

Internationalist Gatekeepers?: Stereotype, victimThe Tension Between Asylum  
Advocacy and Human Rights

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Introduction

Despite the well-established status of refugee protection in today's international regime, most refugees fleeing to safety in developed states do not arrive with a ready guarantee of access to enduring human rights.<sup>1</sup> Rather, they enter as "asylum seekers" -- a temporary and increasingly disenfranchised category of non-citizen<sup>2</sup> -- who need to establish their eligibility for refugee status before they can enjoy the prospect of long-term safety and nondiscriminatory treatment. Refugee law and asylum advocacy are the tools by which the conversion from temporary migrant to permanent resident is made. Asylum advocates and adjudicators, as interpreters and enforcers of refugee law,

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<sup>1</sup> Some states, such as the United States, do administer overseas refugee programs, which award refugee status to a quota of eligible candidates prior to their entry; most states do not, and even for those that do, the numbers involved are small by comparison with those who travel without any status to seek asylum at the port of entry.

<sup>2</sup> For a dramatic example of proposed measures to curtail radically rights of asylum seekers, see Border Protection Bill, H.R. Bills Digest No. 41 (2001) [Australia].

are critical actors in this conversion. They are the operatives that enable the general guarantees of refugee protection in the international arena to percolate down to individuals fleeing persecution. And yet asylum advocacy occupies an ambiguous position within the human rights movement.

This may seem a surprising claim, for the protection of refugees, asylum-seekers, displaced persons and other forced migrants today is clearly central to contemporary human rights concerns. Media reports abound of drowned, trapped, asphyxiated refugees, in flight from some of the world's most oppressive regimes.<sup>3</sup> Images accumulate of huddled desperate masses carrying their possessions as they flee war or ethnic strife to seek safety across a border from Iraq, Kosovo, Chechnya, Afghanistan; headlines speak of young girls from refugee camps trapped by traffickers and sold for sex to highly organized networks operating transnationally;<sup>4</sup> and stories multiply of suicides, riots, and abusive conditions among detained asylum seekers in western jails.<sup>5</sup> In today's

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<sup>3</sup> Chris Brummitt, *Survivors of Sunken Refugee Boat Left Traumatized*, ASSOCIATED PRESS, Oct 23, 2001 (describing death toll of at least 350, including Iraqis, Afghans, Palestinians, Algerians from sunk boat off the coast of Indonesia).

<sup>4</sup> Frank Viviano, *Global Mob Cashes in on Human Cargo*, S.F. CHRON., Feb. 16, 1999, at A1; JOHN MORRISON, THE TRAFFICKING AND SMUGGLING OF REFUGEES: THE END GAME IN EUROPEAN ASYLUM POLICY? 65 (2000).

<sup>5</sup> A detention center for asylum seekers in Belgium was closed down in April 1994 after the European Committee for the Prevention of Torture criticized its "totally unacceptable" conditions. Jane Hughes & Ophelia Field, *Recent Trends in the Detention of Asylum Seekers in Western Europe*, in DETENTION OF ASYLUM SEEKERS IN EUROPE:

world, the experience of serious human rights violations is closely linked to the act of migration: as a push factor causing desperate masses to flee across borders, however dangerous the conditions of flight and uncertain the prospects of even minimal safety; and as a reception reality, related to the increasingly harsh conditions surrounding the quest for asylum. Indeed, as a transnational phenomenon, refugee flight involves multiple sites and diverse agents of oppression, within, across and between borders. Asylum advocates confront these transnational issues in their advocacy. They are thus compelled to operate on several fronts, at critical junctures of human rights discourse, drawing on human rights advocacy and influencing it at one and the same time.

#### I. NOT JUST “INNOCENT VICTIMS”: THE CHALLENGE OF ASYLUM ADVOCACY

In formulating claims for international protection, advocates may have to address human rights abuses in three different fora: persecution in the state of origin (the basis of the claim to asylum); rights violations in the course of migration (which may impinge on the substance of the claim); and abusive host state practices at the point of reception (which may affect procedural questions about where a claim should be lodged or whether the applicant is credible). Multiple actors and claims may be involved. Where a political persecutee with genuine identity documents flees directly from a known persecuting state of origin to the host state, the “classic” instance of asylum seeking, the international protection system that has been in place for half a century can be straightforwardly invoked to claim asylum. Today, however, it is increasingly the case that the asylum seeker’s flight is tortuous; it is likely to be indirect, facilitated by commercial intermediaries and false documents. The bona fides of

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ANALYSIS AND PERSPECTIVES 33 (Jane Hughes & Fabrice Leibaut eds., 1998). Sixty-four female asylum seekers were moved from the INS Frome Detention Center in Florida in December 2000 amid allegations that they had been sexually abused by guards. Jody A. Benjamin, *Group wants migrants out of Jail*, SUN-SENTINEL (Fort Lauderdale), June 2, 2001, at 3B.

the asylum seeker thus present a critical set of preliminary issues. Questions of identity may be problematic -- who exactly is the applicant and what is his or her nationality? Establishing which state has responsibility for considering the asylum application may also be controversial, where the applicant's flight itinerary has involved various safe "third" countries en route to the state where the asylum application is being made -- why did the applicant not present the asylum claim at the first opportunity and why should this host state assume responsibility for considering the claim?

In the process of establishing answers to these critical threshold questions, the asylum seeker's credibility may be called into question. In a climate, such as the present one, where escalating concerns about terrorism, economic recession, and state security fan heightened exclusionary and xenophobic impulses in developed states considering asylum applications, the challenge of establishing a particular host state's obligation to protect is particularly great.

Asserting the imperative of exilic protection for an alien who may have secured access to the territory by clandestine or fraudulent means requires a robust translation of international obligations into domestic protections. Asylum advocacy thus challenges the traditional, single-state focus of much human rights work and the identification of beneficiaries of human rights intervention as simply innocent domestic "victims."

#### *A. Human Rights Challenge to Asylum Advocacy*

Conversely human rights work presents challenges for asylum advocates. The field of human rights has undergone significant transformations since the mid-twentieth century, when the principle normative framework for refugee law was established. A gender-based approach to rights has transformed thinking about what count as rights violations, problematizing not only the simplistic division between public, state-induced harms and private domestically caused problems, but also the very notion of the "political."<sup>6</sup> Human rights discourse has thus been transformed to include questions related to gender-defined social mores, sexual orientation, and sexuality.

Moreover there have been fundamental changes in the approach to children's rights, environmental rights, indigenous rights, and to group rights

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<sup>6</sup> HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 136-318 (2d ed., 2000).

more generally, changes that have altered the landscape for considering the appropriate objects of human rights protective intervention and the legitimate targets for accusations of human rights abuse. State-centered approaches to rights enforcement have been supplemented by consideration of the responsibility of a wide range of other, non-state agents. The relevance of human rights concerns to questions of health, development, and globalization is increasingly acknowledged. Internal displacement has emerged as a key area of concern, dislodging the primacy of state sovereignty as a justification for nonintervention.

These developments challenge asylum advocates to refashion the foundational concepts in refugee protection while retaining the force of the original internationalist framework at a time when exilic protection of asylum seekers is under severe challenge. Asylum advocates thus have to position themselves as a distinctive species of human rights activist, operating within the defined constraints of a somewhat antiquated normative framework but in the face of fast-changing, cutting edge and compelling situations of human rights abuse and need.

### *B. Turning Distant Wrongs Into Local Rights*

This dual set of challenges, from asylum advocates to the human rights movement and vice versa, provides a framework for exploring the critical yet ambiguous position of asylum advocacy within human rights. At first glance, asylum advocates certainly have a credible role as human rights activists. They adduce particularized evidence of abuse among populations frequently neglected by mainstream politics, to trump restrictive immigration policies that lie at the heart of domestic sovereign decision making. Distant wrongs are the working tools they wield to produce local rights. They draw concrete and particularized attention to serious harms that may have no immediate relevance to domestic political concerns; they fight battles that may not polarize domestic opinion leaders, but at the same time may not interest them. Ignorance, incredulity and indifference may be as significant hurdles for the asylum advocate as disagreement or hostility. They urge governments and courts to be translators of general human rights norms into the minutiae of administrative practice.<sup>7</sup> They

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<sup>7</sup> A good example is the Australian case of *X v. Minister of Immigration & Multicultural Affairs*

test, even expose, the boundaries of domestic insularity and hypocrisy by juxtaposing internationalist public pronouncements with exclusionary and parochial bureaucratic procedures: atrocities that are condemned when carried out at a safe distance, suddenly become the subject of a test of the civility and willingness to enforce human rights obligations within the host state. At the time of this writing, asylum proceedings challenging the Australian government's exclusion of 433 Afghan refugees rescued at sea by a Norwegian freighter after fleeing universally condemned Taliban rule illustrate the point.<sup>8</sup>

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concerning two unaccompanied refugee minors from Kenya who had arrived as stowaways. (1999) 164 A.L.R. 583. Upholding their applications for a guardianship order despite the failure to appoint the requisite "tutor" to present their application, the court held: "It is hard to imagine two persons less likely to be able to find a tutor than the applicants. They have no connection with Australia." *Id.* at ¶ 46. Citing Art. 3(1) of the Convention on the Rights of the Child, the court said: "This article contemplates that in every aspect of legal proceedings concerning children there will be a consideration of the best interests of the child. It does not allow for *inflexible rules* . . . . The terms of Art 3(1) do not permit an unalterable requirement for the intervention of a tutor in proceedings brought by children to enforce their fundamental human rights". *Id.* at ¶ 48.

<sup>8</sup> The conservative Australian government, with a clear eye to the upcoming general election, took a hardline

stand, refusing to allow the asylum seekers access to Australian territory. This immediately met with near universal public approval: three days after the passengers were rescued, Melbourne's Herald Sun newspaper reported an opinion poll according to which 96 percent of those surveyed approved of the government's stand. The Sydney Morning Herald published a letter from a John Thos Brown, who wrote: "These boat people are not illegal immigrants, nor refugees, alleged or otherwise. They are pirates, hijackers and thieves." Belinda Goldsmith, REUTERS, Aug. 29, 2001. Meanwhile the rescuees sent the following letter to the Australian government: "You know well about the long time war and its tragic human consequences and you know about the genocide and massacres going on in our country and thousands of us innocent men, women and children were put in public graveyards, and we hope you understand that keeping view of above mentioned reasons we have no way but to run out of our dear homeland and to seek a peaceful asylum . . . .But your delay while we are in the worst conditions has hurt our feelings. We do not know why we have not been regarded as refugees and deprived

This powerful form of human rights intervention is based on the premise that setting one's own back yard in order and seeking to enforce the human rights obligations of the advocate's home state, however understood, is a good starting point for internationalist activism. However worthy acts of solidarity with far away victims of oppression may be, they are unlikely to have more impact than the translation of that solidarity into protection for those, in one's own country, who are fleeing that very oppression. Unprecedented global migration in the last half century has transformed domestic human rights work by massively diversifying the population present within developed states.<sup>9</sup> The importance of citizenship as a criterion of eligibility for domestic social welfare has diminished dramatically.<sup>10</sup> There is therefore much scope for intervention for a lot is at stake in the conversion from "asylum seeker" to "refugee": permanent residence, access to state benefits, the possibility of family reunion, and, eventually, eligibility for host state citizenship with its most important attribute --immunity from deportation. Moreover, as conceptions of what constitute human rights obligations change, so asylum advocates may take on the challenge of retooling their intervention. If the host state comes to recognize previously neglected harms as human rights violations -- domestic violence or

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from rights of refugees . . ." Victorian Council for Civil Liberties Inc. v. Minister for Immigration & Multicultural Affairs (2001) F.C.A. 1297, ¶ 28.

<sup>9</sup> Immigrants represent 9.8% of the US population, 8.2% of the German population, 16.3% of the Swiss population; immigration is responsible for 40% of post-World War 2 population growth in Australia; even traditionally restrictionist Japan began admitting foreign workers in the 1980s. CAROLINE B. BRETTELL AND JAMES F. HOLLIFIELD, *MIGRATION THEORY -- TALKING ACROSS DISCIPLINES* 1 (2000).

<sup>10</sup> YASEMIN SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* 124 (1994).

discrimination on the basis of sexual orientation for example -- then victims of those harms from other states can benefit even if their state of origin does not accept this classification. If developments within rights theory transform our understandings of agency and of the construction of the human subject -- the child as agent rather than victim, environmental harm as a source of persecution, economic and social rights as positive obligations on states -- then those changes can filter through to the presentation of claims. In this sense asylum advocacy internationalizes the expansive conception of rights and is a practical expression of global humanitarian concern.<sup>11</sup>

### *C. Legitimizing Gatekeeping*

Under closer scrutiny however, the role of asylum advocates as human rights activists is more problematic than this account suggests. Their position can be contrasted with that of other human rights advocate/activists. Advocates for domestic violence victims who go to court with their clients to obtain injunctions excluding violent partners from the home, or who work in women's refuges to provide a safe home for abused women and their children, do not contribute to strengthening a patriarchal system of family law, nor can it be claimed that they legitimize or perpetuate domestic violence in the broader society. Their limitations in securing rights protection are a reflection of resource inadequacy rather than ideology. The same, *mutatis mutandis*, can be said of many other groups of human rights workers -- those who work with victims of torture, or who expose human rights abuses of governments, or who represent the disabled, and the elderly. They may be resource providers and

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<sup>11</sup> For an example of this expansive conception, see the Commission of the European Communities, Draft Proposal for a Council Directive, COM(2001)510, art. 15 (describing provision of subsidiary protection beyond refugee protection for persons fleeing "serious unjustified harm on the basis of a violation of a human right . . . where there is an extraterritorial obligation to protect").

redistributers (e.g., providing aid or welfare support), they may be idea brokers for civil society (e.g., intervening in interstate treaty negotiations), they may be traditional advocates, (e.g. civil rights lawyers) — all discrete but well-established aspects of human rights interventionism. But they cannot be considered legitimizers, or essential intermediaries within the system. The position of asylum advocates is different. By participating in the filtering process which sifts out worthy from unworthy forced migrants, they contribute to legitimating the emerging global migration system, whatever their personal intentions might be.

Asylum advocates are participants in a polarized global migration regime, which promotes the ever-freer movement of the enfranchised just as it increasingly restricts access to protection or opportunity for the disenfranchised. Conflicting pressures emerging from the needs of developed states complicate this contradictory tension at the heart of contemporary migration control. Developed states need to maintain the primacy of sovereign state borders while participating in borderless global transnational regimes of power and trade; they need to facilitate business mobility and availability of both skilled and unskilled labor, while protecting domestic welfare regimes and service structures from illegitimate claimants. In addition, many developed states face compelling political pressures to promote racial homogeneity in the face of increasing diversity.<sup>12</sup> Finally, states increasingly seek to privatize and decentralize immigration control while taking credit for comprehensive control of their borders. Thus border control has been exported far beyond the physical confines of developed states, by readmission agreements with surrounding buffer states, by visa requirements, and by penalties on carriers transporting undocumented or inadequately documented travelers, in order to keep unwanted potential migrants from accessing the territories of these states.<sup>13</sup> Within this system, the institution of asylum has become a key pressure point, complicating the filtering process that is designed to separate eligible from ineligible travelers.

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<sup>12</sup> See generally, CHRISTIAN JOPPKE, *IMMIGRATION AND THE NATION STATE: THE UNITED STATES, GERMANY AND GREAT BRITAIN* (1999).

<sup>13</sup> Gallya Lahav & Virginie Guiraudon, *Comparative Perspectives on Border Control: Away from the Border and Outside the State*, in *THE WALL AROUND THE WEST: STATE BORDERS AND IMMIGRATION CONTROLS IN NORTH AMERICA AND EUROPE* 55-77 (Peter Andreas & Timothy Snyder eds., 2000).

Asylum is constructed to be a strictly limited humanitarian safety valve, permitting only a fraction of would-be migrants, the discrete class of “genuine” refugees, to trump immigration restrictions and gain access to the developed world.<sup>14</sup> Asylum is thus intended to act as a “bridge between morality and law,”<sup>15</sup> entrenching a regime of international sovereignty and solidarity within an increasingly harsh and discriminatory state-based system. “Genuine” refugees are to be sifted out from the mass of “illegal” migrants who purport to be eligible for international protection but are not, and are increasingly perceived as a danger to the security, cohesion and well being of destination states. Asylum is the process that keeps migration exclusion morally defensible while protecting the global gatekeeping operation as a whole.

This system produces benefits for a somewhat arbitrarily selected minority of forced migrants: foreign policy considerations and access to resources, most importantly high quality legal representation, make a dramatic difference to the prospects of success.<sup>16</sup> Thus whilst thousands of applicants gain refugee status or some form of subsidiary humanitarian protection,<sup>17</sup> tens of

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<sup>14</sup> MATTHEW J. GIBNEY, *THE STATE OF ASYLUM: DEMOCRATIZATION, JUDICIALIZATION AND EVOLUTION OF REFUGEE POLICY IN EUROPE* 1-20 (U.N. Refugee Agency Evaluation and Policy Analysis Unit Working Paper No. 50, 2000).

<sup>15</sup> David Held, *Laws of States, Laws of Peoples: Three Models of Sovereignty*, in *LEGAL THEORY* (forthcoming 2002) (manuscript at 19, on file with author).

<sup>16</sup> Deborah E. Anker, *Determining Asylum Claims in the United States: An Empirical Case Study*, 19 *N.Y.U. REV. L & SOC. CHANGE* 433, 454 (1992); AMNESTY INTERNATIONAL, *MOST VULNERABLE OF ALL: THE TREATMENT OF UNACCOMPANIED CHILDREN IN THE UK* (1998).

<sup>17</sup> The European Union (EU) is proposing to harmonize this two tier international protection across member

thousands live in a limbo of illegality without access to basic civic rights, or are incarcerated for years as they await a decision on their cases, and hundreds of thousands are rejected, unable to gain access to a forum where the adjudication of refugee protection can be made in the first place.<sup>18</sup> Advocates are scarce and most asylum applications end in failure.<sup>19</sup> Moreover, apart from a relatively small number of precedent setting appeals, most cases lack impact beyond the applicant in the case; even the extensive efforts of asylum advocates only benefit a tiny number of the world's refugees. But, in the process of participating, they accord a critical legitimacy to the filtering system.

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states. See Commission of the European Communities, Proposal for a Council Directive, COM(2001) 510.

<sup>18</sup> According to the U.N. High Commissioner for Refugees, during the year 2000, a total of 983,679 individual asylum applications were made, but only 191,710 or 19.9% were granted refugee status; at the end of the year there were 896,557 asylum applications pending. U.N. HIGH COMM'R OF REFUGEES, PROVISIONAL STATISTICS ON REFUGEES AND OTHERS OF CONCERN TO UNHCR FOR THE YEAR 2000 21 (2001).

<sup>19</sup> Recognition rates for refugee status vary considerably from country to country, though in developed states they are always under 50%; according to UNHCR statistics for 2000, Sweden had a recognition rate of 2.1%, the UK of 9.3%, Germany of 10.8%, Australia of 17.3%, the US of 21.4% and Canada of 48.6%. See Id.

*D. "The Worse the Better"*

It is not just this legitimating role that renders asylum advocacy problematic. It is also the pressure to generate simplistic,<sup>20</sup> even derogatory characterizations of asylum seekers' countries of origin, as areas of barbarism or lack of civility in order to present a clear-cut picture of persecution.<sup>21</sup> The

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<sup>20</sup> For example, the brief prepared by a US asylum advocate on behalf of a Guatemalan street child alleging gang persecution, contained the following: "Since Alex was so young, uneducated and unkempt, no one in the capital would give him a job. So, Alex had to fall in with a group of about fifteen other abandoned street children living in the Zone 1, or the old city center, of Guatemala. Alex and these children together begged for money to buy food. These children told Alex of the dangers of trying to steal: if caught, the police or guards would lock you away or possibly simply kill you. Alex heard of bodies of children appearing mutilated on the outskirts of the capital. Alex also learned that the police would fine a street child for no reason and throw them in prison." Brief and documents in Support of Application for Asylum and Withholding of Removal, (on file with author).

<sup>21</sup> For example, a recent UK House of Lords case cited

central guiding principle of this pressure might be described as “the worse the better” -- the more oppressive the home state, the greater the chances of gaining asylum in the host state. While understandable as a pragmatic strategy to maximize the chances of a successful outcome, this approach easily turns into stereotypy, even cultural arrogance. It denies the political complexities in the state of origin, where oppositional forces may mount challenges to the oppressive behaviors cited. Moreover it is reductive: differing conceptions of gender, religious or age-based roles and rights within the state, and the culture or religion of the asylum seeker may be homogenized into a uniform picture -- a stereotype may come to stand in for the variety of possible forms of oppression.

Hard-pressed, relatively uninformed immigration and asylum decision-makers may readily consume this shorthand -- after all it is impossible to be an expert on sociopolitical developments worldwide. But this strategy is not cost-free -- it legitimizes and perpetuates simplistic stereotypes under challenge in many of the countries from which asylum seekers flee. It may also narrow the scope for advancing asylum claims on behalf of claimants who do not fit the prevailing stereotype. Thus, if women from a particular region are categorized as submissive, voiceless victims, then a woman who flees persecution on the basis of her political activism, or her association with or support for political opponents of the regime, will face the additional hurdle of persuading the decision-maker that her political opinions, as a woman in that country, are taken sufficiently seriously to count as a threat. If children are portrayed merely as defenseless victims, with no say in their life choices, then an entrepreneurial child who has organized his or her own flight may have difficulty fitting into the

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the following fact summary from the decision of the lower court: “She cannot return to her husband. She cannot live anywhere in Pakistan without male protection. She cannot seek assistance from the authorities because *in Pakistan society women are not believed or they are treated with contempt by the police*. If she returns she will be abused and possibly killed.” Regina v. Immigration Appeal Tribunal and Another, ex parte Shah, [1999] 2 All E.R. 545 (H.L.).

“child” category. Women and children whose persecution was based on these activist modes of behavior have indeed encountered such difficulties.<sup>22</sup>

Moreover for the asylum advocate there is a clear benefit to be derived from juxtaposing the social and legal systems of the states of origin and the host state to emphasize the inadequacies of the former and the protective capabilities of the latter, since demonstration of the need for surrogate state protection is critical to a successful asylum claim.<sup>23</sup> But inevitably there is some simplification on both sides of this contrast. The situation in the state of origin may be presented schematically and in overbroad brush strokes to drive home the claim of persecution. At the same time the difference between state protective capacities abroad and domestically may be exaggerated. What of domestic violence rates, or racially based violence and segregation in the US or Britain or Germany? Is what “they” do persecution and what we do merely discrimination?<sup>24</sup> How effective are our courts in addressing these problems?

It can be countered that from the point of view of the asylum seeker this is of little relevance since the critical problem is the absence of state protection in the state of origin. If the goal is gaining asylum, nuanced social analysis of the home or host country is unnecessary. The law itself demands recognizable categories into which each case must fit, so simplification and stereotypy are necessary strategies. After all, presenting an asylum case is not the same as writing an anthropological or sociological tract. But in terms of a human rights strategy within an internationalist movement, this reductive and stereotypical portrayal of non-western forms of oppression is problematic and shortsighted. It exploits the relative ignorance among western decision-makers of the context in which “distant wrongs” arise, to promote what may end up being short-lived

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<sup>22</sup> JACQUELINE BHABHA & SUE SHUTTER, *WORLDS APART: WOMEN UNDER IMMIGRATION, NATIONALITY AND REFUGEE LAW* 246 – 48 (1994);

Jacqueline Bhabha, *Inconsistent State Intervention and Separated Child Asylum-Seekers*, 3 *EUR. J. MIGRATION & L.* 283-314 (2001).

<sup>23</sup> See e.g., *Matter of A and Z*, No. A72-190-893, A72-793-219 (EOIR, Dec. 20, 1994).

<sup>24</sup> Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 *HUM. RTS. Q.* 213, 265 (1995).

access to “local rights.”

Asylum advocates’ simplifying tendency may also be a consequence of their own inadequate information about the specifics of the case at hand, both in relation to acknowledged types of persecution and in relation to emerging areas. Data on the impact of China’s “one child policy” in rural areas across the country, for example, may not be readily available; the mandatory nature or effect of female circumcision in particular African communities may be contested; the risk of persecution facing Christians in India, Kurds in Turkey, homosexuals in Brazil, may all be matters of factual and interpretative controversy. Human rights reports produced by governments and non-governmental organizations may lack sufficient detail to ground the claim at hand; they may not reflect very recent political developments and they may not address the particular region that the asylum seeker has fled. Even expert witnesses may be willing to comment on the general circumstances surrounding the asylum application but may be unable to assess the likelihood of persecution in a given case. These informational deficits may be even more striking in emerging areas of human rights work. The discriminatory impact on indigenous or minority communities of economic, transport or environmental policies (relating to water, oil, access to employment opportunities) may be hard to document and difficult to incorporate into claims of persecution.<sup>25</sup>

#### *E. Human Rights Imperialism?*

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<sup>25</sup> A UN-sponsored report written in 1988 claimed that environmental decline was not recognized as a legitimate cause of refugee movements by most governments despite the fact that “the number of environmental refugees--estimated by the author to be at least 10 million--rivals that of officially recognized refugees and is sure to overtake this latter group in the decades to come.” JODI L. JACOBSON, ENVIRONMENTAL REFUGEES: A YARDSTICK OF HABITABILITY 6 (Worldwatch Paper No. 86, 1988).

But the tendency to adopt overly general or stereotypic portrayals is not simply a product of pragmatic strategizing or relative ignorance; it is also a reflection of a problematic yet well-established if somewhat self-righteous human rights approach, which constructs and reifies an oppressive “culture” or ethnic group or religious identity to vent outrage against,<sup>26</sup> and to juxtapose against absolutist, universal norms -- rights -- that are presented as existing independently of any cultural trappings. As Mahmood Mamdani comments: “Part of the self-righteousness and intolerance of the rights movement is its tendency to dismiss every local cultural assertion as masking a defence of privilege and inequality at the expense of the individual right of the disadvantaged in the same society.”<sup>27</sup> This approach is clearly demonstrated by cases where the asylum application is framed in terms of a “them” and “us” cultural dichotomy. It is not uncommon for international human rights norms to be introduced into the reasoning of individual asylum decisions as exemplars of “western” civilizational superiority, juxtaposed against oppressive “cultural” practices of one sort or another.<sup>28</sup> Often the “other” culture is essentialized and homogenized, so that a unitary ideology is presented as representative of a broad spectrum of opinion and belief.

This strategy has produced contrasting outcomes. In some cases, the civilizational contrast has been used by asylum adjudicators to justify an extreme, abstentionist cultural relativism -- what some might term cultural relativism as a human rights violation in and of itself.<sup>29</sup> A good example is a

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<sup>26</sup> I am grateful to Kay Warren for this insight.

<sup>27</sup> Mahmood Mamdani, *Introduction*, in *BEYOND RIGHTS TALK AND CULTURE TALK 3* (Mahmood Mamdani, ed., 2000).

<sup>28</sup> Jacqueline Bhabha, *Embodied Rights: Gender Persecution, State Sovereignty and Refugees*, 9 *PUB. CULT.*, 3, 3-32 (1996).

<sup>29</sup> For an eloquent exposition of this point of view see Maryam Namazie, Exec. Director, International Federation of Iranian Refugees, Address at Panel on Racism, Cultural Relativism and Women’s Rights organized by Action Committee on Women’s Rights in

1987 British case, concerning a westernized middle-class Iranian woman fleeing the Islamic revolution that overthrew the Shah of Iran. The woman testified that the regime's revolutionary guards had threatened her with imprisonment for not wearing a veil and clothing that covered her whole body. Rejecting her asylum application, the adjudicator stated: "[it is] a matter of common knowledge that women of the Islamic faith are regarded to coin a phrase as second class citizens . . . . Further . . . the regime in Iran is regarded with abhorrence in the West and has been roundly condemned by the United Nations . . . . I fully accept . . . women in particular in many instances have suffered horrendous treatment . . . . However this is something that applies to all women in Iran . . . it is clear that a very large number of women in Iran do not agree with the emancipation of women. It seems to me one is on dangerous ground if you attempt to interfere with a person's customs or religious beliefs and on even more dangerous ground if you do so on a national or world wide scale."<sup>30</sup> The reductive, binary opposition between "the West" and the rest (Iran in this instance) was used to justify absolute deference to state sovereignty. More recently, however, the identification of international human rights norms as specifically "western" has led to the opposite outcome. The universalizability of western rights is the justification for using them to trump alien, oppressive behaviors.<sup>31</sup> For example, a Jordanian woman fleeing domestic violence

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Iran and Amnesty International's Women's Action Network (August 14, 2001).

<sup>30</sup> Gilani v. Secretary of State for the Home Department [1987] No. TH/9515/85(5216) Immigration Appeal Tribunal (UK) (on file with author).

<sup>31</sup> Rosalyn Higgins advances a forceful defense of this unselfconscious universalism: "It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world. In my view this is a point advanced mostly by states, and by liberal scholars . . . . It is

established a well-founded fear of persecution based on having “continued to express her belief in Western values through her actions” and “[having] challenged the society and government of Jordan.”<sup>32</sup> Several female circumcision cases have also been presented in this way.<sup>33</sup> The advocate’s strategy here is to increase the applicant’s chances of success by getting the adjudicator’s support for this dichotomized portrayal. In the process though, the advocate’s role may be compromised. Far from challenging discriminatory, often explicitly racist stereotypes, he or she may be trading in them, a spokesperson for “western enlightenment”, to better advocate for the client.<sup>34</sup>

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rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards . . . . I believe that there is nothing in these aspirations that is dependent upon culture, or religion or state of development. They are as keenly felt by the African tribesman as by the European city-dweller . . . .” ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 96-96 (1994).

<sup>32</sup> Matter of A and Z, No. A72-190-893, A72-793-219 (EOIR, Dec. 20, 1994).

<sup>33</sup> Bhabha, *supra* note 28.

<sup>34</sup> A recent campaign by the UK government to “eliminate” forced marriages also deploys this dichotomous approach. Describing the need to confront cultural beliefs that were unacceptable in Western societies, Patricia Hewitt, Minister for Women, said it was time to go “beyond multiculturalism” for a debate on essential British values including “good

Changing boundaries for asylum advocacy do not dispel this trading in stereotypes. As new categories of human rights recipients are constructed, as human rights standards are invoked to assess the behavior of an expanding range of social agents, so new categories of potential asylum applicant have been developed.

## II. TWO OVERLAPPING SYSTEMS

It is not surprising that asylum advocacy is so intricately connected with discursive strategies from the human rights field. From the outset the refugee and human rights regimes have developed as overlapping, if discrete systems. When the main international refugee protection instrument, the 1951 Convention on the Status of Refugees, was drafted, today's plethora of international human rights treaties did not exist; the only comprehensive instrument available was the Universal Declaration of Human Rights, a nonbinding aspirational document. The Declaration is explicitly enumerated in the very first preamble to the Refugee Convention.<sup>35</sup> Despite this, the Refugee Convention goes beyond a recitation of concerns that only affect refugees, such as the threat of refoulement

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old-fashioned tolerance" and a basic belief that men and women are equal". Kamal Ahmed et al., *Ministers Plan to end Forced Marriages*, OBSERVER (U.K.), Nov. 4, 2001, at 15.

<sup>35</sup> "Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination." Convention Relating to the Status of Refugees, *opened for signature*, July 28, 1951, Preamble, 189 U.N.T.S. 137.

or the need for travel documents, to include certain general rights that are enumerated in the Universal Declaration. These include the right to freedom of movement, to education and to nondiscriminatory access to social assistance and employment.<sup>36</sup> Since the protection of these more general rights in the Universal Declaration is not nationality based, and therefore no less available to refugees than to other potential beneficiaries, it is not clear why the drafters of the Refugee Convention felt it necessary to enumerate them specifically. Perhaps their inclusion was thought to increase their salience and therefore enforceability for refugees, given the nonbinding status of the Universal Declaration. In any event, it appears that refugee law and human rights law intersected from the outset. Gradually, binding human rights conventions have developed to encompass and exceed many of the protections that only the refugee regime afforded refugees originally.<sup>37</sup> Moreover, a plethora of specialized human rights instruments and judgments have further expanded the scope of human rights protections into domains not covered at the time of the Refugee Convention's drafting. How do these new frontiers of human rights legal activism relate to refugee protection and what role do asylum advocates play in bridging these two distinct regimes?

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<sup>36</sup> Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217 (A) (III), arts. 26, 22, 24 & 27, U.N. Doc. A/810 (1948).

<sup>37</sup> *See, e.g.*, International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 3 (entered into force January 3, 1976).

From the outset, the refugee protection regime was intended to be restrictive and partial, a compromise between unfettered state sovereignty over the admission of aliens, and an open door for non-citizen victims of serious human rights violations.<sup>38</sup> It was always clear that only a subset of forced transnational migrant persecutees were intended beneficiaries.<sup>39</sup> The 1951 Convention defines a refugee as a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country.”<sup>40</sup> This definition clearly excludes those forced to flee because of personal vendettas and private feuds, non-discriminatory economic duress, famine or internal civil turmoil -- in short, those whose persecution is not based on some form of egregious systemic discrimination or rights violation.

#### A. *Defining the Refugee Convention's Parameters*

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<sup>38</sup> Andrew E. Shacknove, *Who is a Refugee?*, 95 ETHICS 274, 276 (1985).

<sup>39</sup> David A. Martin, *The Refugee Concept: On Definitions, Politics and the Careful Use of a Scarce Resource*, in REFUGEE POLICY: CANADA AND THE UNITED STATES 30-51 (Howard Adelman ed., 1991).

<sup>40</sup> Convention Relating to the Status of Refugees, opened for signature July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 150. In fact, the Convention narrows the scope of protection further to those, within the above definition, who have not committed war crimes or crimes against humanity. See *id.* arts. 1(A) - (F) for the full definition.

Identifying precisely what the parameters of the definition's protective mantle are has been more problematic. Two sets of problems have particularly occupied advocates and scholars. First, the Convention definition leaves open for interpretation the central question of which reasons for persecution bring an applicant within the refugee definition -- how are the five broad grounds set out in the definition to be construed, and what interpretative frameworks can be drawn on? Three of the grounds of persecution -- race, religion and nationality -- have not presented significant challenges, since they are readily identifiable. But establishing acceptable definitional boundaries has been at issue in relation to the other two enumerated grounds.<sup>41</sup> What types of opinion count as political (neutrality? pacifism? opinions imputed by the persecutor but which the persecutee may not hold)? How should one construe the broad, open-ended, amorphous category of "particular social group" (is a sense of group belonging essential? do broad demographic characteristics such as gender or age qualify? do characteristics that are chosen rather than innate or immutable qualify)? As pressure to expand the scope of refugee protection has increased, so the impetus to broaden the scope of these terms has grown.

Second, the term "persecution," while central to modern refugee protection, indeed "the exclusive benchmark for international refugee status",<sup>42</sup> is not a well-circumscribed legal concept. It is not defined in the Convention, but was imported from the preceding international refugee regime as a familiar term and a useful western tool, flexible enough to cover the circumstances of both victims of Nazism, and Soviet and other eastern dissidents fleeing a polarized Cold War. But the advantage of this somewhat elusive standard was less apparent in a changed era, when foreign policy considerations no longer dominated the selection of worthy recipients of refugee protection to the same extent as in the past.

### *B. Human Rights as a Benchmark*

The malleability of the term "persecution", and its lack of relationship to other known legal entities in international instruments, such as "torture," "cruel,

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<sup>41</sup> KAREN MUSALO ET. AL., *REFUGEE LAW AND POLICY: CASES AND MATERIALS* 353-456; 549-598 (1997).

<sup>42</sup> JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 99 (1991).

inhuman or degrading treatment or punishment,” was problematic.<sup>43</sup> A forceful case for anchoring the definition of “persecution” in the evolving human rights regime was made by James Hathaway in the early 1990s. He argued that the concept of persecution, needed to be reconceived to save the Refugee Convention from becoming “a mere anachronism”<sup>44</sup> and that it should be defined as “the sustained or systemic violation of basic human rights” demonstrative of a failure of state protection.”<sup>45</sup> This suggestion proved influential: advocates, judges, even governments, seized on it and it has now become an orthodoxy within refugee jurisprudence.<sup>46</sup>

The availability of international human rights norms as an external benchmark to establish the presence or absence of one of the grounds for, and to identify, “persecution” has been critically important.<sup>47</sup> In the process of using these norms, however, advocates and decision-makers have had to navigate the

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 104.

<sup>45</sup> *Id.* at 104-05.

<sup>46</sup> See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 51-66 (1996); MUSALO ET AL., *supra* note 41; Commission of the European Communities, Proposal for Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, COM(2001) 510; T. Alexander Aleinikoff, *Membership in a Particular Social Group: Analysis and Proposed Conclusions* (2001)(unpublished manuscript, on file with author).

<sup>47</sup> HATHAWAY, *supra* note 42; Krista Daley & Ninette Kelley, *Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence*, 12(2) INT’L J. REFUGEE L. 148, 151 (2000).

delicate path between the Scilla of human rights enforcement and the Charybdis of what one might polemically call human rights imperialism.

A critical issue has been the tension between refugee protection and deference to state sovereignty; in particular, the extent to which a law “of general application”, which is applied non-discriminatorily to the population as a whole, can be held to be persecutory.<sup>48</sup> Is it illegitimate interference or imperialistic arrogance to classify as persecutory a law that a state adopts, without discriminatory intent, in order to achieve an apparently legitimate goal? This question has arisen in relation to China’s coercive population policy, captured by the “one child” rule, which has formed the basis of numerous asylum claims.<sup>49</sup> Some decision makers have justified their refusal to grant refugee status to applicants fleeing coercive birth control programs in terms of a respect for China’s sovereignty; others have justified their grant of refugee status in terms of the absolute nature of fundamental human rights norms as a guide to permissible state behavior. Both arguments featured in a Canadian case concerning two applicants, a mother and a young daughter, fleeing forcible attempts at birth control imposed by the Chinese government.<sup>50</sup> The case first came before the Refugee Appeals Board, which dismissed the applications, privileging respect for Chinese state sovereignty over respect for the human rights of individual Chinese citizens. The Board held that the evidence indicated “simply a desperate desire [on the part of the Chinese authorities] to come to terms with the situation that poses a major threat to its modernization plans. It is not a policy born out of caprice, but out of economic logic. The possibility of coercion in the implementation of the policy is not sufficient to make it one of persecution. *I do not feel it is my purpose to tell the Chinese government how to run its economic affairs.*”<sup>51</sup> The higher, appellate court took the opposite approach -- reversing the board’s decision, they argued, “Under certain

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<sup>48</sup> Reed Boland, *Civil and Political Rights and the Right to Nondiscrimination: Population Policies, Human Rights, and Legal Change*, 44 AMER. U. L. REV. 1257, 1270 (1995).

<sup>49</sup> Bhabha, *supra* note 28, at 20-26.

<sup>50</sup> Cheung v. Canada (Minister of Employment & Immigration) [1993] 102 D.L.R. 4<sup>th</sup> 214.

<sup>51</sup> *Id.*

circumstances, the operation of a law of general application can constitute persecution . . . . *Brutality in furtherance of a legitimate end is still brutality.*<sup>52</sup> A recognition that involuntary sterilization and coerced abortion constitute basic human rights violations<sup>53</sup> was used by the court to trump the argument that China had a sovereign right to decide how to manage its escalating population crisis. The human rights standard provided a useful “objective” or external measure for justifying a politically interventionist decision.

### III. EXPANDING THE SCOPE OF ASYLUM – THE HUMAN ASPECT OF GLOBAL FORCED MIGRATION

It is not only in interpreting the refugee definition that the human rights framework has played a central role. An expansive conception of human rights has also been the backdrop for the changing interpretation of forced migration as a whole in the context of post-cold war globalization. One might say, reversing the well-known feminist aphorism, that the political has become personal -- the human impact of seemingly impersonal, geopolitical or societal strategies is no longer on the interpretative margins, of relevance only to psychologists or social workers. Rather human rights norms are increasingly used as consensus tools

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<sup>52</sup> *Cheung*, 102 D.L.R. at 214 (emphasis added). For a contrasting approach, see *Matter of G--*, Interim Decision 3215 (BIA 1993).

<sup>53</sup> See Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1978), art. 3 (right to life, liberty and security of the person) and art. 5 (freedom from torture, cruel and inhuman or degrading treatment); see also *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to bear children is “one of the basic civil rights of man”).

for comprehensive accountability,<sup>54</sup> a new architecture with which to analyze and develop broad programmatic social goals. The UN's human development index<sup>55</sup> and the European Union's adoption of the "scoreboard" criteria for evaluating post-Amsterdam treaty developments<sup>56</sup> are examples of this increasingly popular strategy. In this process, the simple dichotomy of civil and political rights versus economic, social and cultural rights is rendered obsolete, an anachronism at best. Questions of due process, non-discrimination, and freedom from torture intersect with concerns regarding access to basic services; health, housing and education rights; and linguistic, sexual and religious freedoms.

This indivisibility of rights, long recognized in theory but only recently acknowledged in the practical application of human rights standards to assessments of social developments, impinges on asylum advocates directly. It opens the avenue of asylum to an expanded cast of players since the consequence of large global forces are now being scrutinized for their human rights impact.<sup>57</sup> Indeed this changing perception of the relation between economic development and rights access or protection can affect the conceptualization of persecution itself and thus directly change advocacy strategies.

Discriminatory state policies that result in food insecurity, disproportionate HIV/AIDS infection, water deprivation, oil pollution, land flooding for particular populations or sub-sections of the population, might all

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<sup>54</sup> AMARTYA SEN, DEVELOPMENT AS FREEDOM 280-281 (1999).

<sup>55</sup> UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT (1999).

<sup>56</sup> See THE DIRECTORATE ON JUSTICE AND HOME AFFAIRS "BIANNUAL UPDATE OF THE SCOREBOARD TO REVIEW PROGRESS ON THE CREATION OF AN AREA OF "FREEDOM, SECURITY AND JUSTICE" IN THE EUROPEAN UNION, the most recent one of which COM(2001)278. An earlier report is COM(2000)782.

<sup>57</sup> UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *The Changing Dynamics of Displacement, in THE STATE OF THE WORLD'S REFUGEES: FIFTY YEARS OF HUMANITARIAN ACTION* 275-287 (2000).

count as persecution, though this approach has yet to be developed. It would be an extension of the arguments successfully used already, in an earlier expansionist phase of asylum advocacy during the 1990s,<sup>58</sup> to establish that forcible sterilization or mandatory veiling might count as persecution. New strategies for protective advocacy thus present the challenge of distilling claims that can benefit individual claimants from massive group problems. But such an expansion of the basis for asylum claims, into the protection of economic, social, or positive rights feeds directly into the tension between the asylum advocate's internationalist and gatekeeping roles. It highlights the fundamentally problematic distinction between "genuine" and "economic" refugees, linking discriminatory policies that undermine communities' economic survival possibilities to the concept of persecution directly. Though economic desperation itself cannot be a basis for claiming asylum (or indeed, in the absence of evidence of willful neglect or discrimination, for claiming that the country of origin, as opposed to the international community, is violating any human right), its causal link to particular policies may well provide the foundation for such a claim. Work by environmental and indigenous rights activists can be used to substantiate this expansion of the scope of asylum advocacy.<sup>59</sup> In an era of polarized economic globalization, where dictatorship and destitution go hand in hand, it will be increasingly important that the asylum advocate establish that economic desperation and refugee status are not mutually exclusive.<sup>60</sup>

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<sup>58</sup> MUSALO ET AL., *supra* note 41, at 600-601.

<sup>59</sup> Suzette Brooks Masters, *Environmentally Induced Migration: Beyond a Culture of Reaction*, 14 GEO. IMM. L. J. 855 (2000); RICHARD BLACK, *REFUGEES, ENVIRONMENT, AND DEVELOPMENT* (1998).

<sup>60</sup> The deliberate imposition of substantial economic detriment for one of the five convention grounds has long been recognized as a possible basis for claiming asylum. MUSALO ET AL., *supra* note 41, at 235-245. What is new is the acknowledgement that economic destitution can precipitate vulnerability and social

The problematic gatekeeping role of asylum advocacy, straddling the impact of economic globalization on forced migration and developments in human rights discourse, is well illustrated by a relatively novel areas of asylum work -- smuggling and trafficking as central aspects of the quest for asylum today. Ten, even five years ago, this area of work did not impinge noticeably on asylum advocacy; today it is of critical importance. It highlights the rapidly changing and intersecting boundaries of human rights and asylum practice.

A. *The Trade in Desperation: Smuggling and Trafficking of Asylum Seekers and the Challenge for Advocacy*

Nowhere is the complex link between economic desperation and refugee status more evident than in the area of human smuggling and human trafficking<sup>61</sup> --two forms of illegal and commercially

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ostracism that leads to persecution, see, e.g., James Pinkerton, *Judge Grants Orphan Twins Asylum After Hearing About Abuse by Family*, HOUSTON CHRON., Feb. 9, 2000, at A15 (discussing the effect of economic destitution on street children); Y.C.K. (re) [1997] C.R.D.D. No. 261, V95-02904 (Nov. 26, 1997)(considering the effect of economic deprivation on women inducted into forced prostitution).

<sup>61</sup> The distinction between smuggling and trafficking is not clear-cut. Traditionally, "smuggling" has been used to identify consensual arrangements between the migrant and the travel agent, where--in exchange for a fee--the agent assists the migrant to cross an international border illegally. Trafficking has been

used to refer to coercive and exploitative arrangements, where the migrant is forced or tricked into travel in order to be exploited by the agent. For definitions which reflect this distinction and which have recently received widespread support, see Protocol against the Smuggling of Migrants by Land, Air and Sea supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 25, U.N. GAOR, 55th Sess., Supp. No. 49, Annex III, art. 3, U.N. Doc. A/RES/55/25 (2000) [hereinafter Smuggling Protocol]; and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 25, U.N. GAOR, 55th Sess., Supp. No. 49, Annex II, art. 3, U.N. Doc. A/RES/55/25 (2000) [hereinafter Trafficking Protocol]. Given the difficulty of distinguishing between coercion and consensus in such situations, however, and the unscientific nature of the term "exploitation," it may be more satisfactory to use the presence (trafficking) or absence (smuggling) of an enduring exploitative relationship after the travel is completed as the distinguishing

assisted entry used by those fleeing persecution to reach a place of safety in the face of migration control measures.<sup>62</sup> Asylum seekers are increasingly compelled to resort to the use of smugglers, counterfeit documents, subterfuge and clandestine behavior to circumvent mandatory visa requirements, carrier sanction policies that turn airline staff into immigration control agents, and other forms of immigration control. These controls, some state run and some privatized, operate both at the border and far beyond the immediate frontier zones.<sup>63</sup> Circumvention is thus increasingly a professional art, not something that can be left to ingenuity or good luck.<sup>64</sup> The exorbitant sums of money paid

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criterion. By this test, apparently consensual arrangements that involve bonded labor agreements that last for years after the travel to repay transportation debts would count as trafficking not smuggling.

<sup>62</sup> MORRISON, *supra* note 4, at 24.

<sup>63</sup> Gallya Lahav & Virginie Guiraudon, *Comparative Perspectives on Border Control: Away from the Border and Outside the State*, in *THE WALL AROUND THE WEST: STATE BORDERS AND IMMIGRATION CONTROLS IN NORTH AMERICA AND EUROPE* 55 - 77 (Peter Andreas & Timothy Snyder eds., 2000).

<sup>64</sup> For an illustration of how these pressures impact on women in particular, see *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, U.N. ESCOR, 56<sup>th</sup> Sess.,*

for cross border smuggling services and the life-threatening risks taken are testament to the efficacy of states' border controls not, as is sometimes claimed, to their increasing irrelevance. Some asylum seekers, caught in dangerous situations or devastated refugee camps, are coerced or tricked into leaving their dire living circumstances by traffickers only to encounter far worse abroad -- the fear of persecution in the home country thus compounded by risks arising directly out of the trafficking situation.<sup>65</sup>

With legal access increasingly barred, illegality, in differing guises, is the strategy of last resort for those desperate to flee.<sup>66</sup> Procedures for limiting

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Agenda 12(a), para. 83, U.N. Doc. E/CN.4/2000/68  
(2000).

<sup>65</sup> MORRISON, *supra* note 4, at 24; Jonas Widgren, *Multi-lateral Co-operation to Combat Trafficking in Migrants and the Role of International Organizations*, Eleventh IOM Seminar on Migration (1994), *cited in* Patrick Twomey, *Europe's Other Market: Trafficking in People*, 2 EUROPEAN J. MIGRATION & L. 1, 1-36 (2000).

<sup>66</sup> The International Organization for Migration estimates that up to 4 million people are trafficked every year. Pino Arlacchi, Under Secretary-General and Executive Director U.N. Office for Drug Control and Crime Prevention, Briefing to the U.N. Missions in New York City (Feb. 17, 1999). According to the U.S. government sources, approximately 50,000 women and children are trafficked into the United States annually. Press Release, U.S. Department of Justice, Departments of Justice and State Issue Human

unwanted migration are not confined to the erection of obstacles to access; at the border or inside the territory, asylum seekers are progressively criminalized, subjected to adversarial interrogations and incarcerated for extensive periods in harsh conditions.<sup>67</sup> It is not surprising then, that “illegal immigrant”, “unemployed alien”, and even “terrorist”, “hijacker”, “criminal”, are frequently used as synonyms for “asylum seekers” or “refugees,”<sup>68</sup> particularly in the wake of the September 11, 2001 events in the United States.<sup>69</sup> Instead of providing

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Trafficking Regulations and Guidelines for Prosecutors and Investigators (July 18, 2001) available at <http://www.usdoj.gov/opa/pr/2001/July/331ag.htm> (last visited Feb. 22, 2002).

<sup>67</sup> DETENTION OF ASYLUM SEEKERS IN EUROPE: ANALYSIS AND PERSPECTIVES 5-43 (Jane Hughes & Fabrice Liebaut eds. 1998).

<sup>68</sup> An Australian national paper, describing the Afghan asylum seekers prevented from making asylum applications in Australia, complained that Australia had become “a magnet for asylum-seekers, drug smugglers and gun-runners.” Andrea Hopkinds, *Fortress Australia resists Immigration Push*, REUTERS, Aug. 28, 2001.

<sup>69</sup> DeNeen L. Brown & Ceci Connolly, *Suspects Entered Easily from Canada; Authorities Scrutinize Border Posts in Maine*, WASH. POST, Sept. 14, 2001; Mark Clayton & Gail Russe Chaddock, *Terrorists Aided by a leaky U.S.-Canada Line*, CHRISTIAN SCI. MONITOR, Sept. 19,

protection for trafficked victims subjected to severe human rights abuses, states have tended to deport them as illegal migrants, without investigating possible claims to asylum.<sup>70</sup> Smuggled asylum seekers have also been penalized as illegals, and subjected to expedited removal procedures or long periods of detention.<sup>71</sup> It has been up to asylum advocates to try and challenge the blurring of categories between asylum seeker and criminal and to operationalize the migration filter in a manner that draws in the human rights protections. To dispel the presumption of economically driven illegal immigration that arises

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<sup>70</sup> MORRISON, *supra* note 4, at 78; see *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44*, U.N. ESCOR, 56<sup>th</sup> Sess., Agenda 12(a), paras. 37-46, U.N. Doc. E/CN.4/2000/68 (2000).

<sup>71</sup> Informal Note by United Nations High Commissioner for Human Rights to Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized crime, U.N. GAOR, 4<sup>th</sup> Session, para. 17, U.N. Doc. A/AC.254/16 (1999); *Report of the working group of intergovernmental experts on the human rights of migrants, submitted in accordance with Commission on Human Rights Resolution 1998/16*, U.N. ESCOR, 54<sup>th</sup> Sess., paras. 115 - 22, U.N. Doc. E/CN.4/1999/80 (1998).

because of the commercialized nature of the transport, and to successfully substitute protection for penalization,<sup>72</sup> asylum advocates have to contextualize “illegal” migration within a broader socio-economic framework that includes questions of labor, economics, and health policy.

Some support for this contextualizing approach can be derived from recent domestic and international developments. This is not to deny that the prime emphasis has been on improving detection and criminal enforcement. Individual states have introduced stiff criminal sanctions against traffickers and smugglers;<sup>73</sup> states have also collaborated to institute transnational measures that facilitate collaboration to apprehend traffickers.<sup>74</sup> But there has also been growing attention to the human rights violations inflicted on victims of these practices. The United Nations recently addressed the relationship between commercially facilitated migration and rights protection questions under the rubric of the Transnational Organized Crime Convention of 2000.<sup>75</sup> Two

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<sup>72</sup> For an example of a Canadian case where a trafficked person was granted asylum, see *Y.C.K. (re)* [1997] C.R.D.D. No. 261, V95-02904 (Nov. 26, 1997).

<sup>73</sup> See CARMEN GALIANA, EUROPEAN PARLIAMENT DIRECTORATE GENERAL FOR RESEARCH, WORKING PAPER ON TRAFFICKING IN WOMEN 43 (2000), Pub. L. No. 106- 386, §102(b)(1), 114 Stat. 1464 (2000) codified as amended in scattered sections of 8, 12, 22 U.S.C.A.(2000)).

<sup>74</sup> The Commission of the European Communities issued a Proposal for a Council Framework Decision on Combating Trafficking in Human Beings on Dec. 21, COM(2000)854 final [hereinafter Framework Decision].

<sup>75</sup> Transnational Organized Crime Convention of 2000, G.A. Res. 25, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/RES/55/25 (2000).

protocols to the Convention, one on Trafficking<sup>76</sup> and the other on Smuggling,<sup>77</sup> address the human rights of victims of these practices as a central issue,<sup>78</sup> highlighting the need for protection rather than punishment.<sup>79</sup> This is an

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<sup>76</sup> See Trafficking Protocol, *supra* note 61 (requiring state parties to consider implementing measures to provide not only for the physical, psychological and social recovery of trafficked persons, but also to work with nongovernmental organizations to provide housing, counseling, medical, and educational assistance).

<sup>77</sup> See Smuggling Protocol, *supra* note 61

(acknowledging explicitly the complex socio-economic conditions that contribute to forced migration)

Article 5 calls for a range of measures to preserve and protect the rights of smuggled migrants, including the exclusion of criminal sanctions against them.

<sup>78</sup> As of October 9, 2001, only 3 of the 91 countries having signed the protocols have ratified them. Thus the protocols are not presently binding on state parties and will not be for some time. Trafficking Protocol and Smuggling Protocol, *supra* note 61.

<sup>79</sup> European Union developments in relation to trafficking go still further than the provisions set down in the UN Convention, by explicitly introducing human rights standards into the definition of

important step in the right direction. However, protective concerns have emphasized the need for states to provide welfare and counseling support to victims "while they are within [their territories]".<sup>80</sup> There is scant acknowledgement that victims of trafficking or smuggled persons may be refugees who require permanent status in the host country.<sup>81</sup> The rights-based

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trafficking. The European Commission includes the suppression of "fundamental rights in the definition of trafficking." See Commission Proposal for a Council Framework Decision on Combating Trafficking in Human Beings, COM(2000)854 final at Art. 1. The UN Protocol definition of trafficking relies on the concept of "exploitation." See Trafficking Protocol, *supra* note 61, art. 3.

<sup>80</sup> See Trafficking Protocol, *supra* note 61, at art. 6.

<sup>81</sup> Article 7 of the Trafficking Protocol merely requires state parties to "consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases". Trafficking Protocol, *supra* note 61, at art. 7. The Smuggling Protocol contains no reference to the possibility of permanent stay, beyond a general reference to the applicability of the Refugee Convention; at Article 18(5) the Protocol merely states, "Each state party involved with the return of

approach to tackling the phenomena displayed in this convention may benefit asylum advocacy,<sup>82</sup> but the challenge of moving beyond short-term protective intervention to the long term need for asylum for those who are eligible will again emphasize the advocate's complex gatekeeping role.

A particular gatekeeping difficulty for asylum advocates may arise in the context of claims on behalf of women trafficked for sexual exploitation. The difficulty reflects a tension between migration and human rights approaches to the issue. Whether the initial decision to embark on transnational migration was taken by or with the consent of the trafficked person is irrelevant from a human rights perspective: it is the rights abuses inflicted that are the concern and the focus of intervention. Thus, harms inflicted on commercial sex workers who may have agreed to travel initially, and in circumstances different from those that transpire during or at the end of the journey, are of concern, as are abuses inflicted on persons of "good" moral character, who were coerced from the start. However, in the migration context, where the restriction of unauthorized migration is the overriding policy concern, these are compelling policy pressures to limit state protective responsibilities: evidence of coercion at the outset of the journey, rather than the presence of abuse at any given point during the trafficking relationship, thus comes to be the focus of state protection for "victims of trafficking."

An example of this approach is the U.S. *Trafficking Victims Protection Act of 2000*. It establishes a comprehensive set of protections and services, including eligibility for a special "T" visa which can result in permanent residence,<sup>83</sup> but these protections are limited to victims of "severe forms of trafficking in persons," defined as a coerced victim of trafficking who is enslaved without having ever consented.<sup>84</sup> It follows that a person who

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a person. . . shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person."

Smuggling Protocol, *supra* note 61, at art. 8(5).

<sup>82</sup> For related European developments, see Framework Decision, *supra* note 74.

<sup>83</sup> 8 U.S.C.A. §§ 1101, 1255 (2000).

<sup>84</sup> "The term 'severe forms of trafficking in persons'

consented to being transported across borders for the purpose of engaging in commercial sex but who then finds herself in an abusive, coercive situation, is not protected. For the same reason, those who are known to have worked as sex workers prior to the transnational transport are likely to be excluded.<sup>85</sup> Given the difficulties of distinguishing clearly between coercion and consent, and the likelihood that a significant proportion of trafficking victims may have engaged in previous commercial sex, this limitation imposes a problematic gatekeeping constraint on advocates.

#### IV. CONCLUSION – A CRITICAL JUNCTURE CONCLUSION – A CRITICAL JUNCTURE

The pivotal role of international refugee protection in the current migration system and indeed in the transnational arena more generally places asylum advocates at a critical juncture of human rights work. They are engaged in asserting, at a point of acute confrontation, and through the medium of individual life stories, the imperative of a new architecture of cosmopolitan democracy that takes human rights claims at face value. Not the cosmopolitan democracy of transnational business collaborations, of the free flow of ideas across the globe, of the growing universe of exchange of goods and services -- rather the fraught and adversarial insistence on a shared universe of rights and resources that the disenfranchised and persecuted peoples of the developing world import through their physical presence on the territory of developed states and through their claim to asylum.

Asylum advocates bear a heavy onus. They have to use the expanding boundaries of human rights work to build this cosmopolitan edifice in the face of restrictionist pressures. They have to draw on theoretical innovations in conceptions of rights to include within the protective mantle of asylum new categories of rights bearers -- women, children, sex workers, even “terrorists” in a climate of xenophobic exclusion; they have to use accurate and up-to-date human rights documentation from around the world to ground applicants’ claims

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means ...sex trafficking in which a commercial sex act is induced by force, fraud, or coercion.” 22 U.S.C.A. § 7102 (2000) (emphasis added).

<sup>85</sup> *Id.*

in particularized but recognizable fact situations;<sup>86</sup> they have to translate general theories of globalization, the feminization of poverty, the economic fall-out of structural adjustment policies, the changing face of post-cold war armed conflict into comprehensible claims that will bring the abstract guarantees of international protection to bear on persecuted individuals.

This new architecture of cosmopolitan democracy is particularly hard for asylum advocates to advance at a time when undocumented or inadequately documented non-citizens are viewed with heightened suspicion and hostility. The pressure to avoid novel claims and eschew expansive human rights demands in favor of tried and tested refugee categories is powerful. But it is limiting and ultimately self-defeating: more and more “genuine” refugees present in seemingly “illegal” and unorthodox ways. It is up to asylum advocates to use the expanded tools from the human rights movement to limit the impact of restrictionist gatekeeping and, at the same time, to insist that forced migrants’ rights remain a central concern of domestic human rights movements. As the overwhelming concern with state security, stereotypic profiling and “rooting out terrorism” threatens to overshadow reformist pressures within asylum policy, and to tilt the balance of decision making even more in favor of exclusion, it is vital that attention to internationalist obligations to persecuted individuals be sustained. Asylum advocates, torn as they are between their internationalist and gatekeeping functions, are uniquely positioned to give a human, individualized account of the impact of terror and tyranny on those seeking safe haven within developed democracies.

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<sup>86</sup> For interesting discussion about the theoretical questions surrounding a “case”, see CASS. R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).