advantages. First, it seemingly allows those who conceive of justice in terms of required action to shelve disputes about agency while they work out requirements of justice. Secondly, the political resonance of appeals to rights can be harnessed to issues of international distributive justice (O'Neill, 1991: 285). Those who claim rights view themselves within an overall framework of recipience (O'Neill, 1991: 286). Rights are demands of others. They demand that others not interfere with or obstruct the right-holder.

When considering the policy options of powerful states, a more appropriate focus would be on obligations, which make direct demands for action or restraint. This focus suggests that the rhetoric of rights is not the fundamental idiom of such reasoning, but a derivative way of thought in which others are seen as the primary agents and right-holders as secondary agents, whose actions depend on opportunities created by others (O'Neill, 1991: 286). According to O'Neill, a concentration on rights could mask recognition of power and it obligations and so constrain moral vision and concern since the more powerful could end or reduce the others' need (1991: 286). In the context of refugees, a theory of rights must bring the need of the refugee under the heading of justice by demonstrating universal rights to accessing protection from persecution. This is a difficult task since the UDHR and the 1951 Refugee Convention are silent on the right of asylum seekers to actually gain protection. An analogous approach to identifying obligations of justice would look for principles of action that can be adopted (O'Neill, 1991: 297). This would be a more feasible approach since various international human rights instruments, as outlined above, obligate state parties to not return refugees to situations of peril once they have arrived at their frontiers.

VI. Conclusion

In sum, the international refugee regime has undergone transformations in ideology and commitment since its inception in 1950. The refugee has lost her political relevance since the end of the Cold War. Hence, states' commitment to providing asylum to refugees has shifted from one of resettlement in the receiving state to that of a non-entrée regime of containment within the refugee-producing region. Today states would

rather pursue interventionist policies and provide aid to states that neighbour refugee producing countries in order to keep potential refugees closer to home. However, this has not stemmed the flow of refugees to affluent Western states.

The cosmopolitan ethical perspective ascribed to in this thesis begins with the assumption of an equal moral worth of all individuals. It maintains that the moral obligations that we have toward members of our community are also obligations we have to all others regardless of their nationality and proximity. It could also be argued that cosmopolitan ethics would not limit access to asylum just to those who fit within the 1951 Refugee Convention definition but would prescribe asylum obligations to individuals forced to flee their country of origin for reasons of famine, environmental disaster and/or civil war. This analysis, however, is confined to the definition found in the 1951 Refugee Convention, since it is the one employed by Western states in general and Canada and the United States in particular.

The next chapters explore the evolution of post-World War II refuge policies in Canada and the United States. This leads to a discussion of the safe third country agreement between these two countries. In light of this agreement, chapter three focuses on the cosmopolitan ethical perspective that is outlined in this chapter to explore the future of asylum in North America based on the European Union's safe third country mechanism and its effect on access to asylum in Europe.

II

The Evolution of Canadian and American Refugee Policy: Inter-war Period to the Present

I. Introduction

The pursuit by states of their own well-being has been the greatest factor shaping the international legal response to refugees since World War II. The humane impulse to give asylum to those who seek protection has often come into conflict with other public policy initiatives, including the desire to stem the general flow of migration movements. Historically, depending on the policy priorities of the government of the day, migration movements were either welcomed or perceived as an intrusion into national society.

Canada and the United states view refugee flows through a combination of humanitarian and domestic considerations. Over time Canadian and American refugee policies have been shaped by political priorities, such as foreign-policy considerations, domestic economic interests, and humanitarian matters that relate to international obligations as well as national security concerns. These factors, while influential on the creation of national refugee policies, combine to result in national refugee policies that gradually provide less and less protection to asylum seekers who arrive at the frontier of Canada and the United States in search of protection from human rights abuses in their country of origin.

This chapter provides an overview of how access to asylum has been regulated in Canada and the United States since World War II. It will show that the Cold War had a significant effect on refugees seeking asylum in North America. The treatment of refugees in Canada and the United States during and after the Cold War will be

contrasted to highlight the influence that foreign policy, economic as well as security interests, play on refugee policies and practices. This thesis argues that refugees lost their relevance with the fall of Communism. Thus, receiving states in the West demonstrated a lack of dedication to upholding their international obligations toward asylum seekers through the implementation of barriers that hinder their access to asylum. One such tool is 'safe third country' agreements. Canada and the United States signed such an agreement in December 2002. This agreement will be discussed against the backdrop of the events of September 11th, 2001, in the United States. Also, the *non-refoulement* obligations of the two countries will be examined in relation to the safe third country agreement.

II. Refugee Policy During the Cold War Era

II.I. The Development of Refugee Policy in Canada: 1933 – 1991

Canadian immigration and refugee policy of the past stands in sharp contrast to the current image of Canada as a country of immigrants, a country with a long and enviable history of welcoming a sizeable number of the world's refugees and dissidents. During the 1930s and 1940s, Canada could find no room for the tormented Jews of Europe. During the twelve years of Nazi terror, from 1933-1945, while the United States accepted more than 200 000 Jewish refugees, Canada found room for fewer than 5 000 (Abella and Troper, 1982: x). Thus, although Canada is today seen as a land of immigrants, it was in fact only selectively so. For most of its history, Canada has had a restrictionist immigration policy and from the onset an immigration policy with unabashed ethnic and racial priorities (Abella and Troper, 1982: x).

Well after the ratification of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention), states did not distinguish between immigrants and refugees. Instead, both categories of migrants were treated equally and similar criteria and restrictions to entry were applied to both streams (*see* Barnett, 2002). In determining who to admit as a refugee, states considered such factors as language, religion, education, skills, race and economic viability (Crock, 2003).

Despite Canada's key role as Chair of the *ad hoc* committee that drafted the 1951 Refugee Convention, Canada did not become a party until June 1969. It was not until then that Canada formally acknowledged its obligation to refugees in accordance with international law. This obligation, however, would not be incorporated into domestic legislation for another seven years. A few reasons account for the delay. One reason was that Canada did not envision itself as a country of first asylum for refugees (Bissett, 2002: 1). The Canadian government believed its role in helping to resolve refugee problems should be as a country of resettlement. Two oceans to the east and west and the frozen barren tundra to the north acted as barriers to large-scale refugee movements, therefore very few refugees could make their claims for asylum from within the borders of Canada (or the United States). Most refugees had little choice but to wait in refugee camps until the opportunity for resettlement presented itself.

Receiving states, such as Canada and the United States, would send immigration officers to refugee camps to select potential new immigrants. As a resettlement country, Canada had the opportunity to select refugees, thereby controlling the makeup of Canadian society. Refugees were selected on the basis that they could successfully establish themselves upon arrival in Canada and not simply from the perspective of their

need for protection (Bissett, 2002: 2). Refugees were subject to age and occupational criteria, as well as good health and character requirements (Kelly and Trebilcock, 1998: 342). They were eligible for admission to Canada if they undertook either to find employment under the auspices of the Department of Citizenship and Immigration or to establish themselves in a business, trade or profession, or in agriculture (Corbett, 1957: 40). While humanitarianism undoubtedly played a role in unlocking the door to access to Canada, it was eclipsed by a less noble and more pragmatic motive, namely, the need for additional workers (Knowles, 1997: 134). Labour was needed to feed a rapidly expanding and industrializing economy (Adelman, 1991: 190).

Canada's refugee policy was reactive in nature, with no evidence of a stable, long-term approach towards assisting victims of war and persecution. Most of the refugees arrived as part of special programs that Canada set up for political, economic or humanitarian reasons. The first of such programs was established in 1962, and involved one hundred families escaping the People's Republic of China (Kelly and Trebilcock, 1998: 360). This movement represented the first time that Canada served as a haven for non-European refugees (Kelly and Trebilcock, 1998: 363). The program coincided with the decision to increase the annual immigration rate in order to stimulate the economy (Knowles, 1997: 154).

Another hypothesis for Canada's delay in signing the 1951 Refugee Convention was the Royal Canadian Mounted Police's belief that it would constrain Canada's ability to deport refugees on security grounds (Whitaker, 1987: 57-8; see also Dirks, 1977: 179-82 and Kelly and Trebilcock, 1998: 363). Security considerations played a major role in Canada's immigration policy during the early Cold War period in seeking to screen-out

Nazi complicitors and then Communist agitators and sympathizers (Kelly and Trebilcock, 1998: 342). Prior to the 1956 Hungarian Revolution,[38] there was a fear of taking in refugees from Soviet-dominated regimes lest the Soviets "seed" the refugees with spies, a factor that was partially responsible for Canada's timid response to those fleeing the suppression of the workers' revolt in East Berlin in 1953 (Adelman, 1991: 191). This resistance runs counter to what one might have thought was the logic of the Cold War, namely to uphold the rights of those who were fighting against communism. The security establishment in Ottawa, rather, spent years doing its best to limit the number of refugees allowed into Canada from the East (Whitaker, 1987: 74).

Whitaker (1987) suggests that it was widely believed by the security and intelligence agencies throughout the Western world in the late 1940s and 1950s that persons who left Communist countries were, *ipso facto*, high security risks. This belief appears to have been composed of a number of elements. There was a concern that highly trained agents were being deliberately planted for purposes of espionage and sabotage. It was also feared that the immigrants would turn out to be Communist state agitators, encouraging subversion among ethnic minorities in their new country. There was the sense that Communist states were so totally in control of their citizens that if anyone was able to leave, it could only be because the state had some purpose in allowing him or her to leave. Finally, there was the assumption that Communist governments could exercise undue influence over their former citizens residing in Canada by

[38] Within a few months of the outbreak of the revolution in Hungary, approximately 180 000 Hungarians had entered Austria and another 20 000 had crossed into Yugoslavia. Western resettlement programs ultimately accommodated 200 000 Hungarian refugees (Loescher, 1993:70).

threatening retaliation against relatives still in the homeland (see Whitaker, 1987). Nevertheless, mounting international pressure for Western countries to admit refugees for resettlement, media coverage of the refugee question and corresponding demand by Canadian churches and voluntary agencies that the government pursue a more aggressive refugee policy were some of the factors that contributed to the opening of the doors to citizens of countries governed by left wing regimes (Knowles, 1997: 175).

In attempts to avoid discriminating among immigrants (including refugees) on the basis of race, religion or national origin, Canada passed its first immigration act in 1952 (Adelman, 1991: 193). The *1952 Immigration Act*[39] still did not consider refugees as a separate and distinct category of migrants. This was not done until the *1976 Immigration Act.*[40] The *1976 Immigration Act* made significant changes to Canadian refugee policy. In particular, it incorporated the 1951 Refugee Convention definition of "refugee." This legislation also prescribed a process for dealing with people who arrived in Canada asking for asylum. This provision was necessary because in the years leading up to the *1976 Immigration Act*, small numbers of people had begun to ask for asylum after entering the country. Most of the people making asylum claims in Canada were entering as visitors from countries whose citizens did not require visitor visas to enter: India, Portugal, Trinidad and Tobago, Turkey and Brazil (see Bissett, 2002). The amendments formalized and developed what had previously been an *ad hoc* approach to refugee determination and selection.

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[39] *An act respecting immigration*, Statutes of Canada 1952, c. 42, *assented to* 4th July, 1952 [hereinafter referred to as the *1952 Immigration Act*].

[40] *Immigration Act*, 1976, S.C. 1976-77, c. 52 [hereinafter referred to as the *1976 Immigration Act*].

Kelly and Trebilcock (1998: 404-05) outline the three provisions of the *1976 Immigration Act* addressing refugee resettlement. First, a refugee could be sponsored by the Canadian government or a private organization that undertakes to provide the refugee with lodging, care, maintenance and resettlement assistance for one year. Second, the applicant could qualify under a special-measures landing program, wherein the Immigration Department would use its discretion to ease immigration requirements for people from a particular country, on a case-by-case basis. This process allowed individuals who fell into any of these categories to be admitted, even if they did not satisfy the 1951 Refugee Convention definition of a refugee. In particular they did not have to be outside their country of origin. This approach demonstrates that no distinction was being made between refugees (persons who suffered from one of the five enumerated grounds of persecution) and immigrants (who were in search of new opportunities). The emphasis was being placed on a particular conflict or country rather than on the actual circumstances of the individuals applying for resettlement. The refugee definition did not factor into the equation in determining whether resettlement would be granted. To qualify under any of the designated classes, a prospective refugee was usually required to demonstrate that he or she could become successfully established in Canada, which reflected the continuing importance of economic considerations in Canadian refugee policy. Finally, the inland refugee determination system was available to those individuals who were present in Canada.

Ideological influences stemming from the Cold War divide were present in the selection criteria. Under the *Eastern European Self-Exiled Persons*[41] special measures

[41] *Self-Exiled Persons Designated Class Regulations*, SOR/78-931.

landing program, Eastern Europeans were subject to the most liberally-defined selection criteria: they only needed to be outside their country of origin and willing to emigrate to Canada (Adelman, 1991: 195). They were seen to be in need of protection because they lived under a communist regime. Establishing persecution was not a relevant or determinative factor in order to be recognized as needing protection. It was sufficient to just be a citizen of a communist country. This signalled a significant shift from previous policies that viewed individuals fleeing communism as security risks. This is due in part to the influence of foreign policy goals that was willing to relax the suspicion that existed in the 1940s and 1950s in favour of vilifying communist regimes by providing protection to those how lived under them.

By contrast, in order to qualify under the *Latin American Political Prisoners and Oppressed Persons*[42] special measures landing program, applicants had to meet a higher standard than those of the other designated classes. Under this program, those claiming the need for protection as a refugee, primarily victims of right-wing regimes, had to demonstrate that they had a well-founded fear of persecution for one of the five Convention refugee grounds, or that they had been detained for the legitimate expression of free thought or exercising civil liberties and that they were likely to establish themselves successfully in Canada (Kelly and Trebilcock, 1998: 406). However, they were not required to be outside their country of origin.

The political bias in Canada's refugee policy is further illustrated by its treatment of the Chileans when contrasted with the welcome given only the year before to refugees from Uganda. In 1972, the Ugandan despot Idi Amin decreed the expulsion from his

[42] *Political Prisoners and Oppressed Persons Designated Class Regulations*, SOR/82-977.

country, within ninety days, of approximately fifty thousand persons of Asian origin who held British passports. This precipitated a major international refugee crisis (Whitaker, 1987: 255). The Canadian government announced its intention to help some of the refugees, eventually taking five thousand six hundred Ugandan Asians. By getting an immigration team into Uganda quickly Canada was able to "skim off the cream of the crop" (Dirks, 1977: 243). As Dirks concludes, "in terms of age and educational qualifications, Ugandan Asians comprised one of the most desirable groups ever to gain admittance to Canada (1977: 243).

A year later, Chile showed the other political side of Canada's refugee policy. Over seven thousand Chileans fled the violent overthrow of the democratically-elected Socialist-Communist government of Salvador Allende. Canada could have adopted a liberal and humanitarian policy toward the refugees fleeing the new Pinochet regime, most of whom were left wing, but instead it let ideological and economic factors outweigh humanitarian considerations. The Canadian government did not want to risk alienating Chile's new administration or the United States, which deplored Chile's economic changes under Allende (Knowles, 1997: 174). Although Canadian immigration policy had shed its openly racist bias and its blatant favouritism towards certain nationalities, it still retained its bias against left-wing regimes. Chile was a sad case of what happens to indigenous forces for change in the underdeveloped world when they become ensnared in the ruthless politics of the Cold War (Whitaker, 1987: 255).

II.II. The Development of Refugee Policy in the United States: 1933 – 1991

During the same period, Loescher and Scanlon describe American refugee policy as "calculated kindness" (1986: xviii). Almost from its inception, the refugee policy of the United States has been restrictive. As with the Canadian approach to refugees during this period, no distinction was made between an immigrant and a refugee. Immigration on the whole was seen as a potential threat to the nation, and the primary aim of refugee and immigration legislation was to protect the country, its institutions and traditions from the dangers immigration might bring (Rystad, 1990: 207). In the first few decades of the twentieth century, the United States did not admit refugees (Yarnold, 1990: 11). For example, in the 1930s, the restrictive forces, bolstered by the strength of anti-Semitism, succeeded in sharply limiting the number of refugees fleeing Nazism able to enter the United States. In 1939, more than nine hundred Jews aboard the S.S. St. Louis, a passenger ship that left Hamburg, Germany, bound for Havana, Cuba, were forced to return to Europe when – after Cuba refused to allow these asylum seekers to disembark – the United States then denied the ship, which was in sight of Miami, permission to dock (Crock, 2003: 57).

American refugee policy up to the early 1950s was characterized by restrictive measures modified by foreign policy considerations (Rystad, 1990: 209). Following the Hungarian Revolution, the United States used visa measures available under the *Refugee Relief Act*[43] to accept several hundred thousand Hungarian refugees. This group of refugees drew attention to the tension between security concerns and foreign policy

[43] *Refugee Relief Act extends refugee status to non-Europeans*, PL 83-203, 1953 [hereinafter referred to as the *Refugee Relief Act*].

initiatives present in the United States at that time. President Truman went to great lengths to hire a public relations firm to create a positive image of the Hungarian refugees in order for the American people to better accept their admittance (Loescher and Scanlon, 1986:58). In the conflict between security concerns regarding individuals fleeing non-democratic regimes and the will to use such individuals as pawns in the Cold War fight, the latter perspective prevailed.

The United States became a party to the 1967 Protocol in 1968. However, it essentially improvised its processing of onshore asylum applications for more than fifteen years following, because it was assumed that those fleeing persecution and violence would be admitted only from camps abroad, and then only after review by American authorities (Mitchell, 1997: 65). From 1945 – 1980, the United States accepted refugees on the basis of *ad hoc* emergency legislative measures (see Zucker and Zucker, 1991).[44] In 1965, amendments to the *Immigration and Nationality Act*[45] permitted six per cent of all ordinary immigrants to enter as refugees if they could satisfy four requirements: (1) they had departed from a Communist country or a country within the general area of the Middle East; (2) they had departed in flight; (3) the flight was caused by persecution or fear of persecution on account of race, religion or political opinion; (4) they were unable or unwilling to return. The *1965 Immigration and Nationality Act* codified the bias in favour of aliens fleeing from "hostile" countries. In addition, the concept of a refugee, albeit within geographic and ideological constrictions, was now part of statutory law.

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[44] Emergency legislative measures include the *Displaced Persons Act* of 1948, *Refugee Relief Act* of 1958, *Fair Share Law* of 1960, *Migration and Refugee Assistance Act* of 1962.

[45] *Immigration and Nationality Act Amendments*, PL 89-236, 1965 [hereinafter referred to as the *1965 Immigration and Nationality Act*].

However, it was not until the 1970s, especially after the departure of the United States from Vietnam, that the need for a comprehensive refugee policy became manifest.

American refugee policies have reflected the desire to embarrass communist systems during the Cold War. Toward antagonistic states, political asylum and refugee decisions represent one of many methods for registering disapproval of a nation's leadership or political system. Toward friends and allies, such decisions were trickier. By granting asylum from persecution or conferring refugee status, a state passes judgement on the foreign government that may undermine foreign policy efforts to support that government (Falk, 1989: 29). These policies have resulted in extensive immigration from Mexico and large numbers of refugees from Cuba and Nicaragua, but limited acceptance of asylum seekers from Haiti, El Salvador and Guatemala (McBride, 1999: 289). The United States viewed the refugee situation as symbolic of the problems of living under communism and saw the departure of refugees as a means of weakening communist regimes (McBride, 1999: 292).

The use of refugees as a political and foreign policy tool is demonstrated in the American treatment of asylum seekers from Cuba, Haiti, Nicaragua, El Salvador and Guatemala. As part of its hostility toward the Cuban Revolution, American administration in Washington welcomed Cubans who arrived in the United States in two major movements, one in 1960-1962 and the other in 1965-1973 (Mitchell, 2000: 85). They were classified as refugees from communism. They were allowed to enter and settle without the necessity of legal status, sponsorship, guaranteed employment or shelter. The United States Coast Guard did not intercept boats that transported illegal

migrants from Cuba (Yarnold, 1990: 14). Simultaneously, a clear double standard appeared in American refugee policy with its treatment of asylum seekers from Haiti.

While Cubans were freely allowed into the United States, Haitians were turned away. Partly because they were fleeing a government that was profoundly repressive but not politically radical, and partly because they were poor black migrants entering a United States southern state less than twenty years after the advent of the Civil Rights movement, the American government quickly showed hostility toward Haitians (Mitchell, 2000: 85). Reasons for failure of the United States to open the door as widely to Haitians as it had for Cubans was that the United States had better relations with Haiti's leadership. The closed-door policy toward Haitian asylum seekers can also be attributed to economic interests combined with little desire to embarrass the Haitian government by accepting Haitian asylum seekers. Also, Haitians were far poorer and less educated than Cuban refugees and therefore, perceived to be fleeing for economic rather than humanitarian reasons. The Immigration and Naturalization Services (INS) began with the presumption that Haitians, because they are poor, had come to find work (Zucker and Zucker, 1991: 246). American officials concluded that the best way to reduce the numbers of Haitians arriving by boat, and also project an image of controlling the frontiers, was to intercept the seaborne migrants in international waters (Mitchell, 1997: 52). It was thought that if Haitians could not get to American soil, their pleas would not be heeded in American courts where delays and appeals would allow Haitian asylum seekers to remain for indefinite periods (Mitchell, 1997: 53). With these motivations, the United States invented the interdiction policy that is still in effect against Haitians.

United States foreign policy and involvement in the internal affairs of Central American countries led to increased refugee flows of citizens from these countries (McBride, 1999: 295-6). In Nicaragua for instance, conflict between the Contras and Sandinistas led to the flight of close to half a million refugees, many of whom sought relief in the United States. Since they were fleeing communist oppression, most had reasonable expectation of receiving a positive response to their asylum applications from American authorities (McBride, 1999: 296). By providing a safe haven for individuals fleeing communist oppression, the American government was able to present itself in a positive light when compared to its communist rivals as a protector and promoter of democracy, freedom and human rights.

In the case of El Salvador and Guatemala, the situation was not as welcoming. Because the United States was supporting the government of El Salvador, a low percentage of asylum grants served American foreign policy objectives.[46] A high acceptance rate of refugees from El Salvador would have conveyed some disapproval behind the American vote of confidence being given to its struggle for democracy. Thus the INS's emphasis on rapid case processing of illegal migration, combined with a lack of incentive for the State Department to dig into the difficult but critical issues of economic versus political flight, resulted in extremely low acceptance rates – about two percent – at the very time when public awareness of and revulsion over the death squad activity in El

[46] In 1990, the United States accepted a very small number of Salvadoran and Guatemalan asylum seekers – somewhere between 3-15%. In contrast, in the same year, Canada accepted a much higher percentage – approximately 78% of Salvadorans and 80% of Guatemalan asylum seekers (Arboleda and Hoy, 1993: 81).

Salvador reached a peak (Meissner, 1988: 63). The rationale for denying Salvadoran asylum claims was usually not that the individual lacked a fear of persecution, but was instead, fleeing generalized violence and therefore without an individual threat. When an individual had proof of arrest, detention, even torture, it was argued that in El Salvador, a country with a democratically-elected government, only revolutionaries are imprisoned. If the asylum applicant had been imprisoned or feared arrest, he must have been a guerrilla (Zucker and Zucker, 1991: 243). Perhaps this is why most Salvadorans who entered the United States illegally only sought asylum when confronted with the possibility of being returned to El Salvador (McBride, 1999: 296).

American support for the ouster of President Jacobo Arbenz of Guatemala and subsequent aid patterns contributed to the emergence of a civil war which may have taken approximately one hundred thousand lives from 1966 through the mid-1980s (Yarnold, 1990: 25). It took almost another decade before a fragile peace agreement was signed between the government and opposition forces. By then, close to a million persons were internally displaced and another two hundred thousand may have fled the country (McBride, 1999: 296). Denial of Guatemalan asylum claims in the United States was premised on the underlying principle that the government had changed since the individual fled Guatemala and that the applicant had nothing to fear from the new government (Zucker and Zucker, 1991: 242). While Guatemalan governments did change hands with some regularity, the new government did not have different policies from its predecessor.

In summary, during the Cold War period the humanitarian purposes envisioned by the 1951 Refugee Convention were largely ignored. Instead foreign policy interests and

objectives drove the refugee programs of Canada and the United States. Refugee laws were loosely applied in relation to those who fled communist rule because Canada and in particular, the United States sought to emphasize and manifest disapproval. Yet they were rigidly applied in relation to rightwing regimes because they did not wanted to erode such governments' claims of legitimacy or to weaken grounds for support (Falk, 1989: 29). During the Cold War, refugee admissions were a particularly important tool in American anti-Communist foreign policy. The American government garnered domestic support for opening its borders to people who left Communist countries as characterizing those asylum seekers as "voting with their feet", thereby validating American anti-Communist foreign policy as proof of the inadequacies of communism (Zucker and Zucker, 1991: 235). Throughout the Cold War immigration and refugee policies came to be seen less as a means of addressing the needs of fleeing individuals or of recognizing their right to self-determination, and more as a vehicle for facilitating the selection by each state of new inhabitants who could contribute in some tangible way (such as skills or wealth) to the national well-being. As noted, domestic economies led states to be more concerned with promoting the general economic well-being of their own populations. In good economic times it was much easier to justify opening the borders to asylum seekers.

III. Shift in Commitment to Refugees: 1991 – 2000

By the mid-1980s, international economic growth had declined and unemployment grew. Countries no longer wanted an influx of labour (Barnett, 2002: 248). At the same time, the threat of Communism was receding. National interests became more differentiated and regionalized. The decade of the 1980s was the starting point for the adoption of a number of policies by Western governments designed to discourage asylum seeking in their countries and to contain asylum seekers in territories proximate to their home countries. This was the beginning of the non-entrée regime most Western receiving countries enforced through their asylum policies.

The economic collapse coupled with the end of the Cold War led to considerable discussion, if not legislation, concerning the perceived need for greater restrictive migration policies. Such discussions focused on the unsupported claim that refugees from developing nations take jobs from citizens in the receiving countries or cost taxpayers money due to increased burdens on public assistance programs (Bailey, 1989: 57). Instead of being seen as positive contributors to the national fabric, refugees from the developing world were now often perceived as disguised immigrants claiming refugee-status to facilitate otherwise unobtainable access to receiving nations (Barnett, 2002: 249). The admission of refugees of divergent political and social characteristics was now framed as presenting threats to domestic harmony. In the United States, for example, "[t]he problem of asylum policy was overshadowed by [the] intense political struggle over immigration policy, particularly the growing perception that illegal immigration of Hispanics and other minority groups [would] erode the political and economic stability of the nation" (Brill, 1983: 174).

III.I. Canada's Shift in Commitment to Refugees

The refugee question dominated Canada's immigration scene in the 1980s, attracting widespread media coverage, igniting public controversy and radically altering Canada's immigration policy. In the 1980s, the refugee question catapulted into new prominence because of an upsurge in the number of the world's refugees. Two decades earlier, in the early 1960s, the refugee count stood at approximately 1.2 million. By 1989, however, civil war, ethnic strife, persecution, political upheaval and natural disasters in the developing world had boosted the world refugee population to approximately 12 million (Matas and Simon, 1989: 13).[47] Improved communications, cheaper transportation and the growing gulf between rich and poor nations led to soaring numbers of people seeking to escape overpopulation and the lack of economic opportunities in their homelands (Knowles, 1997: 179). Some of these individuals sought a better life in developed countries, such as Canada and the United States. As a result, Canada's refugee determination system was severely tested. In the mid-1980s a substantial number of migrants arrived at Canada's doorstep and made asylum claims.[48]

Events that ignited the controversy and widespread media coverage include the one hundred and fifty-five Tamils who were found drifting toward the coast of Newfoundland in August 1986. They had set out on their journey to escape harsh conditions in West German refugee camps. Equally dramatic was the arrival of a group of Sikhs less than a year later. In July 1987, one hundred and seventy-four Sikhs landed

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[47] The majority of these refugees (approximately 11.3 million) were concentrated in Africa and Asia (Nanda, 1989: 5).

[48] In December 1986, more than 3 000 people claimed refugee status from within Canada, contributing to the 18 000 claims in total for that year. The first six weeks of 1987 saw over 6 000 claims made. (Hawkins, 1989: 192).

off the coast of Nova Scotia. The repercussions of their dramatic arrival and the subsequent arrival of thousands of other asylum seekers in Canada forced the federal government to rethink its policy toward those making refugee claims. The *Refugee Deterrents and Detention* Bill[49] resulted in reaction to public outrage (Knowles, 1997: 181). In large part, the *Refugee Deterrents and Detention* Bill was aimed directly at plugging the refugee flow because the unpredictable arrival of asylum claimants made it extremely difficult for Canadian authorities to implement a coherent immigration program. Ironically the Canadian government was rapidly moving toward a policy of tougher immigration enforcement and control when only the year before it was awarded the United Nations prestigious Nansen medal in "recognition of its major and sustained contribution to the cause of refugees" (Marlarek, 1987: 96).

III.II. American Reassessment of the Utility of Refugees

On the other side of the border, in March 1980, the United States Congress enacted comprehensive national legislation incorporating the provisions of the 1967 Protocol in the *1980 Refugee Act.*[50] It was intended to apply a more universal standard to asylum decisions (Zucker and Zucker, 1991: 238). Although the *1980 Refugee Act* intended to remove the influence of partisan politics and foreign policy bias from refugee admissions and asylum decisions, it vested the power to admit refugees and asylum seekers in the State and Justice Departments, two departments whose interests would be undermined by neutrality or disinterest (Zucker and Zucker, 1991: 226). By stipulating

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[49] *Refugee Deterrents and Detention* Bill, C-38, July 1987.
[50] *Refugee Act* of March 17, 1980 (94 Statutes-at-Large 102) [hereinafter referred to as the *1980 Refugee Act*].

that asylum was to be granted at the discretion of the Attorney General, Congress, in fact, assured the perpetuation of the narrow and parochial standard that had previously been applied (Zucker and Zucker, 1991: 238). Thus, the major provisions of the *1980 Refugee Act* – ideologically neutral admissions and a fair asylum policy – were never implemented.

While Congress passed a new refugee act that signalled a fundamental shift in the nation's approach to refugees, reports of delays, fraud and political reasons led to growing anti-asylum sentiment. This anti-refugee sentiment showed itself in the change in attitude towards Cuban asylum seekers. During the summer of 1980, one hundred and twenty-five thousand Cubans arrived in south Florida. These new arrivals were labelled as criminals, sociopaths, homosexuals, and "troublemakers" (Loescher and Scanlan, 1986: 217). It was difficult for the American government to justify granting refugee status to this large number of migrants at a time when jobs and affordable housing for American citizens were becoming increasingly scarce and national welfare demands were rising (Loescher and Scanlan, 1986: 217). Furthermore, the anti-asylum fervour received more ammunition in January 1993, when a Pakistani gunman armed with an assault rifle killed two Central Intelligence Agency employees in Langley, Virginia. A month later, a car bomb exploded beneath the World Trade Centre in Manhattan, New York. The gunman in the first incident had filed an affirmative asylum application the previous year; one of those involved in the Trade Centre bombing had requested asylum upon his arrival at JFK International Airport. Many people pointed to these two incidents as evidence that the asylum system was being used for nefarious intentions (Shrag, 2000: 33).

Following these incidents, a strong campaign was mounted to restrict access to asylum in the United States. In January 1995, new regulations that reflected a complete revamping of the system were issued. The new regulations streamlined asylum procedures so that newly-filed asylum claims would be adjudicated promptly, within several months rather than years. Most importantly, asylum seekers were no longer able to obtain a work permit immediately upon filing an asylum claim (Shrag, 2000: 61).

The *1996 Immigration Act*[51] introduced an expedited removal process that took effect on 1 April 1997. Under the system of "expedited removal" a uniformed enforcement officer of the INS – as opposed to a specially trained immigration judge – could turn an asylum applicant back at the airport or border crossing without due process and without meaningful review. Expedited removal may be used to deport individuals who arrive with facially valid documents if an INS officer suspects that these documents were obtained by fraudulent means. The basic purpose of expedited removal is to deny foreigners who lack valid documentation the ability to enter the United States. Individuals who were removed are barred from re-entering the United States for five years. In the fiscal year 1997 through fiscal year 1999, 99% of all persons subjected to expedited removal were turned away from the United States, without any further review to determine whether they had a credible fear of persecution and might be entitled to asylum (Musalo and Taylor, 2001).

As a group, refugees are very likely not to have valid travel documents – precisely because of the circumstances of their persecution and flight. In some cases, they will be denied travel documents by the same government that has persecuted them. In other

[51] *Illegal Immigration Reform and Immigrant Responsibility Act* of 1996 Pub L. 104-208, enacted on September 30, 1996 [hereinafter referred to as the *1996 Immigration Act*].

cases, because they are fleeing from persecution in great haste; they either lose their documents or trafficking agents confiscate such documents in flight. Article 31 of the 1951 Refugee Convention recognizes this reality when it states

> 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...enter or are present in their territory without authorization, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

If the asylum seeker could not have legally entered a country in order to escape persecution this amounts to "good cause for their illegal entry" (Weis, 1995: 303). Thus, refugees should be exempt from punishment for unauthorized entry. But instead, many undocumented asylum applicants are detained in regular penal institutions with convicted felons for prolonged periods of time.

Briefly, the 1990s saw the arrival of increasing numbers of asylum seekers from non-European parts of the world. Changes to immigration and refugee policies severely undermined the ability of refugees to seek asylum in Canada and the United States. Asylum practices in the United States became "fairer" and less ideological in one respect only: the disfavour formerly extended to those fleeing right-wing military regimes was universalized (Loescher and Scanlan, 1986: 215). The universally tougher approach to asylum taken by Canada and the United States demonstrates that refugees from every country are less welcome than they were during the middle of the 1970s. The trend to tighten up access to the frontier would only become more evident after the attacks on American territory.

IV. The Effect of September 11, 2001

On September 11, 2001, two airplanes were flown into the World Trade Centre buildings in New York City. Moments later another plane crashed on the Pentagon building in Washington, D.C. Since these attacks common refrains from the Bush administration include "September 11 changed the world" (Mgbeoji, 2005: 107). This charge led to the "war on terror" that was unleashed by the United States. All aspects of international and national society have felt the ripple effects of the war on terror. Mgbeoji argues that the war on terror is not a real war; there are no fixed enemies or boundaries of conflict (2005: 107). Rather its main purpose is to scare the populace into uncritical and unquestioning faith of the government (Mgbeoji, 2005: 108).

This theory is supported by the fact that although none of the hijackers entered the United States from Canada and none had made a refugee claim in Canada or the United States, the reports that immediately followed the attacks pointed fingers at Canada's lax refugee policy.[52] In fact, each hijacker apparently arrived in the United States with valid fixed-term visitor or student visas and then overstayed their visas (Macklin, 2001: 389). The "porous" border between Canada and the United States also came under criticism, again with fingers pointed at Canada's relaxed attitude toward screening those who enter. Fear grew from the uncertainty of why such atrocities were committed. Images of the planes flying into the buildings as well as the chaos in New York flooded television

[52] Cf. Stewart Bell (2001) "A Conduit for Terrorists," 13 September *National Post*, Toronto; Diane Francis (22 September 2001) "Our Neighbour's Upset over Our Loose Refugee System," *Financial Post*, Toronto; D.J. Brown (2001) "Attacks Force Canadians to Face Their Own Threat," 23 September *Washington Post*, Washington, D.C., A36. A poll conducted for the Council for Canadian Unity indicated that the support for reduced immigration rose after September 11th from 29 % to 45%. However, an even larger percentage, 80% according to Léger Marketing, demanded stricter controls over immigration.

screens. Eventually, these images were linked with the pictures of the hijackers who came to be characterized as foreign invaders, living, going to school and interacting among Americans. A new enemy was born – terrorism. The contestable nature of what or who a terrorist is has induced confusion with refugees and led to the construction of refugees (from Muslim and Arab countries in particular) as enemies or at least elements to be excluded from the newly threatened and insecure societies (Freitas, 2002: 36). In making the link between terrorists and refugees, many news reports and politicians cited the 1998 case of Algerian-born Ahmed Ressam, who planned an unsuccessful attack on California's Los Angeles International Airport. In 1995, he was found not to be a Convention refugee in Canada, but he was not deported because of *non-refoulement* obligations and also because the Canadian Security and Intelligence Service wanted to keep an eye on him (Macklin, 2001: 391).

In November 2001, the Canadian Parliament passed a new *Immigration and Refugee Protection Act* (IRPA),[53] two months after September 11th. This legislation had been under study and preparation since 1997. IRPA is characterized as a more generous approach to asylum seekers.[54] The new legislation retained the provision for the implementation of the "safe third country" mechanism; an added safeguard was included to specify that no country will be considered "safe" that has not signed the UN Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or

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[53] *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced,* persecuted or in danger, c. 27, *assented* to 1st November, 2001, [hereinafter referred to as IPRA].

[54] In addition to the five Convention grounds, IRPA adds two additional grounds under which an individual can be deemed a person in need of protection (ss. 97 (1) and (2)). These two additional grounds incorporate Canada's obligations under the Convention Against Torture. One can be found to be a protected person if she/he feared cruel and unusual treatment or punishment or torture in her/his country of origin.

Punishment[55] (CAT) (Bissett, 2002: 7).

IRPA is criticized for not taking into account the reality that individuals entering Canada under the guise of asylum seekers could pose a serious threat to the security of Canada and the United States. As during the Cold War era, admittance of refugees is again linked to national security concerns. Refugees have been identified as dangerous figures by the media as well as by governments throughout the world and are placed in the context of threats to national security. In security discourse, an issue is dramatized and presented as an issue of supreme priority; thus, by labelling it as *security*, an agent (in this case, national governments) claims a need for and a right to treat it by extraordinary means (Eriksson, 2001: 9).

The events of September 11th, 2001 lent themselves to the accelerated approval of policies that were intended to limit access to territories of receiving countries, under the guise of protecting national security, not only in Canada and the United States but worldwide. For example, after previous failed attempts to introduce legislation, the September 11th attacks on New York and Washington, DC secured political support for suggested changes that allowed the Australian parliament to pass the *Border Protection (Validation and Enforcement Powers) Act 2001*.[56] This legislation allows for the interdiction and ejection of boats headed for Australian shores (Mathew, 2003: 137). The events of September 11th acted as the catalyst for the Australian policy that had previously failed because now the arguments in favour of the legislation were cloaked in the priority of national security against a proven external enemy even though the events

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[55] *adopted* 10 Dec. 1984, UNGA Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51, *entered into force* 26 June 1987.

[56] *Border Protection (Validation and Enforcement Powers) Act 2001*, C2004A00886, No. 126, *assented to* September 27, 2001.

occurred on the other side of the world. Amnesty International reports that most, if not all, of the persons administratively detained under the United Kingdom's post-September 11th legislation are either refugees or asylum seekers (Amnesty International, 2002: 5). This legislation demonstrates that, even though fictitious, the link made between the terrorist and the refugee was successful.

Canada and the United States addressed the issue of border security by signing the Canada-U.S. Smart Border Declaration on 12 December 2001, in Ottawa. This Declaration aims to harmonize economic and immigration policies between Canada and the United States that are affected by the generally undefended border between the two countries. It states that both countries will cooperate to address threats to the people, institutions and prosperity of both countries. The purpose of the Smart Border Declaration is to outline an action plan to facilitate the free flow of people and commerce, while at the same time developing a zone of confidence against terrorist activities.[57] The action plan has four pillars: (1) the secure flow of people; (2) the secure flow of goods; (3) secure infrastructure and (4) coordination and information sharing in the enforcement of these objectives. Most relevant to this discussion of refugees and access to asylum is the secure flow of people, which involves the flow of refugees. This pillar involves implementing systems to collaborate in identifying security risks while expediting the flow of low-risk travellers.[58] In support of this pillar, both countries agreed to negotiate a safe third country agreement to enhance the managing of refugee claims. This would

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[57] The Government of Canada "The Smart Border Declaration," 12 December 2001, *available at* < www.canadianembassy.org/border/declaration-en.asp > accessed 16 November 2003.
[58] *Ibid.*

involve practices and procedures that ensure that asylum applicants are thoroughly screened for security risks.[59]

Further to the Smart Border Declaration in December 2002, the Canadian and American governments signed an accord to begin discussions on a safe third country agreement.[60] As mentioned in the previous chapter, a 'safe third-country' is "a country in which the asylum seeker has either found protection, or reasonably could have done so" (Bryne & Shacknove, 1996: 219). Safe third country provisions could be interpreted to mean that if you leave your country of origin, whatever the circumstances, and you stop over in one or several "safe" countries while en route you will be returned to one of those countries through which you passed to make your asylum claim.

The agreement between Canada and the United States applies only to asylum seekers arriving at ports of entry along the land border between the two countries, where it could be definitively shown that the asylum seeker had in fact transited through the other country. The agreement "would limit the access of asylum seekers, under appropriate circumstances, to the system of only one of the two countries"[61] by requiring an individual to make an asylum claim in the country from which he/she came, rather than the country he/she seeks to enter next. There are a few exceptions to the proposed regulations. An asylum seeker with family in one of the two countries may join those family members to pursue her asylum claim, even if the agreement would otherwise call

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[59] *Ibid.*

[60] Citizenship and Immigration Canada (2002) "The Final Draft Text of the Safe Third Country Agreement," 5 December, *available at* < www.cic.gc.ca/english/policy/safe-third.html > accessed on 6 July 2004.

[61] *Ibid.*

for return to the other country.[62] This exception applies as long as the anchor relative has lawful status, other than as a visitor, or has a pending asylum claim in the country where the person is seeking to enter. Also, unmarried individuals under the age of eighteen without parents in either country, referred to as unaccompanied minors, would not be returned to the other country.

Aside from these exceptions, the agreement would allow either country to return an asylum applicant to the other country for assessment. The drafters contend that the safe third country agreement would allow refugee determination systems to focus on genuine refugees in need of protection.[63] The drafters also argue that it is founded on the premise that there can be appropriate limits on the ability of an asylum seeker to choose a country of refuge. However, aside from the dual nationality clause in the second paragraph of the definition of a refugee (Art. 1A(2)) there is nothing in the 1951 Refugee Convention that clearly excludes a choice by the asylum seeker as to the country of refuge (Mathew, 2003: 147). Contrary to the presumption in international refugee law

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[62] Family member is defined in Article 1(b) of the Agreement to include: spouse, son, daughter, parent, legal guardian, siblings, grandparents, grandchildren, aunt, uncle, nieces and nephews.

[63] Citizenship and Immigration Canada (2001) "Canada-United States Issue Statement on Common Security Priorities," 3 December, *available at* <www.cic.gc.ca/english/press/01/0126-pre.html> accessed 6 July 2004.

that the asylum seeker ordinarily has the right to decide where to ask for protection,[64] safe third country provisions dictate where the refugee must seek protection.

While there is a common definition of refugee status, each state applies that definition its own way. There are neither agreed mechanisms to determine refugee status, nor any duty to achieve consistency in interpretation of the definition across signatory states. The result is a significant divergence in both the substance and structure of domestic refugee regimes across states. Similarly, refugees who seek protection in different countries are often treated in disparate ways. The claim to refugee status may or may not be recognized. From the perspective of the refugee, the only modest compensation for this divergent treatment is the right to choose where to seek protection. This is not the same as the right to receive protection wherever the refugee prefers. The decision on whether to grant protection and, if so, what kind of protection, remains effectively the prerogative of the receiving state. But the right of each refugee to decide where to ask for asylum affords at least those refugees with knowledge and mobility some degree of control over their own fate. If states are allowed virtually unlimited discretion over how to define a refugee, what rights a refugee will receive, and even when it will be deemed safe to return the refugee to his or her country of origin, then

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[64] United Nations High Commissioner for Refugees, Executive Committee of the High Commissioner's Programme, "Refugees Without an Asylum Country," UN Doc. HCR/IP/2 (1979) concl. 15

> The Intentions of the asylum seeker as regard the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another state, he may if it appears fair and reasonable be called upon first to request asylum from that state (see generally Hathaway 1991: 46-50).

surely the refugee must at least have the right to decide in which country to ask for protection (Hathaway and Neve, 1996: 215).

States justify resorting to the safe third country mechanism on the ground that it deters abuse of the asylum system by economic migrants as well as asylum shopping by asylum seekers. Governments argue that since an individual, genuinely motivated to flee due to fear of persecution, would in any event seek asylum in the very first non-persecutory state to which he or she is able to escape, true refugees suffer no harm under the rule. This attempt at justification of adoption of the safe third country mechanism does not take into account that requiring an asylum seeker to pursue his or her claim in the country of first arrival may result in a denial of protection. Because substantive and procedural harmonization of protection is not a precondition to implementation of safe third country agreements, efforts to deter abuse of the system have arguably been pursued at the expense of the integrity of the asylum system itself (Hathaway and Neve, 1996: 218).

The safe third country agreement between Canada and the United States is premised on the false logic that one is able to identify a "genuine" refugee from one who is trying to abuse the refugee determination system upon appearance at the border. It could be argued that this stems in part from the fact that some countries are labelled as refugee-producing countries while others are not and hence the distinction at the border is based on nationality. Usually, countries that are democracies and allow the exercise of civil and political rights are considered to be non-refugee producing countries. This does not take into account that human rights violations occur in democratic countries also. It also ignores the fact that asylum applications are determined on an individual basis

because each claimant has a unique story that has to be assessed in light of the laws of their country of origin as well as the enforcement or lack thereof of those laws. Even in democratic countries certain portions of a population could suffer adverse treatment that could amount to persecution, but this is not known until a hearing is held where all the facts can come to light.

Ruud Lubbers, former UN High Commissioner for Refugees, argued that, measures such as the safe third country, should not be detrimental to asylum seekers and advocates a "balanced approach" (2003: 1). He points out that refugees are especially vulnerable to the growing suspicion and hostility towards people of different backgrounds and religions, and warns about the possibility that some governments may use anti-terrorist concerns as justification for restricting access to asylum and making it more difficult for those in need of international protection to reach a country where they can present their claim. (Lubbers, 2003: 2).

Despite alleged security concerns, reasons for implementing the safe third country agreement are not really about national security; instead its focus is on stemming the abuse of Canada's refugee determination system. Safe third country agreements are attempts to push the responsibility of refugees back to the developing countries proximate to refugee producing countries (Mathew, 2003: 136). Thus, the safe third country agreement's fundamental concern is about asylum shopping.[65] Then Minister of Citizenship and Immigration Canada stated "Canada and the United States have the same

[65] Citizenship and Immigration Canada (2002) "Minister Coderre seeks government approval of Safe Third Country Agreement," 10 September, *available at* <www.cic.gc.ca/english/press/02/0226-pre.html> accessed on 6 July 2004.

commitment to refugee protection and the same international obligations,"[66] yet as Goodwin-Gill notes, the "safe country" provisions have existed since 1988, but "were not implemented for a variety of practical and political reasons" (1996: 336).

In fact, in May 1987, the Canadian government introduced the *Refugee Reform* Bill which allowed immigration officers to refuse entry to refugee claimants who arrived from a safe third country, where they could have filed a refugee claim (Knowles, 1997: 184). The Canadian government gave approval to the legislation in July 1988 to come into effect on 1 January 1989. However, a key contention was deciding on the countries to be declared "safe" and there was a difference of opinion about whether the United States was a safe country for Salvadorans and Guatemalans. Persuaded that the United States might send refugee claimants, deported from Canada, back to Central America where their lives would be in jeopardy, on 28 December 1988, the Minister of Immigration at that time declared "...at the present time I am prepared to proceed with no country on the safe third country list" (Bissett, 2002, 4).

Another attempt to implement a safe third country agreement occurred in 1995.[67] However, this plan was once again aborted due to extensive changes in American immigration processes (Copeland, 1998: 433). These extensive changes involved the expedited removal process that was discussed above. The core of the proposal was similar to the current agreement. The fact that most refugee claimants arrive in Canada by transiting through the United States meant that the agreement would contribute

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[66] *Ibid.*

[67] Preliminary Draft Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in Examination of the Refugee Status Claims from Nationals of Third Countries, 24 October 1995 [unpublished], see generally Hathaway and Neve (1996).

primarily to Canada's benefit and leave the United Stated processing the vast majority of North American claims. Despite this asymmetry, the idea of a harmonized refugee admission regime was revived under the rubric of the security perimeter (Macklin, 2001: 387).

It is troubling that Canada would pursue another safe third country agreement with the United States given that the expedited removal program remains in place. In addition, on 1 March 2003 the enforcement and services functions of the INS were transferred to the new Department of Homeland Security. Asylum seekers and refugees now fall within the jurisdiction of the new Department and will become increasingly more vulnerable as immigration services and enforcement functions are both viewed narrowly as matters of security.

Two initial decisions relating to asylum seekers were taken by the Department of Homeland Security. First, asylum seekers would be subjected to extended periods of detention based on their nationality and the expansive list of countries whose citizens qualify for "special treatment" by American government officials. Second, asylum seekers would be deprived of the chance to have a meaningful review of the need for detention in their individual cases. American foreign policy is still ideologically shaped, only now the new enemy is the mythical Middle Eastern Muslim terrorist. Canada's foreign policy, on the other hand, is guided less by ideological concerns and more by its economic interest to maintain smooth relations with the United States regarding the free flow of goods, services and low-risk people across the American-Canadian border. This interest far outweighs security concerns within Canada (Adelman, 2002: 15). Thus, from a foreign policy point of view, it seems sound for Canada to be part of American

initiatives for border control harmonization and to sign agreements important to the United States.

A general concern regarding the safe third country agreement between Canada and the United States is ensuring that asylum seekers returned to the United States will not be subjected to unjust and harsh treatment. The Canadian government generally responds to this concern by suggesting that there is nothing to worry about because the American system of refugee determination is very similar to the Canadian system, and that both meet international standards. But, there is an array of areas in which the American and Canadian asylum law and procedures differ significantly. Refugees who would qualify for asylum in Canada could find themselves barred from asylum in the United States, yet would be unable to pursue refugee status in Canada under the safe third country agreement even though they could qualify to make an asylum claim in Canada. For example, individuals who have resided in the United States for over one year and did not make an asylum claim would be time barred from pursuing an asylum claim there and they could not proceed to make an asylum claim in Canada either.

The lack of procedural direction regarding refugee determination in the 1951 Refugee Convention is not compensated for by the supposedly common definition of a refugee which states are obliged to respect. This is so because the requirement that refugee status be assessed in relation to the likelihood of "persecution" in the asylum seeker's country of origin is fundamentally subjective (Hathaway, 1990: 168). The application of the definition requires an evaluation by the receiving state of the country of origin's attitude toward and treatment of the claimant, or other persons similarly situated (Chamberlain, 1983: 149). Governments thus commonly recognize "the existence of

persecution [only] in cases in which their own policies or their political and economic interests are not prejudiced by such recognition" (Tsameny, 1983: 367). That there are differences in interpretation among states party to the 1951 Refugee Convention and the 1967 Protocol is hardly surprising. Canada and the United States are no exception. Despite the fact that Canada and the United States employ similar definitions, variations in interpretation have emerged through the years.

Every person fleeing persecution and asking for asylum is protected by Article 33 of the 1951 Refugee Convention from being rejected at a country's border. The Executive Committee of the High Commissioner (EXCOM)[68] has repeatedly stated that in all cases the "fundamental principle of *non-refoulement* including non-rejection at the frontier" must be ensured (Conclusions 6 and 22). Sending anyone back who would be at risk of serious human rights violations or persecution in their home country constitutes a clear violation of the principle of *non-refoulement*. The fundamental principle of *non-refoulement* reflects the commitment of the international community to ensure that those in need of international protection can exercise their right to seek and enjoy in other countries asylum from persecution, as proclaimed in Article 14(1) of the UDHR, Article 7 of the International Convention on Civil and Political Rights[69] (ICCPR) and Article 3 of CAT. *Non-refoulement* applies whenever a state or one of its agents contemplates the return of persons "in any manner whatsoever" to territories where they may be subjected

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[68] Executive Committee of the High Commissioner's Programme has a membership of more that forty states specifically affected by asylum seekers. It functions in relation to the UNHCR as an advisory body. Its conclusions are not legally binding on the High Commissioner or any state, however its conclusions are respected and considered persuasive.

[69] *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (*entered into force* 23 March 1976).

to persecution, irrespective of whether or not they have been formally recognized as refugees."[70] The direct removal of a refugee or an asylum seeker to a country where he or she fears persecution is not the only manifestation of *refoulement*. The removal of a refugee from one country to a third country which will subsequently send the refugee onward to the place of feared persecution constitutes indirect *refoulment*, for which several countries bear the joint responsibility.[71]

This raises another concern regarding the validity of declaring the United States a 'safe' country for asylum seekers. Both Canada and the United States have ratified the ICCPR and CAT. While Canada has ratified the 1951 Refugee Convention and its 1967 Protocol, the United States has ratified only the 1967 Protocol. This does not detract from the obligations that the United States owes asylum seekers since the 1967 Protocol contains all the provisions of the 1951 Refugee Convention except the time limitation. Thus both countries are bound by *non-refoulement* obligations. Arising from the nature of treaty obligations, there is a general duty to bring domestic law into conformity with obligations under international law (Brownlie, 2003: 35). It is true that a state "may not invoke the provisions of its internal law as justification for its failure to perform" its international legal obligations.[72] The general rule, however, is that when domestic statute conflicts with a treaty the statute prevails (Brownlie, 2003: 45). There is however, a well-established rule of construction, which states that where domestic legislation is

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[70] Executive Committee of the High Commissioner's Programme (1977) Conclusion No. 6 (XXVIII) (A/AC.96/549, para. 53(4).

[71] UNHCR Executive Committee of the High Commissioner's Programme Standing Committee 18th Meeting (2000) "Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach," UN doc. EC/50/SC/CRP.17, 9 June.

[72] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *adopted* 22 May 1969, *entered into force* Jan. 27, 1980, Article 27.

passed to give effect to an international convention, there is a presumption that Parliament intended to fulfil its international obligations.[73]

Roth argues that states' adoption of international obligations does not entail renunciation of their ultimate authority to violate those obligations for the sake of what they deem, unilaterally, to be the national interest (2004: 1030). The safe third country agreement between Canada and the United States has been packaged as necessary for protecting the border between the two countries in the aftermath of the September 11 attacks on the United States. Therefore, derogation from each of the country's international obligations not to refoule asylum seekers to countries where they may be subjected to human rights abuses is cloaked in the justification of the protection of national security. This is possible because of the link that was made between the attacks and refugees immediately following the September 11th events.

A central requirement of most national laws for determining a safe third country is that the asylum applicant is afforded effective protection against *refoulement.* However, it seems that in practice the examination of this question is often conducted in a perfunctory manner. The mechanical assessment is legally backed up by a presumption of safety where the state is a democracy, has ratified the 1951 Refugee Convention and has established a refugee determination procedure according to the principles of the 1951 Refugee Convention (Weidlich, 2000: 656). As already stated, in the United States, refugee claimants who arrive without appropriate documentation are subjected to a summary exclusion procedure, in which they risk being removed from the country without expert examination of their claim and without having had the benefit of legal

[73] *Salomon v. Commissioners of Customs and Excise* [1967], 2 QB 116, CA at 141.

assistance or interpretation services (Neve, 1998: 49). Refugee claimants in the United States are routinely held in harsh detention for extended periods of time. Legal aid is often unavailable and assistance often depends on non-profit organizations and law students (Neve, 1998: 49-50). More specifically, the United States has restricted resettlement after September 11th, and the United States State Department has admitted a number of refugees that is smaller than both the quota recommended by the government and the numbers in previous years (Lubbers, 2003: 3). Since these restrictions have affected specific ethnic groups, it can be surmised that nationals of the states in question, who are physically in the United States may be reluctant to file their asylum claims there for fear of being refused and deported.

V. Conclusion

The process of public policy making has commonly been depicted in terms of a logical sequence (Rochefort & Cobb, 1993: 56). In the instance of asylum policy, public officials have assessed the problem of rising backlogs in the refugee determination system as an economic problem and have attributed the rise in the number of claims to an abuse of the system. In response, Canadian officials have taken advantage of the negative publicity surrounding the events of September 11th and allegations regarding the laxity of its refugee determination system to implement procedures that will stem the flow of asylum seekers to Canada.

Public policies are the mechanisms through which values are authoritatively allocated for a particular society (Schneider & Ingram, 1997: 2). While IRPA enlarged the grounds on which one could be granted protection in Canada, the safe third country

agreement limits the number of individuals who will be able to access this protection. Thus the effect of IRPA is that Canada can be seen as providing a broad means whereby protection to asylum seekers can be granted while on the other hand the invisible hand produced by the legislation severely restricts access to obtaining this protection. This is illustrated by the fact that in 2001, approximately sixty percent of Canada's refugee applicants transited through the United States (Laghi, 2002, A1). The corresponding mid-year figure for 2002 was seventy-two percent (McClintock, 2002). In absolute numbers, approximately 15 000 people per year apply for asylum in Canada after passing through the United States; in contrast, only approximately two hundred per year do the reverse (Frelick, 2002: 1406). By virtue of Canada's geographical location, very few individuals from refugee producing countries are able to arrive here directly.

The safe third country agreement with the United States has the potential of effectively shutting down Canada as a country of asylum for most refugees. The agreement seems designed to ease the burden on the Canadian immigration system. In return, the United States wants Canadian cooperation on a broad range of measures included in the Smart Border Declaration. The United States and Canada are prepared to sacrifice the interests of refugees and their international obligations as a bargaining chip in broader American-Canadian border discussions. The agreement fails to take into account the intentions of refugees who are fleeing from persecution, forcing them to seek asylum in the country they happen to have transited through rather than the country in which they may have contacts and support to aid them while they put their lives back together. The next chapter focuses on the European safe third country agreement to

illustrate the effects of the agreement on access to asylum in Europe and its potential equivalent effect in North America.

III

Refugees in Orbit, The Effect of the Safe Third Country Mechanism: A European Example

I. Introduction

Human rights are based on the notion that respect for basic human dignity is imperative from a moral perspective and necessary in order to achieve world peace and prosperity.[74] In view of our increasingly interconnected world, where the effects of human rights abuses in one place oftentimes have a direct impact elsewhere, this rationale seems more compelling now than ever before. Furtherance of this philosophy requires a clear and unambiguous commitment to human rights at all levels and in all areas. Unfortunately, states are often reluctant to move in this direction. On the one hand, developed states are vigorous defenders of human rights; indeed, all consider the promotion of human rights to be a primary foreign policy objective. This position has been implemented in practice, such as linking aid or trade relations with states' human rights records. On the other hand, the degree to which developed states are dedicated to upholding the principles of human rights for all human beings is questionable when viewed through the lens of their asylum policy. Striving to control migration into their territories while meeting their international commitments to assist persons in need of protection, and in a context of growing resistance of refugees, host states have reacted to these mixed migratory flows by moving towards control and exclusion (Whitaker, 1998: 414).

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[74] See e.g. U.N. Charter Art. 1; and the Preamble to the UDHR, G.A. Res. 217A(III), 10 Dec. 1948.

While the human rights field was primarily concerned with abuses of the rights of citizens by their government or institutions, refugee law comes into play only after persons fleeing persecution have crossed international borders. Even the United Nations (UN) system clearly divided responsibilities for human rights distinctly from responsibilities for refugee protection. Refugee and human rights fields have therefore developed largely independently of each other, in spite of the obvious commonalities that underlie both. However, the past few decades have witnessed a progressive blurring of the traditional lines between refugee studies and human rights discourse. Standards regarding the admission of asylum seekers, their treatment and the granting of refugee status have drawn from various international human rights instruments, including the International Covenant of Civil and Political Rights[75] (ICCPR), the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment [76] (CAT), in addition to the 1951 Convention Relating to the Status of Refugees[77] (1951 Refugee Convention).

Chapter One unveiled the historical development of the international refugee regime and laid the foundation of a cosmopolitan ethical perspective through which access to asylum can be analyzed. Chapter Two provided a brief outline of the Canadian and American immigration and refugee policies from the 1930s to the present. It highlighted key developments in this policy area. The most recent policy formulation has

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[75] *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (*entered into force* 23 Mar. 1976).
[76] *adopted* 10 Dec. 1984, UNGA Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51, *entered into force* 26 June 1987, Article 3. Canada signed CAT on 23 August 1985 and ratified it on 24 June 1987. The United States signed CAT on 18 April 1988 and ratified it on 21 October 1994.
[77] 189 UNTS 137, *adopted* 28 July 1951, *entered into force* 21 April 1954.

been the signing of a safe third country agreement between Canada and the United States. This chapter focuses on Europe to illustrate the effect of a similar agreement on access to asylum in the European Union (EU). Lastly, I will assess the impact of the safe third country agreement in the EU through the framework of cosmopolitan ethics to illustrate the impact this agreement will likely have on access to asylum in North America.

As already stated, the cosmopolitan position is marked by three features: individual human rights are what ultimately matter; they matter equally; and nobody is exempted by distance or lack of a shared community for potential demands arising out of the counting of everybody equally (Pogge, 1992: 48). The cosmopolitan approach has been criticized for overlooking the fact that the state still has a fundamental role in international relations. The cosmopolitan ethics that I proposed in the first chapter, however, is neither superior nor inferior to the state; rather it exists alongside the state. It can be viewed as a moral frame of reference for specifying rules and principles that can be universally shared (O'Neill, 1991).

There are notable divergencies on matters of values and beliefs, as well as with respect to historical experience, that subverts, or at the very least, qualifies claims of a universal normative order (Falk, 1998: 195). Globalization alters the substantive approach to humane governance, particularly with reference to the role of the state (Falk, 1998: 222). With the onset of globalization and the rise of market forces, the state has lost a portion of its autonomy, and is no longer oriented to the well-being of people. Given this reality, from the perspective of cosmopolitan ethics it would be beneficial to reorient the state so as to enhance its willingness to be more people-oriented.

For international obligations to have compelling force, individuals need to shed their national attachments when faced with the choice to help individuals in search of asylum or placing their own interests first because asylum seekers occupy a unique space in international relations. The asylum seeker no longer enjoys the protection of her home country and is thus compelled to seek protection elsewhere. Her claim to inclusion in a host community is a mere consequence of exclusion by the home community. It is premised on the idea that each individual is part of a global community, which has to secure a minimum level of protection, when the home community – the state – fails. If each state were to close their doors the asylum seeker would have no choice but to return to her home country where there is a great likelihood that she would be persecuted at the hands of the state or non-state agents whom the state cannot control. The world has already witnessed this atrocity during World War II when Jews were forced to return to Germany because they were denied asylum elsewhere. This event led to the creation of the Universal Declaration of Human Rights[78] (UDHR) and subsequently the 1951 Refugee Convention. Yet history continues to repeat itself even though states are bound to provide protection as parties to international human rights instruments and as the guarantors of their implementation.

It could be argued that a cosmopolitan ethic underlies all international human rights documents; therefore state parties have *de facto* acquiesced to upholding the tenets of cosmopolitan ethics in that the right to non-discriminatory treatment is explicitly stated in all human rights conventions. Non-discrimination is an integral part of refugee protection as well. In relation to refugees and the protection against discrimination in the

[78] G.A. res. 217A (III), U.N. Doc A/810 at 71, *adopted* 10 December 1948.

receiving country, the key legal instruments are the UN Convention on the Elimination of All Forms of Racial Discrimination[79] and the 1951 Refugee Convention. The Preamble to the 1951 Convention affirms "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination." Furthermore, Article 3 of the 1951 Refugee Convention provides that the Convention shall be applied without discrimination.

Globalization does not respect borders, and technological developments have radically transformed our understanding of space and time. At the same time, the world has become a more tightly regulated public space for the marginalized. While a cosmopolitan world order is optimistic, one needs to acknowledge that states operate on the principle that they have the right to dictate the terms of their own governance. As well, states have an unfettered right to admit or refuse any non-citizen in accordance with their own legal standards. The singular exception to this principle is asylum seekers who arrive at state borders seeking protection. States are bound not to *refoule* anyone who meets the 1951 Refugee Convention definition of a refugee. To determine whether a state will recognize an asylum seeker as meeting the requirements of the 1951 Refugee Convention definition the asylum seeker must have access to the refugee status determination procedures of that state. The safe third country mechanism is an attempt to obstruct asylum seekers' ability to obtain access to refugee status determination procedures.

In the last two decades, European refugee policies have changed from being primarily rooted in humanitarian considerations to becoming more focused on state interests (Kjærum, 2002: 514). At the heart of European asylum policy today is the

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[79] U.N. GAOR G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014, 660 U.N.T.S. 195, *adopted* Dec. 21, 1965, *entered into force* Jan. 4, 1969.

phenomenon of denying an asylum seeker access to refugee status determination procedures on the grounds that the person could have, or should have, sought protection elsewhere. In other words, while the focus should be on the reasons leading to flight, instead the route one takes in search of protection determines whether protection is made accessible. The safe third country mechanism carries with it the risk of direct *refoulment* or of chain deportations, in which each state, without looking at the merits of an asylum claim, passes the asylum seeker back to the last country through which she travelled until the journey ends, either in a country that manifestly does not afford adequate protection to refugees, or worse, in the country of origin. The safe third country mechanism will now be examined in the context of asylum policies in the EU.

II. European Harmonized Restrictionism

Until the late 1970s, the issue of asylum in Europe caused little controversy because few people applied for asylum (Gorlick, 2003: 179). Those who did were usually well-educated Eastern Europeans who were economically and ideologically useful (Gorlick, 2003: 179). Asylum in Europe changed dramatically from the late 1970s to the mid-1990s as the world's refugee population soared. Within a decade, annual asylum applicants in Europe increased ten-fold. The Benelux countries, France and Germany received the largest proportion of refugees in the European Community (EC) (Joly, 1996: 163). In the years 1988-1990, about 80% of all asylum applications lodged in the EC were submitted in two countries: Germany (60%) and France (20%) (Joly, 1996: 163). Southern countries such as Italy, Greece, Portugal and Spain were perceived as transit states from which asylum seekers travelled onward. It was argued

that the greater prosperity and social benefits available in the North attracted the bulk of asylum seekers (Joly, 1996: 163). This gave rise to the Schengen Agreement[80] between Belgium, the Netherlands, Luxembourg, France and Germany in 1985.

The Schengen Agreement established a framework for abolishing internal border controls. This instrument introduced a number of concrete measures facilitating cross-border traffic among contracting parties and established a programme for the complete abolishment of internal borders among its contracting parties (Noll, 2000: 124). In 1990, Belgium, France, Germany, Luxembourg and the Netherlands signed the Schengen Convention [81] which states that the internal borders of contracting parties may be passed at any point without any checks on persons being carried out. The Schengen Convention contains provisions on the control of external borders, visa requirements, the responsibility for the processing of asylum applications, information exchange under the Schengen Information System and the introduction of carrier sanctions[82] (Joly, 1996: 163). Also in 1990, the Dublin Convention[83] was signed. In 1997 it was ratified by

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[80] Agreement between the Governments of the States of the Benelux Economic Union, The Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 14 June 1985.

[81] Convention Applying the Schengen Agreement of June 14, 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, June 19, 1990 [hereinafter referred to as the Schengen Convention].

[82] Carrier sanctions are imposed by destination states on airlines, ship owners and other carriers who bring persons without the necessary documentation (i.e. passport and visa) into their territory (Noll, 2000: 109).

[83] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, Dublin, 15 June 1990, OJ (1997) C254/1[hereinafter referred to as the Dublin Convention].

twelve EU member states.[84] Unlike the Schengen Convention, the Dublin Convention deals exclusively with the allocation of asylum applications. The Dublin Convention is essentially a mechanism for determining which member state of the EU is responsible for examining an application for asylum lodged in one of the contracting States. Asylum seekers must lodge their application for asylum in the first EU country in which they arrive and may be returned to another EU member state if it can be shown that they have either passed through the border of another State (by air, sea or land) or made an application for asylum in another member state. The basic principle of the 'Dublin system' is that state parties mutually recognize each other as 'safe third countries' (Hurwitz, 1999: 647).

Essentially, Europe's safe third country mechanism embraces two elements. First, responsibility for the processing of a given claim for protection must be established by a set of allocation criteria.[85] Second, the physical readmission of an asylum seeker to the responsible country must be secured. Since states are under no obligation to readmit non-nationals under customary international law, the readmission obligation must be

[84] The initial twelve signatory states are Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, The Netherlands, Portugal and United Kingdom. On 1 October 1997 Austria and Sweden signed onto the Convention. Finland signed it on 1 January 1998 and it was extended to Iceland and Norway in 2001. Switzerland ratified the Convention on 5 June 2005.

[85] Where the asylum seeker has transited through more than one EU state, allocation criteria, such as proof of transit through that state determines which state is responsible for determining the asylum claim. This is governed by the Dublin Convention (Noll, 2000: 185).

created by way of treaty (Noll, 2000: 184).[86] The Dublin Convention joins both of these elements in one instrument. The safe third country mechanism denies the asylum seeker the opportunity to choose among potential host countries and does away with a state obligation to process each claim in substance. Rather, the travel route or other allocation criteria determines the receiving country. This concept, absent in the global refugee protection regime, evolved out of the desire to prevent asylum seekers from lodging multiple simultaneous or sequential applications in different Schengen countries (Joly, 1996: 164).

The Dublin Convention regulates allocation among EU member states in a comprehensive and legally-binding manner. The rationale of the Dublin Convention is twofold. First, it allocates responsibility for the examination of asylum applications lodged on the territory of a member state, and, second, it lays down readmission obligations incumbent on the responsible member state. The Schengen and Dublin Conventions set the overall framework for deflecting unauthorized migrants and allocating asylum claims. Thus, every asylum claim filed in a Dublin Convention member state first has to be examined for the purpose of identifying the state responsible to determine the claim, not the actual claim itself. This is so because an asylum seeker may file a claim for refugee protection in a country other than the one they landed in.

[86] A 'readmission agreement' is an international agreement stipulating the procedures for the return and readmission of individuals (with the exception of extradition). The objective of such an agreement is to: (i) combat illegal migration; (ii) share the burden of illegal migration by more countries; and (iii) have a preventive influence on the thinking of potential immigrants and thus to meet one of the conditions for the gradual reduction or abolition of the control on the internal borders of the countries which follow the readmission principles (Working Group of the Budapest Group, Report on the Implementation of Readmission Agreements, Doc. No. BG11/96C p. 2).

The state responsible for processing the asylum claim would be the one that first permitted entry, hence the country in which the asylum seeker first landed. The justification for the rule that only one member state is responsible for examining an application for asylum is that the 'Dublin system' is based on states' mutual confidence in each others asylum procedures. Normally, the member state that was responsible for controlling the person's entry into the territory of the EU is also responsible for deciding the asylum claim (Noll, 2000: 185). At the same time that EU member states were trying to negotiate collective rules to apply to their external borders, there was considerable and concerted effort to recruit other countries into the emergent European border regime, pushing the restrictive borders further out (Uçarer, 2001: 300).

The 1951 Refugee Convention prohibits not only direct *refoulement* to the country of origin, but also indirect, or "chain" *refoulement* to third countries that in turn will *refoule* to the country of origin. In *Soering v. United Kingdom*,[87] the European Court of Human Rights (ECHR) held that Article 3 of the European Convention, which prohibits torture or other "inhumane or degrading treatment or punishment," bars state parties from sending people to countries that will subject them to such treatment – even if the receiving countries are not themselves parties to the European Convention. The UN General Assembly has taken an analogous position with respect to forcible return to a country "where there are substantial grounds for believing that the person may become a victim of extra-legal, arbitrary or summary execution" or "would be in danger of enforced disappearance."[88] Notwithstanding the ruling of the ECHR, obligations under

[87] [1989] ECHR 14038/88, (1989) 11 EHRR 439.
[88] Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, Annex 1, at 20.

the 1951 Refugee Convention and the UN General Assembly Resolution,[89] in November 2002 the European Council mandated the European Commission to negotiate readmission agreements with Turkey, Albania, Algeria, and China; and on a request by Spain, it will negotiate similar agreements with Mali, Ghana, and Gambia.[90] The Commission is also negotiating a readmission agreement with Russia[91] and recently entered into one with Hong Kong.[92]

Of these countries mentioned, only Turkey has ratified the 1951 Refugee Convention. The likelihood is great that asylum proceedings in these countries are nascent, if not non-existent. Hence, the ripple effects of collective restrictionism extend further outwards. These policies have the cumulative effect of shifting the burden of reviewing asylum claims away from the territory of the EU and summarily denying consideration to the possibly legitimate asylum claims. Moreover, some of these countries are known human rights abusers. Enforcement of these readmission

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[89] UNGA Res. 44/162 and 47/133 (reproduced in Inter-Governmental Consultations on Asylum, Study on Burden-Sharing, March 1998, Annex 1, at 20).

[90] *See* European Commission (2003) "Eleventh EU-Russia Summit, St. Petersburg 31.05," IP/03/768 (28 May, Brussels) *available at* <http://europa.eu.int/comm/external_relations/russia/sum05_03/ip03_768.htm> accessed 31 October 2004.

[91] Statewatch News (2002) "EU: "Safe and Dignified", Voluntary or "Forced" Repatriation to "Safe" Third Countries," *available at* <http://www.statewatch.org/news/2002/nov/14safe.htm > accessed on 31 October 2004.

[92] European Commission (2001) European Commission Press Release (2001) "*EU-Hong Kong Readmission Agreement Concluded*," IP/01/1638 (Brussels, 22 November) available at <http://europa.eu.int/comm/external_relations/hong_kong/intro/ip01_1638 .htm> accessed on 31 October 2004.

agreements similar to safe third country agreements,[93] which do not distinguish between economic migrants or asylum seekers, could find asylum seekers being deported to countries that cannot afford them meaningful protection or in some cases *refouled* to the very countries they fled. In either scenario, the asylum seeker is denied access to the refugee status determination procedure in the European country they intended to claim asylum in.

In Western Europe, domestic rules for granting asylum vary greatly. This has two consequences. First, a rational asylum seeker would not seek protection in just any potential host country, but rather in one having higher recognition rates for their particular claim. Secondly, a rejected asylum seeker will want to file a new application in another European country, as chances are fair that another state will assess her case differently than the country that rejected her. This phenomenon has been pejoratively labelled 'forum shopping.'

Reasons for forum shopping also include: the desire for economic and educational opportunities, family and community links, past residence, the possibility of employment and social benefits pending a decision of refugee status, and the calculation that prospects for recognition are more favourable in a specific host country for members of the asylum seekers race, religion, nationality, social group or political opinion (Bryne

[93] The difference between readmission agreements and safe third country agreements is that the readmission agreement is invoked when an asylum seeker has successfully gained entry into a state other than the one first transited through and attempts to make an asylum claim in the second state. The readmission agreement would allow the second state to return asylum seekers to the first state transited through to file their asylum claim. In the case of safe third country agreements, the asylum seeker is prohibited from entering the second state if it can be proven that the first state the asylum seeker transited through deemed, by the second state, a safe to claim asylum in.

and Shacknove, 1996: 209). However, it is important to note that the behaviour of the asylum seeker is not based on a malicious intent to manipulate, but is instead a rational reaction to the disharmony of refugee status determination procedures worldwide. If all states offered roughly the same procedural and material standards, 'forum shopping' would be unnecessary. To do this would be deeply intrusive into asylum legislation of states, which are, on the whole, jealously guarded. Therefore, instead of intensifying the harmonisation of refugee status determination systems, states have opted to allocate asylum seekers under a mechanical rule based on the mechanism of safe third country agreements.

Safe third country arrangements in the EU have left more asylum seekers without access to procedures for longer periods of time, and have led to considerable delays in asylum processing procedures (van Selm, 2001). The following examples illustrate a phenomenon that is at the heart of European asylum policy today: denying an individual access to substantive asylum procedures on the grounds that the person could have, or should have, sought protection elsewhere.

> A Somali family with several dependent children arrives at Zaventem airport in Brussels and asks for asylum. The family members are refused permission to stay in Belgium and are shuttled back to Prague, where they were in transit. The Czech authorities send them on to Bratislavia, Slovakia, whose border police then sent them to Ukraine, a country not part of the 1951 Refugee Convention (Kumin, 1995).

> A Sri Lankan enters Austria illegally and is taken into detention. He files an asylum application that is rejected two weeks later on the grounds that he stayed in safe third countries (Hungary and Romania) before coming to Austria. After more than five months in detention, he is deported to Sri Lanka (Kumin, 1995).

The aim of these harmonized policies is clear: to reduce the number of refugees gaining permanent entry, by erecting obstacles to prevent seeking asylum access to

protection and by deterring new arrivals. The United Kingdom Court of Appeal judgement in *ex parte Adan*[94] captures some of the issues at the heart of the drive towards harmonization of asylum policies (Goodwin-Gill, 1999: 730). In the context of appeals against the return of asylum seekers to Germany and France under the so-called 'safe third country' rule, the United Kingdom Court of Appeal in *ex parte Adan* ruled that it would afford due respect to the system and practice of the third country in question, but that such country had to apply the 1951 Refugee Convention. If the state took a position that departed from the Convention's 'true interpretation', it could not be regarded as safe. The United Kingdom Home Secretary promptly moved to frustrate this ruling by amending the *Immigration and Asylum Act 1999* so as to create an apparently indefeasible presumption that other EU member states are safe by definition (Goodwin-Gill, 1999: 736).[95] Designating a third country "safe" signifies a judgment that the country will provide refugee protection in accordance with the 1951 Refugee Convention and will adjudicate refugee claims in a fair manner (Macklin, 2003: 1).

III. Reality versus Theory

Cosmopolitan ethics offers a normative framework of how states ought to respond to asylum seekers. This would involve the deprioritization of communal ethical bonds for those of a universal humanity (Odysseos, 2003: 183). Beck argues that the cosmopolitan project calls for the establishment of an order in which human rights precedes international law (2000: 79). This is the reverse of the modern statist order where the state precedes human rights.

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[94] *R v. Secretary of State for the Home Department, ex parte Adan* [1999] 4 All ER 774.
[95] See *Immigration and Asylum Act 1999*, §§11 and 12.

How is access to asylum understood in the context of this ethical cosmopolitan proposal? The deflection of refugees challenges the cosmopolitan ethics of an obligation to help those in need. According to Henkin, human rights law is not reciprocal between states; there is no other state that is a victim or otherwise offended when a state violates its human rights undertakings (1979: 235). The forces that induce compliance with other law do not pertain equally to the law of human rights.[96] Violations do not ordinarily affect friendly relations with other states or international credit or prestige (Henkin, 1979: 235). International interests permit derogations from rights when necessary for an important public interest and governments are tempted to interpret and apply those permissible derogations and exceptions as they deem appropriate. As mentioned in chapter two, many recent changes to immigration and refugee policies worldwide have been tied to a perceived terrorist threat since September 11, 2001. This threat, whether perceived or real, has been used as a springboard for governments worldwide to justify closing their boarders to asylum seekers because the perpetrators of the September 11, 2001, incident were initially identified as failed refugee claimants. It was immaterial that this was later found to be false. Heads of government and politicians did not work to correct the dissemination of this misinformation by media outlets. The refugee was identified as a potential terrorist and was therefore a potential danger to national security.

There is no alternative basic structure to international law than the state system; while states are not the only entities, they remain the constituent entities (Henkin, 1995: 4). In a world divided into states then, when one state fails to provide an individual with

[96] The major engines of compliance that exist in other areas of international law are for the most part absent in the area of human rights (Hathaway, 2002: 1938).

safety and protection, cosmopolitan ethics would argue that it is the duty of another state to assist this person in need. Instead, what we are seeing is that states are deferring this obligation to protect individuals in search of protection from state to state by erecting barriers that work to restrict access to asylum. The use of borders and sovereignty in this situation has the effect of privileging a particular state and silencing the asylum seeker. This amounts to a denial of responsibility to uphold the fundamental human rights that were articulated in many international human rights documents as necessary for every individual to enjoy a minimum standard of the good life to which all humans, regardless of nationality or citizenship, are entitled.

Far from disappearing, many borders are being reasserted and remade through ambitious state efforts to regulate the transnational movement of people. European border controls reflect a multilateral "pooling of sovereignty." This has taken its most concrete form through the Schengen and Dublin Conventions, which call for the elimination of internal EU border checks, and at the same time, a harmonization and tightening of external border checks. This means that what once were treated exclusively as national borders and national controls have now become part of a new European space of free movement – insulated by a hardened outer wall. Importantly, the EU border enforcement strategy also involves turning its immediate neighbours into a kind of "buffer zone." Countries such as Poland have been deemed "safe" countries, meaning that asylum seekers who cross through those countries en route to Western Europe can be deported back there, notwithstanding the fact that refugee status determination procedures and support systems are minimal or perhaps non-existent in these deemed "safe" countries.

States weigh their obligation to help asylum seekers against the cost of providing access to refugee status determination processes. If the cost is relatively low, then asylum seekers are likely to be afforded the opportunity to access refugee status determination procedures. On the other hand, the costs of housing, language training, legal aid, social services and large bureaucracies favour state policies that act to limit the number of asylum seekers that will be successful in gaining access to protection. Since September 11th, 2001, the potential security threat that asylum seekers have been characterized to pose to national security has added an additional dimension to the cost of administering a refugee status determination system and is viewed as increasing the costs. The moral duty to help is strongest only when the costs to those helping are small. Hence, as the European treatment of safe third country agreements illustrates, we cannot simply assume that global ethics can be grounded on a universal humanity and that communal ethical bonds can be easily deprioritzied or 'cosmopolitanized'. The openness that cosmopolitan ethics requires is not necessarily brought about through the recognition of state obligation to uphold certain rights. The challenge for cosmopolitan ethics is to refer to a set of rules that recognizes legal standing for everyone equally, without abolishing the distinction between citizens and non-citizens that follows from the existence of states (Elftheriadis, 2003: 245).

International refugee instruments codify a number of specific rights that states are obliged to provide refugees. The 1951 Refugee Convention affirms "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination" and

provides a full range of human rights to refugees. [97] Upon flight, a refugee becomes subject to the jurisdiction of the authorities of the receiving country. Asylum seekers do not forfeit their fundamental human rights when they leave their home countries. Treatment within the receiving state must correspond with obligations to respect fundamental human rights, including the right not to be returned to a territory where the individual may face persecution. This prohibition includes non-rejection at the border or shore whether or not they have been formally recognized as refugees.[98] This principle is the basis for all refugee protection.

National refugee policies clearly discriminate against refugees based on their citizenship although human rights attach to the person and not solely to the citizen. Often, asylum seekers continue to be denied the realization of their human rights in the receiving country when they are placed in detention centres or denied access to social services. The safe third country mechanism goes one step further to discriminate based on travel route taken in pursuit of protection. The safe third country's core intuition is that an asylum seeker is coming from a country in which he or she was safe from

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[97] For example, Article 3 of the 1951 Refugee Convention provides that states parties shall apply to provisions of the Convention without discrimination as to race, religion, or country of origin of the beneficiary; Article 4 governs freedom to practice religion and religious education; Article 16 provides that a refugee shall have free access to the courts of law on the territory of all contracting states; Articles 17, 18, 19 govern the granting of access to employment opportunities to refugees; and Article 21 provides that as regards housing refugees shall be accorded treatment as favourable as possible and in any event not less favourable than that accorded to aliens generally in the same circumstances. Other rights granted to refugees include freedom to movement in the territory of the contracting state (Articles 26 and 31), and facilitating assimilation and naturalization (Article 34). Other provisions include freedom of association with non-political and non-profit making associations and trade unions (Article 15), and provision of administrative assistance by the contracting state authority to allow a refugee to exercise a right under the Convention (Article 25).

[98] UNHCR Executive Committee, 'Non-refoulement', Conclusion No. 6, 1977 at para. c.

persecution and to which safe return is possible. This begs the question of why one would leave in the first place? Considerable effort and fear are involved in fleeing ones country and such a decision is not undertaken lightly.

The European experience illustrates the role that the safe third country mechanism plays to frustrate the process of putting one's life back together. Instead of being able to make an asylum claim in the country of their choice, the asylum seeker must now be cognizant of his travel route, a factor in his flight he has little control over. The North American experience is that asylum seekers who intend on making their asylum claim in Canada but are forced to make that claim in the United States because of the safe third country agreement could face further impediments depending on the country they fled.

Since September 11, 2001, travelers (tourists and asylum seekers alike) of Middle Eastern descent and Muslims are placed under a microscope when traveling throughout the Western world. The current political environment in the United States points to increased detentions of asylum seekers of Middle Eastern ethnicity. They are seen to pose a security threat simply because of their ethnicity and/or religion. This discriminatory practice is a direct contradiction to a cosmopolitan ethic, which holds that all persons stand in equal moral relations to one another (Pogge, 2002: 169). A cosmopolitan ethic conflicts with current practice because the right to grant asylum remains a right of the state. In today's climate of heightened security concerns, arguments revolving around state sovereignty have gained renewed vigour as the ultimate right of states to patrol their borders and to reject asylum seekers at their frontiers.

According to Joly, states do not have complete freedom in deciding whom to admit into their territory (1996: 1). While the UDHR is a non-binding instrument,

Article 14 is implicit within the 1951 Convention and the 1967 Protocol and is an emerging norm in customary international law (Chowdhury, 1995: 105). In addition, the prohibition on *refoulement* has been buttressed by Article 3 of CAT. It is now largely agreed that the right against *refoulement* forms part of customary international law.[99] As well, Articles 1 and 33 of the 1951 Refugee Convention read together place a duty on states to grant, at a minimum, access to asylum procedures for the purpose of refugee status determination. It has been asserted that without appropriate asylum procedures, obligations of *non-refoulement*, including rejection at the frontier, could be infringed (see de Jong, 1998 and Edwards, 2003). The right to seek asylum is assisted by Article 13(2) of the UDHR, as reconfirmed by Article 12(2) of the ICCPR, which provides that "[e]veryone has the right to leave any country, including his own. . .". The right to leave any country and the right to seek asylum are two sides of the same coin in the refugee context. Although, Article 13(2) of the UDHR does not mention a right to enter any country, it would be a meaningless right if it were not intended, at least for the purposes of refugee status determination, especially where an individual has reached a country's

[99] Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Geneva, 13 December 2001 Preambular para. 4. See also, UNHCR, "Summary Conclusions on *Non-Refoulement*", Global Consultations on International Protection, Lisbon Expert Roundtable 3 –4 May 2001, organized by the UNHCR and the Carnegie Endowment for International Peace, Washington D.C. During the drafting of the Declaration of State Parties, one of the only dissenting countries to recognising *non-refoulement* as part of custom was the United States. See also, E. Lauterpacht and D. Bethlehem (2003) "The Scope and Content of the Principle of *Non-Refoulement*," in E. Feller, V. Türk and F. Nicholson eds., Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge: Cambridge University.

territory. To protect refugees effectively from *refoulement*, states must treat asylum seekers as if they were refugees until their status is determined.[100]

The human rights provisions of the UN Charter are directly binding on member states.[101] Similarly, Article 1 of the UDHR provides that "[a]ll human beings are born free and equal in dignity and rights" and Article 2 asserts that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The UDHR set the scene for the future elaboration of human rights standards that do not generally distinguish between nationals and non-nationals. In particular, these articles of the UDHR were later reiterated in Article 2(1) of the ICCPR and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights[102] (ICESCR). Thus, international human rights law has, as its point of departure, the principles of cosmopolitan ethics of non-discrimination and equality.

The Preamble to the safe third country agreement between Canada and the United states that

> Aware that such sharing of responsibility must...safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, access to full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol and the Torture Convention are effectively afforded.[103]

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[100] UNHCR (1993) "Note on International Protection," UN doc.A.AC.96/815, 31 Aug. 1993, para. 11.
[101] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion ICJ Reports 1971.
[102] *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), (*entered into force* 3 Jan. 1976).
[103] Citizenship and Immigration Canada, The Final Draft Text of the Safe Third Country Agreement, *available at* < www.cic.gc.ca/english/policy/safe-third.html > accessed on 15 November 2005.

This passage affirms that the legitimacy of the agreement depends on the fairness and integrity of the refugee status determination systems in both Canada and the United States. If the United States does not secure full and fair treatment for asylum seekers, the blame ultimately rebounds to Canada since it entered into an agreement that would subject asylum seekers to an unjust system. In *Singh* v. *M.E.I.*, the Supreme Court of Canada first articulated the principle that Canada violates a refugee claimant's security of the person by returning him to a country where he may be persecuted.[104] *Singh* had a significant impact on refugee law in Canada, pushing the federal government to amend the *Immigration Act* to afford an oral hearing to eligible refugee claimants (Heckman, 2003, 218). In *Suresh* the Court reversed its earlier position and ruled that Canada should not, save in extraordinary circumstances, expel a person to face torture.[105] These decisions evoke an indirect responsibility for enabling conduct by others that Canada would not do itself (Macklin, 2003: 13).

The 1951 Refugee Convention does not expressly require states to implement specific refugee status determination procedures (Heckman, 2003: 223). However concerns about the American asylum regime encompass both process and substance. The United States resorts to detention of non-citizen entrants more frequently than does Canada. The September 11th, 2001 attacks precipitated even greater systematic reliance on detention (Macklin, 2003: 14). In March 2003, Tom Ridge, then Director of the Department of Homeland Security, announced the automatic detention of "asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers and other terrorist groups

[104] [1985] 1 S.C.R. 177, 207 [*Singh*].
[105] *Suresh* v. *Canada(Minister of Citizenship and Immigration)*, [2002] SCC 1.

are known to have operated...for the duration of their processing period.[106] The United Nations High Commission for Refugees (UNHCR) has criticized this blanket imposition of detention as inconsistent with international legal norms in several respects.[107] First, the practice discriminates on a basis of a prohibited ground: nationality. Second, detention must not be used to deter asylum seekers from the legitimate attempt to obtain refuge from persecution. Third, where detention is used to prevent absconding or for security reasons, "international standards dictate that there must be some substantive basis for such a conclusion in the individual case."[108]

In addition, the United States immigration authorities have begun charging newly arrived asylum seekers with the criminal offence of entering the country with false documents (Christensen, 2004; Weinberg, 2003: 1B). This practice is in direct contravention of Article 31 of the 1951 Refugee Convention, which states that

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

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[106] Press Release, Department of Homeland Security, Operation Liberty Shield, March 17, 2003, *available at* < http://www.dhs.gov/dhspublic/display?content=4234 > accessed on 15 November 2005.

[107] UNHCR (1999) Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers *available at* <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bd036a74> accessed on 15 November 2005.

[108] Standing Committee of the Executive Committee of the High Commissioner's Programme, (1999) "Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommendation Practice," *available at* <http://www.unhcr.ch/cgi-bin/texis/vtx/excom> accessed on 15 November 2005.

According to the Human Rights Committee, determinations as to the lawfulness of an alien's entry or stay must also accord with Article 13 of the ICCPR,[109] which provides that:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Furthermore, since the implementation of the safe third country agreement between Canada and the United States, the American law has changed in a manner that is likely to further reduce the United States acceptance rate of refugees. On May 11, 2005, President Bush signed the *Real ID Act*.[110] The *Real ID Act* makes it much harder for refugees to prove that they qualify for legal protection in the United States. It denies fair treatment and violates certain international human rights obligations to refugees. Under the *Real ID Act*, refugees will be denied asylum because they do not look a judge in the eye – or because of other aspects of their "demeanor."[111] This provision fails to take into account how people from different cultures interact with authority figures – in particular, in talking about traumatic personal experiences. As well, refugee protection could be

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[109] General Comment 15(27) on the position of aliens under the Covenant, UN doc. A/41/40, 22 July 1986, para. 9.

[110] An Act to establish and rapidly implement regulations for State driver's license and identification document security standards, to prevent terrorists from abusing the asylum laws of the United States, to unify terrorism-related grounds for inadmissibility and removal, and to ensure expeditious construction of the San Diego border fence. H.R. 418, *passed on* May, 11, 2005 [*Real ID Act*].

[111] Human Rights First "*REAL ID* Endangers People Fleeing Persecution," *available at* <http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp> accessed on 3 August, 2005.

denied because a female cannot talk about rape with a male immigration officer.[112] This provision fails to appreciate the discomfort women from different cultures feel in talking about violent sexual abuse, to men who are armed and in uniform – much like their attackers. Lastly, an asylum seeker could be denied protection because their relatives were extorted by terrorist groups.[113] The *Real ID Act* allows people who bear no personal responsibility for terrorist acts to be deported and barred from asylum based on overly broad definitions of "terrorism" and of what constitutes "supporting" terrorism. The new law comes at a time when asylum applicants in the United States already face increased difficulties. The rate at which refugees have been granted asylum has dropped from about 43 percent to 29 percent over the past three years. The United States received 48 percent fewer asylum requests in 2004 than in 2001.[114] Taken on their own, each of these elements of the United States system is worrisome. Taken together, they cast into serious doubt whether the United States is able and willing to provide full and fair refugee status determination procedures.

IV. Conclusion

In a world that is increasingly hostile to refugees, safe third country agreements represent a significant further retrenchment of the rights and respect that the privileged are prepared to accord to the least privileged. The ultimate challenge is to frame the human rights vision of refugee protection in a way that takes reasonable account of the

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[112] *Ibid.*
[113] *Ibid.*
[114] Human Rights First, "Human Rights First Condemns Passage of Real ID Act Punishing Victims of Persecution" May 11, 2005 *available at* <http://www.humanrightsfirst.org/media/2005_alerts/asy_0511_realid.htm> accessed on 3 August, 2005.

perceived self-interest of states, and hence stands a chance of adoption and meaningful implementation (Hathaway, 1991: 114). The lack of any meaningful international scrutiny of the procedural dimensions of refugee protection has allowed political and strategic interests to override humanitarian concerns in the access to status determination procedures, it has also facilitated the interposition of domestic economic and social considerations in deciding which persons and groups are to be assisted, thereby undercutting the universality of the protection mandate (Chamberlain, 1983: 103). Conclusion 15 of the Executive Committee of the UNHCR, specifically states that "asylum should not be refused solely on the ground that it could be sought from another state." Conclusion 15 also confirms that "the intensions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account."[115]

Safe third country agreements strip asylum seekers of the little control that they have in their plight to find protection and build a new life. These agreements also aid in the deflection of states' responsibilities to persons in need. If states applied the 1951 Refugee Convention definition in safe third country agreements would not be necessary, if the underlying purpose for safe third country agreements were true: to limit asylum shopping. States are unwilling to harmonize their interpretation of the 1951 Refugee Convention definition and their refugee status determination systems because they are proud of their reputation for upholding human rights and providing generous asylum procedures to those who are actually successful in accessing their system. As illustrated

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[115] UNHCR Executive Committee Conclusion No. 15 (XXX/1979), "Refugees Without an Asylum Country," in Conclusions on the International Protection of Refugees, Geneva: UNHCR, 1990, UN Doc. HCR/1P2/Eng/Rev. 1989 at 39.

by the European perspective, safe third country agreements are used to extend the territory that is inaccessible to asylum seekers. These agreements also operate to deflect states' responsibilities by returning the asylum seeker to a country that is willing to bear the burden, for political or economic reasons, of processing their refugee status claim or return them to their country of origin. The effects of this deflection of responsibility are invisible to everyone but the asylum seeker who is faced with the possible return to a dangerous situation with little or no choice or alternative.

Cosmopolitan theorists would argue that the 'first principles' of ethical obligations and political community should stress the allegiance of each to all at the scale of humanity (Calhoun, 2003: 535). However, the global border control regime, which safe third country agreements are part of, encourages a sense of natural cosmopolitanism for some and reminds others of their nationality (and often of religion and ethnicity as well). However cosmopolitan their initial intentions or self-understandings might have beeen, these Asians, Africans and Latin Americans are reminded that at least certain sorts of cosmopolitanism are not for them. Cosmopolitan ethics asserts that this is not the way the world should be, and that borders should be more open to asylum seekers because of their unique situation.

General Conclusion

The international refugee regime has undergone transformations in ideology and commitment since its inception in 1950. The rhetoric of humane concern lingers, but the modern apparatus of international refugee law is more closely tied to the safeguarding of developed states than to the vindication of claims to protection from asylum seekers (Hathaway, 1990: 175). Refugee law, as currently administered, allows Western states to maintain the façade of universal, humane concern without the necessity of affording genuine protection. The refugee has lost her political relevance since the end of the Cold War. Hence, states' commitments have shifted from one of providing asylum to refugees to that of a non-entrée regime. The perimeter around the earth's territory that is inaccessible to asylum seekers continues to widen. Today, states would rather pursue interventionist policies and provide aid to states that neighbour refugee producing countries in order to keep potential asylum seekers closer to home.

In the instance of asylum policy, public officials have assessed the problem of rising backlogs in their refugee status determination systems as an economic problem and have attributed the rise in the number of claims to an abuse of the system. In response, Canadian officials have taken advantage of the negative publicity surrounding refugees in the wake of the September 11th events, the assertions about porous border controls and allegations regarding the laxity of its refugee status determination system to implement procedures that would stem the flow of asylum seekers to Canada. This is not the first time Canada has sought to implement such an agreement, however, success was assured this time because of the identification of refugees as a threat to national security of not only Canada but also the United States. The safe third country agreement with the United

States has the potential effectively to shut down Canada as a country of asylum for those refugees who are not able to reach its shores without transiting through the United States.

In a world that is increasingly hostile to refugees, safe third country agreements represent a significant further retrenchment of the rights and respect that the privileged are prepared to accord to the least privileged. The ultimate challenge is to frame the human rights vision of refugee protection in a way that takes reasonable account of the perceived self-interest of states, and hence stands a chance of adoption and meaningful implementation (Hathaway, 1991: 114). States need to show that they are in control of their borders but also that human life, whosoever life it may be, is of concern. A new strategy is needed, and human rights principles, which address the utter powerlessness of the asylum seeker, must be an essential part of it. However, the lack of any meaningful international scrutiny of the procedural dimensions of refugee protection has allowed political and strategic interests to override human rights concerns in allowing access to status determination procedures and has facilitated the interposition of domestic economic and social considerations in deciding which persons and groups are to be assisted, thereby undercutting the universality of the protection mandate (Chamberlain, 1983: 103).

International human rights norms impose duties on states toward individuals based not on their nationality but on their humanity or personhood (Harvey, 2000: 12). Thus, the safe third country agreement is problematic both as a matter of law and as applied in practice for the following reasons. First, states are characterized as safe prior to their formal accession to the 1951 Refugee Convention and before confirmation of the protection they afford individual claimants in practice. Alternatively, it is assumed that

because a state is a party to the 1951 Refugee Convention it is a safe country. The institutional and procedural safeguards are not looked at critically to determine whether the state can provide adequate protection for all asylum seekers. Second, asylum seekers who have not significantly interrupted their search for an asylum state are regularly returned to countries through which they have transited for very brief periods, in contravention of international declarations and convention. Mere transit provides an insufficient basis for return.[116] Third, the criteria for allocating asylum seekers to states for purposes of status determination is an inhumane method for resolving issues of residence for genuine refugees and is not conducive to an efficient system-wide allocation of costs. Lastly, the safe country of asylum policy thwarts the objective of eliminating refugees "in orbit," a goal fundamental to the purposes of the 1951 Refugee Convention (Bryne and Shacknove, 1996: 199-200). In principle, an asylum seeker should be afforded a sufficient amount of time to gather herself physically and emotionally before having to present information of an often personal and traumatic nature to unfamiliar officials.

These agreements also aid in the deflection of states' responsibilities to persons in need by returning the asylum seeker to another country, which is willing to bear this

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[116] The UNHCR states:

> While the precise meaning of the term "coming directly" in Article 31 has been the subject of some debate, it has long been the practice of the great majority of states parties to the 1951 Refugee Convention and the 1967 Protocol to admit into their asylum procedures asylum seekers arriving at their borders via a third country, provided they have not significantly interrupted their journey or sought and received asylum in another country.

UNHCR Executive Committee Conclusion No. 6, (XXVIII/1977), 'Non-refoulement' Geneva: UNHCR, 1977.

burden for political or economic reasons. The effects of this deflection of responsibility are invisible to everyone but the asylum seeker who is faced with the possible return to a dangerous situation with little or no choice or alternative.

The safe third country agreement between Canada and the United States will form a similar barrier around North America as that which exists in Europe. The agreement brings with it the surety of being turned back at the Canadian-American border. The agreement has succeeded overwhelmingly with regard to the Canadian government's un-stated purpose of reducing the number of refugee claimants in Canada. Is this goal an acceptable one, when Canada already accepts so few of the world's refugees, when there are so few places where refugees can find protection and when the consequences of closing the door on refugees means that their fundamental rights may be violated? Safe third country agreements will succeed in reinforcing the non-entrée regime that started during the Cold War. Asylum seekers will be trapped in refugee camps in bordering countries where there is little hope of fulfilling the promise of the UDHR that "everyone has the right to recognition everywhere as a person before the law."

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