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Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection

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International refugee law is in crisis. Even as armed conflict and human rights abuse continue to force individuals and groups to flee their home countries, many governments are withdrawing from the legal duty to provide refugees with the protection they require. While

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Since the initial thesis for this project was published as *Reconceiving Refugee Law as Human Rights Protection*, 4(2) J. REFUGEE STUD. 113 (1991), it has been debated, elaborated, and refined. In the spring of 1993, a group of 12 top international refugee law scholars met in Toronto under the sponsorship of the Centre for Refugee Studies to define the conceptual framework for a reconceived system of international refugee protection. North-South teams of expert social scientists were then established to generate critical empirical research on the mechanisms identified to advance the project: collectivized administration, operational burden sharing, temporary protection pending return in safety and dignity, responsibility sharing, and repatriation and development assistance. This research was summarized in five comprehensive "Studies-in-Action," which served as the basis for a meeting in May 1995 of 40 academics, government officials, and representatives of nongovernmental organizations and intergovernmental agencies from around the world. Based on the deliberations of the May 1995 meeting, a draft synthesis of the proposal for reform was widely disseminated among persons and organizations committed to refugee protection, and was debated for several months by an international Internet discussion group involving 80 people. Finally, consultations with leaders in the international human rights and global governance communities were convened in London and Washington in October 1996 to broaden the base of support for reform of the refugee protection system, and to secure strategic guidance on how best to advance the project on the global agenda.

Most of the participants in the project's various stages acknowledged the urgent need for refugee law reform to counter increasing resort by states to measures designed to block access to asylum and otherwise to withdraw from their refugee protection responsibilities. There was a strong consensus that global reform should be preceded by a sustained effort to build confidence in the viability of collectivized and solution-oriented temporary protection, which could be undertaken without calling into question the authority of the present Refugee Convention. This Article seeks to respond to that advice by positing a relatively detailed proposal for reform of the mechanisms of refugee protection at the sub-global level, conceived in a way that will lay the

governments proclaim a willingness to assist refugees as a matter of political discretion or humanitarian goodwill, they appear committed to a pattern of defensive strategies designed to avoid international legal responsibility toward involuntary migrants. Some see this shift away from a legal paradigm of refugee protection as a source for enhanced operational flexibility in the face of changed political circumstances.¹ For refugees themselves, however, the increasingly marginal relevance of international refugee law has in practice signalled a shift to inferior or illusory protection. It has also imposed intolerable costs on many of the poorest countries, and has involved developed states in practices antithetical to their basic political values.

The argument that operational effectiveness will be enhanced by shifting away from reliance on legal principles reflects a serious misunderstanding of the function of international refugee law. The goal of refugee law, like that of public international law in general, is not enforceability in a strict sense.² It is instead a mechanism by which governments agree to compromise their sovereign right to independent action in order to manage complexity, contain conflict, promote decency, or avoid catastrophe.³ International refugee law was established precisely because it was seen to afford states a politically and socially acceptable way to maximize border control in the face of inevitable involuntary migration. Refugee law has fallen out of favor because its mechanisms no longer achieve its fundamental purpose of balancing the rights of involuntary migrants and those of the states to which refugees flee.

Specifically, it is our view that the withdrawal of states from their legal responsibility to protect refugees stems primarily from two fac-

groundwork for eventual universal reform. The more broad-ranging thinking of project participants on fundamental reform of refugee law at the global level is collected in *RECONCEIVING INTERNATIONAL REFUGEE LAW* (James C. Hathaway ed., forthcoming, 1997).

1.

The last five years have witnessed some significant changes in the scale, scope and complexity of the global refugee question In their efforts to respond to these contradictory developments, UNHCR and its partners have been obliged to reassess the continued relevance of established approaches to the problem of involuntary migration. New strategies are emerging from this process, which, in contrast to earlier approaches, are designed to address the causes as well as the consequences of forced displacement. As a result, international attention is moving away from the difficulties confronting refugees in their countries of asylum and towards the circumstances which have obliged them to leave their homeland.

UNHCR, *THE STATE OF THE WORLD'S REFUGEES: IN SEARCH OF SOLUTIONS* 19 (1995) [hereinafter *UNHCR, WORLD'S REFUGEES*].

2. MALCOLM N. SHAW, *INTERNATIONAL LAW* 8 (1991). Yet as Professor Henkin observes, "[i]t is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.*" LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (1979) (emphasis in original).

3. RICHARD FALK, *REVITALIZING INTERNATIONAL LAW* 91-93 (1989).

tors. First, governments increasingly believe that a concerted commitment to refugee protection is tantamount to an abdication of their migration control responsibilities. They see refugee protection as little more than an uncontrolled "back door" route to permanent immigration, in conflict with official efforts to tailor admissions on the basis of economic or other criteria. Second, neither the actual duty to admit refugees nor the real costs associated with their arrival are fairly apportioned among governments. There is a keen awareness that the states in which refugees arrive presently bear sole legal responsibility for what often amounts to indefinite protection.

In principle, refugee protection is not about immigration. It is intended to be a situation-specific human rights remedy: when the violence or other human rights abuse that induced refugee flight comes to an end, so does refugee status. Nor is this duty of limited duration logically assigned on the basis of accidents of geography or the relative ability of states to control their borders. Governments have regularly endorsed the importance of international solidarity and burden sharing, but collectivized efforts to date have been ad hoc and usually insufficient.

The challenge is to re-assert both the essence of refugee protection as a human rights remedy, and the logic of a shared commitment by governments to provide and fund that remedy. We can no longer insist on either the routine, permanent integration of all refugees,⁴ nor expect all governments, whatever their circumstances, simply to receive and provide quality protection to all refugees who arrive at their territory. The critical right of at-risk people to seek asylum will survive only if

4. This Article does not address the question of a formal expansion of the conceptual scope of refugee status beyond that mandated by Article 1 of the United Nations Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (*entered into force* April 22, 1954) [hereinafter *Refugee Convention*]. We proceed instead on the basis of a holistic and contextualized understanding of a Convention refugee as "a person who is outside her country because she reasonably believes that her civil or political status puts her at risk of serious harm in that country, and that her own government cannot or will not protect her." JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* v (1991). There is, however, reason to believe that a shift of the kind advocated in this Article, in which refugee status leads to temporary protection rather than to permanent residence, may induce states to conceive refugee status more expansively. The most inclusive legal definitions of entitlement to refugee status are incorporated in the Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. 1, para. 1, 1001 U.N.T.S. 46 [hereinafter *OAU Refugee Convention*], and the Cartagena Declaration on Refugees, at 190-93, OAS/Ser.L/V/II.66, doc. 10, rev. 1 (Nov. 19-22, 1984), endorsed by the Organization of American States [hereinafter *OAS Cartagena Declaration*]. Each was developed by states accustomed to granting protection on a temporary basis. A comparable relaxation in the definition can be seen in the temporary protection programs implemented by Northern states. Access to these programs usually has not been conditioned on strict compliance with the Convention refugee definition. For instance, persons in flight from ongoing armed conflict, environmental disaster, or other extraordinary and temporary condition may be granted "temporary protected status" (TPS) under United States law. Immigration Act of 1990 § 302, 8 U.S.C. § 1254(b)(1) (1994).

the mechanisms of international refugee protection can be reconceived to minimize conflict with the legitimate migration control objectives of states, and dependably and equitably to share responsibilities and burdens. In the analysis that follows, we argue for a shift to a solution-oriented temporary protection of refugees, conceived within a framework of common but differentiated responsibility among states.

In Part I, we define the current crisis in refugee protection, and elaborate our view that reform should address both the absence of a meaningful solution orientation in present mechanisms of protection, and the problem of individuated state responsibility. We argue that there is an ethical imperative to engage with these legitimate preoccupations of governments, but to do so without compromising the critical right to seek asylum. In Part II, we posit the two cornerstones of a renewed system of refugee law: solution-oriented temporary protection, and shared responsibility among states to both protect refugees and finance the costs of protection. We also show how such a conceptual shift can be achieved without formally revising the framework of the Refugee Convention.

Part III of the Article offers a detailed blueprint of how such a system might function in practice. We define the elements of solution-oriented temporary protection, including respect for the refugees' social structures, development of skills and resources during temporary protection, the promotion of linkages with the internally displaced and stayee communities, and confidence-building in anticipation of repatriation. We grapple with the definition of principled limits to temporary protection, and with the means to ensure that repatriation in safety and dignity is a viable option for most refugees. The institutional structure for the implementation of collectivized protection is then outlined, focusing on the establishment of interest-convergence groups at the sub-global level that agree in advance to allocate the responsibilities and burdens of a refugee flow among themselves on the basis of pre-established criteria.

Finally, we turn to the substantive criteria that we believe ought to define the relative obligations of the state members of an interest-convergence group. Basing our proposal on the notion of common but differentiated responsibility, we suggest standards that take full account of the very real differences in the relative abilities and circumstances of states, and seek to maximize the overall commitment to protection by drawing on the strengths of each participating government.

I. THE NEED FOR REFORM

Modern refugees increasingly encounter significant barriers erected to prevent them from reaching potential asylum states. Because particular states have legal obligations only toward refugees who are within the sphere of their formal or de facto jurisdiction,⁵ efforts to exclude refugees altogether are an effective means to avoid the duty to provide protection. Where the denial of entry is politically or logistically problematic, refugees who arrive in asylum states are often dealt with harshly and in violation of their human rights. Many states hope that refugees physically present will feel compelled to leave, or at least that would-be refugees will be diverted elsewhere. For those refugees able to enter and remain in an asylum state, the reality of protection is increasingly bleak. While fewer governments are prepared to link refugee status to a right of permanent residence, little thought is given to how to dovetail the modalities of temporary asylum with a serious commitment to solutions. The "warehousing" of refugees, long practiced by many states of the South, is therefore becoming a common feature of asylum in the North as well.

A. *Refoulement*

Even though international law presently requires no more than the provision of rights-regarding temporary protection, Northern states, in law or in practice, have historically afforded refugees permanent status.⁶ As the interest-convergence⁷ between refugees and developed countries has disappeared, Northern states have sought to avoid the arrival of

5. The Refugee Convention, *supra* note 4, and the Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, are treaties to which particular states agree to be bound. While an individual is a Convention refugee as soon as he or she meets the Convention definition (*see infra* text accompanying notes 173-178), the rights that accrue by virtue of that status remain inchoate until the refugee comes under the formal or effective control of a state party to the Refugee Convention or Protocol.

6. The notion of interest-convergence theory is elaborated in Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

7.

Because refugees seeking protection in the years following the Second World War were of European stock, their cultural assimilation was perceived as relatively straightforward. Refugees also helped to meet acute post-War labor shortages. The reception of refugees opposed to communist regimes moreover reinforced the ideological and strategic objectives of the capitalist world The reasons that induced this traditional generosity toward refugees have, however, largely withered away. Most refugees who seek to enter developed states today are from the poorer countries of the South: their "different" racial and social profile is seen as a challenge to the cultural cohesion of many developed states. The economies of industrialized states no longer require substantial and indiscriminate infusions of labor. Nor is there ideological or strategic value in the admission of most refugees. To the contrary, governments more often view refugee protection as an irritant to political and economic relations with the state of origin.

refugees by adopting policies of external deterrence. Because developed states have the logistical capacity to prevent the arrival of many, and sometimes most, refugees, they have been able to implement *non-entrée*⁸ practices that prevent refugees from even reaching their frontiers. Since legal duties arise only once refugees successfully access a state's jurisdiction, *non-entrée* practices are a relatively invisible, and hence politically expedient, means to ensure that refugees are never in a position to assert their legal right to protection.

Specifically, most Northern states impose a visa requirement on the nationals of refugee-producing states, and penalize airlines and other transportation companies for bringing unauthorized refugees into their territories. By refusing to grant visas for the purpose of making a claim to asylum, Northern countries have been able to insulate themselves from many potential claimants of refugee status.⁹ The United Nations High Commissioner for Refugees (UNHCR) has expressed concern that visas are a serious obstacle to the admission to protection of refugees, and may in some instances put refugees at serious risk of *refoulement*,¹⁰ that is, of return to the country in which they assert they will be at risk of grave harm.¹¹

Multilateral burden-shifting arrangements and bilateral readmission treaties have also proved popular with Northern states. These arrangements deny entry to asylum-seekers who have not arrived by direct transportation, and authorize their summary removal to so-called "safe third countries" to pursue their claims.¹² In Europe, refugees are thus

James C. Hathaway, *Can International Refugee Law Be Made Relevant Again?*, in U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 14, 15 (1996).

8. The concept of *non-entrée* policies ("the refugee shall not access our community") is developed in James C. Hathaway, *The emerging politics of non-entrée*, 91 *REFUGEES* 40-41 (1992).

9. Asylum applications in the 15 developed states that belong to the Intergovernmental Consultations dropped by 44% between 1992 and 1995. The projection is for a further 3% reduction in 1996. The rate of decline was radically greater in Europe, where *non-entrée* practices are most evolved, as compared with Australia, Canada, and the United States. The European 1995 asylum claim rate was 58% lower than the 1992 rate; the 1995 rate for Australia, Canada, and the United States actually increased by about 20% relative to 1992. INTER-GOVERNMENTAL CONSULTATIONS ON ASYLUM, REFUGEE AND MIGRATION POLICIES IN EUROPE, NORTH AMERICA, AND AUSTRALIA, *EVOLUTION IN THE NUMBER OF ASYLUM APPLICATIONS AND GENEVA CONVENTION STATUS DECISIONS* (July 22, 1996). "Sanctions . . . have had an effect on the number of airport asylum requests. A year after Britain's fines were introduced, airport asylum applications dropped by fifty percent." Peter Kessler, *Jet Set Refugees*, 88 *REFUGEES* 35 (1992). See generally Erika Feller, *Carrier Sanctions and International Law*, 1 *INT'L J. REFUGEE L.* 48 (1989).

10. UNHCR, *WORLD'S REFUGEES*, *supra* note 1, at 200-01.

11.

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.

Refugee Convention, *supra* note 4, art. 33(1).

12. Rosemary Byrne & Andrew Shacknove, *The Safe Country Notion in European Asylum Law*,

removed from Northern and Western Europe to the transit states of Southern, Central, and Eastern Europe. The governments of Canada and the United States have similarly explored the possibility of an arrangement with Mexico that would authorize the return to that country of Central and South American asylum-seekers.¹³ These procedures are premised neither on substantive nor procedural harmonization of refugee determination at a level that ensures meaningful protection.¹⁴ Because the largely uncoordinated system of international refugee protection is incapable of delivering consistent results from state to state, burden-shifting arrangements can deprive persons who are genuine refugees of internationally guaranteed rights, including the right to protection against *refoulement*.

Even when refugees are able to navigate the course of visas, interdiction, and burden-shifting arrangements, they often remain at risk of *refoulement*. Developed states that wish to avoid receiving refugees adopt restrictive interpretations of the Convention refugee definition as a means of influencing refugees' choice of a destination state. The result is a downward spiral of protection toward the lowest common denominator, and a failure to recognize the claims of persons who are entitled to international protection. For example, the states of the European Union have recently adopted a common policy in which they refuse to recognize the refugee status of persons threatened by non-state actors unless the risk "is individual in nature and is encouraged or permitted by the authorities."¹⁵ Only Sweden has formally opposed this reversal of the usual understanding that seriously at-risk persons are also refugees where the authorities are not complicitous in the harm, but nonetheless prove unable to offer effective protection.¹⁶

9 HARV. HUM. RTS. J. 185 (1996). A "domino effect" has been noted, in which refugees are pushed farther and farther away from developed states. Stefan Teloken, *The Domino Effect*, 94 REFUGEES 38-40 (1993). See also Wladyslaw Czaplinski, *Aliens and Refugee Law in Poland—Recent Developments*, 6 INT'L J. REFUGEE L. 636, 641 (1994).

13. Arthur C. Helton, *Toward Harmonized Asylum Procedures in North America: The Proposed United States-Canada Memorandum of Understanding for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 26 CORNELL INT'L L.J. 737, 738 (1993). A proposed agreement between the United States and Canada contemplates the possibility that asylum-seekers who arrive in the territory of either state may be removed to a third country. Preliminary Draft Agreement between the Government of Canada and the Government of the United States of America for Cooperation in Examination of Refugee Status Claims from Nationals of Third Countries, Oct. 24, 1995, art. 5.

14. See FRANÇOIS CRÉPEAU, *DROIT D'ASILE: DE L'HOSPITALITÉ AUX CONTRÔLES MIGRATOIRES* 280-84 (1995); SARAH COLLINSON, *BEYOND BORDERS: WEST EUROPEAN MIGRATION POLICY TOWARDS THE 21ST CENTURY* 83-84 (1993).

15. Council of the European Union, Joint position defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, 1996 O.J. (L 63).

16. *Id.* at Annex II. Denmark initially entered the same reservation as Sweden, but withdrew

More dramatically, Northern states are beginning to adopt summary exclusion procedures and to interdict refugees at frontiers and in international waters. France, for example, detains asylum-seekers in artificially designated "international zones" of its airports, in which it has claimed to be free from the constraints of either domestic or international law.¹⁷ The interdiction at sea of Haitian refugees by the United States is another example. The U.S. Coast Guard forced asylum-seekers onto its vessels, destroyed their boats, and returned them to Haiti where many suffered further human rights abuse.¹⁸ The U.S. Supreme Court condoned this policy.¹⁹ In addition, recent legislation adopted in the United States allows for the quick turnaround of refugees at border points. Refugees who rely on false documentation to avoid visa controls will now be subject to a summary removal process after no more than a rudimentary examination of their need for protection.²⁰ European governments have similarly approved expedited exclusion procedures for a wide-ranging category of asylum-seekers, including those whose claims are deemed (without a hearing on the merits) "inconsistent, contradictory or fundamentally improbable."²¹ Because both the American and European procedures authorize the removal of asylum-seekers whose claims to refugee status have not been seriously considered, they raise the specter of *refoulement*.²²

its objections. In contrast to the European Union position, the Office of the United Nations High Commissioner for Refugees affirms that "[w]here serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 65 (1979) [hereinafter, UNHCR HANDBOOK] (emphasis added).

17. U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 140 (1995). The recent judgment of the European Court of Human Rights in *Amuur v. France*, 22 Eur. Ct. H.R. at 533 (1996) found that despite its name, the "international zone" does not have extraterritorial status. As a result, the denial by France of basic legal, humanitarian, and social assistance to asylum-seekers within the "international zone" amounted to a violation of Art. 5(1)(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

18. See generally Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT'L L.J. 675 (1993); Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325 (1993).

19. See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993). See also Guy S. Goodwin-Gill, *The Haitian Refoulement Case: A Comment*, 6 INT'L J. REFUGEE L. 103 (1994).

20. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

21. Ministers of the Member States of the European Communities Responsible for Immigration, Resolution on manifestly unfounded applications for asylum (Nov. 30–Dec. 1, 1992), reprinted in EUROPEAN CONSULTATION ON REFUGEES AND EXILES, SAFE COUNTRIES, MYTHS AND REALITIES, App. C (1995).

22.

[C]onsider the case of Fauziya Kassindja, the young woman who fled from Togo to escape genital mutilation. She sought asylum here but was turned down on arrival and again by an immigration judge. After a year in detention, a dedicated lawyer took her

It is also *refoulement* to require refugees to repatriate while a risk of persecution persists in their country of origin. In January 1996, Germany announced a two-stage plan for repatriation of Bosnian refugees, to begin on June 30, 1996, but then appropriately suspended the plan out of concern that conditions were still unsafe. Soon after the recent Bosnian elections, however, German authorities announced that repatriation efforts would proceed.²³ This time, the government has minimized the significance of human rights concerns, turning a blind eye to widespread evidence of election fraud.²⁴ Indeed, the fact that officials have said they will not send refugees back to "areas now governed by hostile ethnic groups"²⁵ suggests that the situation in Bosnia is too unstable to warrant sending refugees back at all. The NATO-led peace force has reported dozens of homes destroyed by fires or explosions, and observed that "[u]sing mines to blow up houses that refugees might fix up and move into is clearly designed to keep fear alive and intimidate refugees who might have wished to return to their homes."²⁶ There is even evidence of official hostility to the return of refugees, formal commitments notwithstanding.²⁷ The forced return of refugees to such circumstances amounts to *refoulement*.

Southern states have historically demonstrated relatively scrupulous regard for the principle of *non-refoulement*, even under very difficult circumstances. A case in point was the admission to India of ten million refugees from Bangladesh (then East Pakistan) between March and December 1971. Most of the refugees were Bengali Hindus, many of whom had family or other connections in India. The massive numbers notwithstanding, "there was no question of turning any refugee

case to the Board of Immigration Appeals, which granted her asylum. Under [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *supra* note 21], Ms. Kassindja would have had at most one week to appeal to an immigration judge—without a lawyer, and probably by telephone. She could not have taken her case to the Board of Immigration Appeals. After the immigration judge turned her down, she would have been sent back at once to Togo, and butchery.

Anthony Lewis, *Covering Up Cruelty*, N.Y. TIMES, Sept. 27, 1996, at A15.

23. German authorities originally intended to begin repatriating Bosnians after March 31, 1996. At a January 26, 1996 meeting that date was delayed until June 30, 1996. U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 150 (1996). This deadline was again extended, but the intention to begin repatriations was reaffirmed, following a meeting of 16 German state interior ministers on September 19, 1996. A government spokesman indicated that "those who resist voluntary repatriation will face deportation." *Germany to Begin Returning Bosnians*, REFUGEE REPORTS, Sept. 30, 1996, at 13.

24. Alan Cowell, *Germans Plan to Return Refugees to Bosnia*, N.Y. TIMES, Sept. 20, 1996, at A14; Julian Borger, *Massive vote-rigging taints Bosnia election*, MANCHESTER GUARDIAN WKLY., Sept. 29, 1996, at 1.

25. Cowell, *supra* note 24.

26. *Dozens of Bosnian Homes Are Set Ablaze*, N.Y. TIMES, Oct. 26, 1996, at A7 (quoting Major Simon Haselock, a spokesman for the NATO peace force in Bosnia).

27. Mike O'Connor, *Defiantly, Bosnian Serbs Blow Up Muslims' Homes*, N.Y. TIMES, Nov. 7, 1996, at A6.

back.”²⁸ Increasingly, however, Southern states have taken decisive, and often unlawful, action to avert responsibility toward refugees. While usually lacking the resources and sophisticated border control systems to implement *non-entrée* policies, governments in the less developed world have engaged in several more direct forms of *refoulement*.

Most notoriously, Southern governments have sometimes forced refugees away from their territory by physical deterrence or the closure of borders. Between 1975 and 1980, for example, one million Indochinese refugees fled Vietnam, Cambodia, and Laos. Countries in the region were unwilling to admit them, even on a temporary basis. Concerned that there would be little effective international assistance, governments were convinced that temporary admission would lead to long-term responsibility for the refugees. These countries of first asylum only agreed to allow refugees to be admitted to temporary protection once they had received formal commitments from countries outside the region to accept the refugees for resettlement. When resettlement countries opted to stop receiving refugees, first asylum states were reluctant to continue to offer even temporary protection.²⁹

Boatloads of Liberian refugees have also recently been shunted from port to port throughout West Africa, and at times denied entry to any country. They have been forced to remain on overcrowded ships, in unhealthy conditions, without sufficient food and water for prolonged periods of time, and always at risk of eventual return to Liberia. Countries such as Sierra Leone, Côte d'Ivoire, Guinea, and Ghana have welcomed hundreds of thousands of Liberians over the past seven years, but now appear unwilling to allow more Liberian refugees into their territory.³⁰ In closing its border, Côte d'Ivoire (which has provided asylum to over 300,000 Liberians) emphasized that it simply could not cope with any more refugees.³¹ Tanzania took similar action in 1995

28. B.S. Chimni, *The Legal Condition of Refugees in India*, 7 J. REFUGEE STUD. 378, 381 (1994). In emphasizing the temporary nature of the refuge India would provide, the government referred to the refugees as “evacuees,” and housed them in short-term “transit relief camps.” The refugees quickly returned home after the liberation of Bangladesh. The officially assisted repatriation movement of the refugees began on January 1, 1972 and was completed an extraordinary two and one-half months later. G.J.L. Coles, *Temporary Refuge and the Large Scale Influx of Refugees* 5 (submitted to UNHCR Expert Meeting, July 17, 1981).

29. See generally JANINA W. DACYL, *BETWEEN COMPASSION AND REALPOLITIK* (1992); James C. Hathaway, *Labelling the “Boat People”: The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees*, 15 HUM. RTS. Q. 686 (1993); Sten A. Bronée, *The History of the Comprehensive Plan of Action*, 5 INT’L J. REFUGEE L. 534 (1993).

30. Jana Mason, *Liberian Refugee Crisis: Africa Reconsiders its Tradition of Hospitality*, REFUGEE REP., July 30, 1996, at 1–10; *Asylum? No, thanks*, 37 AFR. CONFIDENTIAL, May 24, 1996, at 8.

31. Mason, *supra* note 30, at 3.

in response to an influx of as many as 50,000 Rwandans, who needed to escape ethnic-based violence in Burundi, their country of first refuge. Already accommodating about 750,000 Rwandan refugees and fearing decreasing support from the international community, Tanzania temporarily closed its borders.³²

Even where refugees are admitted to a Southern asylum state, they occasionally face concerted efforts to drive them out. Zaire admitted huge numbers of Rwandan refugees following the genocide and ensuing civil war that left perhaps one million Tutsi and thousands of moderate Hutu dead in 1994. There was, however, considerable local hostility and resentment directed at the refugee population, which was blamed for environmental degradation and increased insecurity in the area. In 1995, Zaire began forcibly expelling several thousand of the estimated 1.8 million Rwandan refugees, and announced that the forced repatriations would continue until there was a concrete plan to provide for the return of the refugees to Rwanda.³³

The duty of *non-refoulement* was similarly violated by the mass expulsion of some 500,000 Rwandan refugees from Tanzania in December 1996,³⁴ pursuant to an edict enforced by armed troops.³⁵ UNHCR apparently acquiesced in this move,³⁶ even though no serious effort had been made to effect a reconciliation between the Hutu refugees and the Tutsi and other survivors of the 1994 genocide.³⁷ Nor was provision

32. *Refuge seekers denied entry*, [TORONTO] GLOBE & MAIL, Apr. 1, 1995; *Rwandans stopped at border*, [TORONTO] GLOBE & MAIL, Apr. 3, 1995; *Tanzania Closes Border to Over 50,000 Refugees*, AGENCE FRANCE PRESSE, available in LEXIS, News library, Curnws file. In 1996, Tanzania again closed its border to refugees. UNHCR PUBLIC INFORMATION SECTION, INFORMATION BULLETIN: BURUNDI AND RWANDA, June 1996.

33. *Refugees Flee Zairian Troops*, [TORONTO] GLOBE & MAIL, Aug. 23, 1995. See also *Zaire Expels 3,500 Refugee From Rwanda Border Camp*, N.Y. TIMES, Aug. 22, 1995, at 2; *Terrified Rwanda Refugees Forced out of Camps*, [TORONTO] GLOBE & MAIL, Aug. 22, 1995; *Zairian Troops Force out Hutus*, THE INDEPENDENT, Aug. 22, 1995; AMNESTY INTERNATIONAL, RWANDA AND BURUNDI—THE RETURN HOME: RUMOURS AND REALITIES, Feb. 20, 1996. Forced repatriation was again threatened in 1996, long before the apparently voluntary mass repatriation of refugees in the latter part of that year. *Zaire Move to Seal Camp Part of Plan*, [TORONTO] GLOBE & MAIL, Feb. 13, 1996; *Get out, Maybe*, [TORONTO] GLOBE & MAIL, Feb. 20, 1996.

34. *Tanzania and the U.N. Tell Rwandan Refugees to Go Home*, N.Y. TIMES, Dec. 6, 1996, at A15.

35. James C. McKinley, Jr., *Tide of Rwanda Refugees Flows Back to Tanzania Camps*, N.Y. TIMES, Dec. 14, 1996, at A4; James C. McKinley, Jr., *Soldiers Force Refugees Into Rwanda From Tanzania*, N.Y. TIMES, Dec. 16, 1996, at A3.

36.

Now Tanzania, another country where [Rwandan Hutus] sought refuge, no longer wants them either, and its policy is being enforced by troops with guns. On the sidelines, someone representing the United Nations High Commissioner for Refugees stands by and notes cheerfully, "They're moving in the right direction."

Barbara Crossette, *The Shield for Exiles is Lowered*, N.Y. TIMES, Dec. 22, 1996, at 4(1).

37. Suzanne Daley, *Rwandans Confront a Time to Heal*, N.Y. TIMES, Dec. 3, 1996, at A6.

of any kind made to consider particularized objections to the asserted safety of return.

B. Denials of Refugee Rights

While Southern states have traditionally been less likely than Northern governments to block access to asylum altogether, refugee life in much of the less developed world is marked by insecurity and the inability to meet even basic needs. In part, this occurs because refugees are being protected in states in which citizens themselves suffer from a severe lack of economic resources. Of the twenty-six countries where the refugee to host population ratio is 1:100 or greater, only five have a per capita gross national product over U.S. \$1,000.³⁸ As Southern countries continue to face mass influxes of refugees without assurance of dependable assistance from wealthier countries, they have expressed an understandable reluctance to share scarce resources with refugees.³⁹ Southern states have increasingly resisted honoring international legal duties that require the expenditure of resources, such as the right of refugees to be assimilated to nationals in terms of access to rationing systems, elementary education, and public relief.⁴⁰

Refugees also face severe difficulties as the result of human rights abuse in many Southern asylum states. Malawi, for example, hosted a population of 1.1 million Mozambican refugees between the early 1980s and 1992. Large-scale repatriation occurred in 1993, when sixteen years of brutal civil war in Mozambique ended. Malawi's willingness to shelter such a large number of refugees, amounting to more than ten percent of its own population, is without parallel in the North. Refugees in Malawi, however, also endured a pattern of serious human rights abuse, including expulsion, detention, sexual abuse, and theft of food rations. At the time, human rights violations were commonplace in dictatorial Malawi, and the ruling government strongly supported RENAMO, the armed Mozambican opposition group from which many of the refugees were fleeing.⁴¹

Perhaps the most common denial of refugee rights in the South is the forced confinement of refugees. Mozambican refugees in South Africa were granted temporary resident status only in two South African homelands, and any Mozambican residing elsewhere in South

38. U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 7 (1996).

39. Fernando del Mundo, *The Future of Asylum in Africa*, 96 REFUGEES 3-7 (1994).

40. Refugee Convention, *supra* note 4, arts. 20, 22, 23. See generally JAMES C. HATHAWAY & JOHN A. DENT, REFUGEE RIGHTS: REPORT ON A COMPARATIVE SURVEY 32-33, 39-40 (1995).

41. See RICHARD CARVER, LAWYERS COMMITTEE FOR HUMAN RIGHTS, AFRICAN EXODUS: REFUGEE CRISIS, HUMAN RIGHTS AND THE 1969 OAU CONVENTION 3, 80-83 (1995).

Africa was considered an illegal alien subject to deportation.⁴² The majority of Vietnamese refugees in Thailand have been held in an isolated and overcrowded detention center in the northeast of the country, where there are concerns about inadequate water and sanitation, an arbitrary code of justice, and physical abuse.⁴³ Countries of first asylum routinely restrict Indochinese asylum-seekers to closed camps, which have been described as being "run in the same spirit and according to many of the same rules as the prisons[,] . . . surrounded by tall fences and patrolled by guards."⁴⁴

In some instances, there have been serious concerns about the vulnerability of refugees in the South to attack by agents of both their home and asylum countries. In Kenya, for example, there have been numerous reports of the rape of Somali refugee women by local police and military. Somali refugees in Kenya have also been attacked by armed Somali bandits who fled into northeast Kenya after U.N. forces were deployed in Somalia. Because of longstanding discrimination in Kenya directed at its own ethnic Somali population, Kenyan authorities did little to stop the assaults.⁴⁵

Relocation efforts have also been the source of rights violations, even when the efforts were undertaken to ensure greater safety for the refugees. In the early 1970s, the Sudanese government, with the cooperation of UNHCR, forcibly relocated Eritrean refugees from border camps to new, permanent settlements away from the frontier. The refugees, who were not consulted, resisted the move, primarily because they considered it incompatible with their desire to repatriate.⁴⁶ In 1984, Mexico transferred Guatemalan refugees from self-settled camps near the border to interior locations in order to avoid attacks on the refugees by the Guatemalan military. To achieve this goal, Mexican authorities resorted to flagrant human rights violations, including burning settlements, cutting off food supplies, and forcibly evicting refugees.⁴⁷

42. *See id.* at 42-47.

43. U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY 85* (1993).

44. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *INHUMANE DETENTION: THE TREATMENT OF VIETNAMESE BOAT PEOPLE IN HONG KONG 2* (1989). *See also* U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY 81* (1993); U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY 84* (1995).

45. *See* AFRICA WATCH, *KENYA: FORCIBLE RETURN OF SOMALI REFUGEES AND GOVERNMENT REPRESSION OF KENYAN SOMALIS* (1989); IMMIGRATION AND REFUGEE BOARD DOCUMENTATION CENTRE, CANADA, *KENYA: RESTORATION OF MULTIPARTY GOVERNMENT AND KENYANS OF SOMALI ORIGIN* (1992); AFRICAN RIGHTS, *THE NIGHTMARE CONTINUES: ABUSES AGAINST SOMALI REFUGEES IN KENYA* (1993). *See also* CARVER, *supra* note 41, at 64-71.

46. GAIM KIBREAB, *REFUGEES AND DEVELOPMENT IN AFRICA: THE CASE OF ERITREA 80-83* (1987).

47. Joel Simon & Beatrix Manz, *Representation, Organization, and Human Rights Among Guatemalan Refugees in Mexico—1980-1992*, 5 HARV. HUM. RTS. J. 95, 109-10 (1992).

In extreme cases, patterns of rights violation may be tantamount to *refoulement*. Since 1983, India has provided asylum to over 200,000 Sri Lankan refugees. Initially, the refugees were welcomed in southern India. Tensions grew, however, when India attempted unsuccessfully to intervene in the Sri Lankan conflict, and when Tamil separatists assassinated Indian Prime Minister Rajiv Gandhi in 1991. Following a 1992 agreement between Sri Lanka and India to facilitate voluntary repatriation of the refugees, India began taking a number of steps to "promote" return. The Indian government suspended education for the children of Sri Lankan refugees, delayed the delivery of food rations and stipend money, and refused to make repairs in refugee camps. After nongovernmental organizations (NGOs) were banned from the camps, supplementary health, feeding, education, and recreation programs ended. Freedom of movement was restricted, making it difficult for refugees to work. There were also concerns that some refugees had not understood the repatriation agreements (which were initially available only in English), and that they were not provided with reliable information about conditions in Sri Lanka. By violating the rights of Sri Lankan refugees in order to force them to return home before it was safe, the Indian authorities committed "indirect *refoulement*,"⁴⁸ consistently violating refugee rights to force them to return to an unsafe home.

Patterns of human rights violations against refugees have also been reported in Northern countries, particularly in states of the former Soviet bloc.⁴⁹ In most cases, though, Northern governments have respected the human rights of refugees who manage to enter their territories, no doubt prompted by legal cultures receptive to holding states formally accountable to their treaty obligations. But when a significant number of Bosnian asylum-seekers successfully evaded European *non-entrée* policies, special legal regimes were devised coupling relaxed eligibility requirements with rights sometimes set below international legal standards. Under the guise of affording refugees from former Yugoslavia (legitimate) temporary protection, these schemes often suspended the usual procedures for processing refugee claims and required members of the des-

48. ASIA WATCH, HALT REPATRIATION OF SRI LANKAN TAMILS, Aug. 1993; U.S. COMMITTEE FOR REFUGEES, "PEOPLE WANT PEACE": REPATRIATION AND REINTEGRATION IN WAR-TORN SRI LANKA, Jan. 1994.

49.

"We have no right to work, no education, no right to rent housing, no right to medical treatment," [a refugee in Russia] said. "We are still subject to the law on foreigners, which means we are considered illegal." He produced tattered pieces of a UNHCR registration card that he said had been torn up by a Russian policeman who said it was worthless.

Ron Redmond, *Old Problem in a New World*, 94 REFUGEES 28-30 (1993). See also Sarah Koenig, *Refugees Straining Patience in Russia*, N.Y. TIMES, Dec. 26, 1996, at A6.

ignated groups to accept the lesser status and lesser rights provided for in the special legislation.⁵⁰

While European governments have the authority to enact supplementary protection regimes, they cannot rely on the existence of such programs to deny Convention rights to those entitled to Convention refugee status under international law.⁵¹ Yet, European countries have sometimes placed restrictions on the freedom of movement of temporarily protected refugees. In Germany, persons with a temporary residence authorization may not leave the *länder* or part of the *länder* that issued the authorization.⁵² In other countries, such as Norway, entitlement to social assistance and housing benefits may be expressly tied to residence in a certain municipality or reception center.⁵³ More generally, temporary refugee protection is frequently coupled with policies that make it difficult for refugees to support themselves and their families. Most Northern states allow individuals in receipt of temporary protection to work. In the Netherlands, however, work permits are issued only after three years of temporary protection.⁵⁴ In Denmark, temporarily protected refugees can work only in refugee shelters, in special programs run by the Danish Refugee Council, or in jobs that cannot be filled by a Dane or the holder of a Danish work permit.⁵⁵ After the decision was made to suspend the processing of Bosnian asylum claims, temporarily protected refugees in Germany were denied access to the labor market.⁵⁶ The Refugee Convention, in contrast, requires states to grant refugees the same access to employment as that of the nationals of the most favored countries,⁵⁷ arguably requiring European Union (EU) states to grant refugees the same access to employment as granted nationals of other EU states.⁵⁸

50. For instance, when temporary protection for Bosnian refugees was adopted in Denmark in November 1992, the authorities suspended the processing of Bosnian claims for regular asylum (resumed in December 1994). Similarly, although a grant of temporary protection is no legal bar to an application for asylum in Germany, the processing of Bosnian asylum claims was de facto suspended in that country as well. SECRETARIAT OF THE INTER-GOVERNMENTAL CONSULTATIONS ON ASYLUM, REFUGEE AND MIGRATION POLICIES IN EUROPE, NORTH AMERICA AND AUSTRALIA, REPORT ON TEMPORARY PROTECTION IN STATES IN EUROPE, NORTH AMERICA AND AUSTRALIA 79, 118 (1995) [hereinafter INTER-GOVERNMENTAL CONSULTATIONS, TEMPORARY PROTECTION].

51. Many Bosnians assigned to temporary protection had genuine claims to refugee status. By way of comparison, Canada recognized 97% of refugee claims from Bosnia-Herzegovina in 1995. IMMIGRATION AND REFUGEE BOARD, CONVENTION REFUGEE DETERMINATION DIVISION, STATISTICAL SUMMARY, 1995.

52. INTER-GOVERNMENTAL CONSULTATIONS, TEMPORARY PROTECTION, *supra* note 50, at 122.

53. *Id.* at 168.

54. *Id.* at 153.

55. *Id.* at 82.

56. *Id.* at 121; Morten Kjærø, *Temporary Protection in Europe in the 1990s*, 6 INT'L J. REFUGEE L. 444, 453 (1994).

57. Refugee Convention, *supra* note 4, art. 17(1).

58. HATHAWAY & DENT, *supra* note 40, at 27. However, some European governments have

In the face of restrictions on the right to work, access to public assistance is clearly crucial.⁵⁹ Some European states, including France and Belgium, grant temporarily protected refugees access to the national social welfare system.⁶⁰ Other states withhold welfare assistance, or limit the provision of welfare to "in kind" assistance, including some period of required residence in reception centers, and longer-term provision of food, clothing, and pocket money. For instance, in the United States, beneficiaries of Temporary Protected Status (TPS)⁶¹ enjoy only restricted eligibility for public assistance, and have been unable to apply for a number of basic forms of welfare support.⁶²

Northern states have taken a particularly restrictive approach to the reunification of refugee families. As discussed in Part II,⁶³ this right to reunification does have standing in international law and is of vital importance to the well-being of refugees. However, most Northern states, including the United States, France, Germany, Switzerland, and the United Kingdom, do not allow any family reunification for the beneficiaries of temporary protection,⁶⁴ while the Netherlands allows reunification only after three years of temporary protection.⁶⁵

C. Refugee Warehousing

The "temporary" protection systems of many states could more accurately be called "indefinite" protection regimes. Refugee protection frequently amounts to a system of prolonged "warehousing" in which refugees are denied the right to integrate in the asylum state, yet are

entered explicit reservations to the Convention, refusing to extend to refugees the same right to work as accrues to the nationals of countries with which they have preferred trade or customs arrangements. For example, the Belgian government has stipulated that:

[I]n all cases where the Convention grants to refugees the most favourable treatment accorded to nationals of a foreign country, this provision shall not be interpreted by the Belgian Government as necessarily involving the régime accorded to nationals of countries with which Belgium has concluded regional, customs, economic or political agreements.

UNITED NATIONS CENTRE FOR HUMAN RIGHTS, STATUS OF INTERNATIONAL INSTRUMENTS 273 (1987). Similar reservations have been entered by, inter alia, Denmark, Finland, Luxembourg, Netherlands, Norway, and Sweden.

59. The Convention provides refugees with specific welfare-related rights in the areas of rationing, housing, public relief, the protection of labor laws, and social security. Refugee Convention, *supra* note 4, arts. 20, 21, 23, 24.

60. INTER-GOVERNMENTAL CONSULTATIONS, TEMPORARY PROTECTION, *supra* note 50, at 62, 109.

61. Immigration Act of 1990, *supra* note 4.

62. B. Frellick & B. Kohnen, *Filling the Gap: Temporary Protected Status*, 8 J. REFUGEE STUD. 339, 352 (1995).

63. See *infra* text accompanying notes 211–215.

64. INTER-GOVERNMENTAL CONSULTATIONS, TEMPORARY PROTECTION, *supra* note 50, at 109, 122, 211, 221, 235.

65. *Id.* at 154.

unlikely to be restored to meaningful membership in their home community.

The ability to end temporary protection is fundamentally dependent on the promotion of meaningful and durable changes in the state of origin. Repatriation is unlikely to succeed if the refugees are returned before conditions are truly safe.⁶⁶ It has been recently observed, for example, that the repatriation of Cambodian refugees was conducted with insufficient regard for the need to build a "lasting foundation for the safe reintegration of returning refugees."⁶⁷ Despite a U.S. \$3 billion repatriation and reconstruction effort, large numbers of Cambodian returnees have again been displaced by fighting, have been unable to turn their repatriation grants into lasting investments, and have been injured by land mines more frequently than in previous years.⁶⁸ Massive financial assistance to returnees does not necessarily guarantee successful repatriation if political conditions are not truly ripe for return.

Even when conditions are objectively safe, repatriation can fail if the groundwork for return and reintegration has not been properly laid. It is particularly important to build cooperative relationships between returnees and individuals who remained in the country of origin. For instance, the return of Guatemalan refugees from Mexico has been marked by misunderstandings and resentment between returnee and resident communities. The Guatemalan military has consistently portrayed the returning refugees as associates of armed guerrillas, leading local people to fear that returning refugees will foster heightened military activity. Local residents also resent the fact that returning refugees are exempt from the obligation to participate in civil patrols. Other conflicts have developed around land ownership. Returnees are eager to reclaim land that belonged to them before they fled but that other peasants, often army sympathizers, have occupied during their absence. Local residents have threatened returnees and, occasionally, have even physically prevented them from entering villages. The Guatemalan government has done little to mediate these disputes and has been slow to fulfill its promises to provide returnees with new land.⁶⁹ Repatriation and resettlement following civil war is particularly com-

66. *See, e.g., supra* text accompanying notes 23–27 and 24–36.

67. Iain Guest, *Returning to an uncertain future*, MANCHESTER GUARDIAN WKLY., Jan. 7, 1996, at 15.

68. *Id.* *See also* U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 80–81 (1996); BETWEEN HOPE AND INSECURITY: THE SOCIAL CONSEQUENCES OF THE CAMBODIAN PEACE PROCESS (Peter Utting ed., 1994).

69. U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 145–46 (1993), 178–79 (1995), 189–91 (1996).

plicated, given the lingering effects of brutal human rights violations committed by fellow citizens.⁷⁰

When safe repatriation does not prove possible within a reasonable period of time, refugees should be afforded the option of permanent resettlement. Most Northern states having specific legislative schemes of temporary protection guarantee residual access to permanent residence. In Norway, permanent residence is granted after three or four years.⁷¹ In Denmark, access to the normal determination procedure is required after two years of temporary protection. If unsuccessful, and if temporary protection is still required, permanent residence follows after another two years.⁷² In the Netherlands, a grant of permanent residence will normally be made after three years of temporary protection.⁷³

In the United States, however, TPS does not automatically convert into a more permanent status.⁷⁴ This is also the case for France and Germany, which have implemented temporary protection through less formal administrative channels rather than adopting specific legislation.⁷⁵ There is no limitation as to how long "temporary" protection can continue. The same is true in most of the less developed world where temporary protection rarely converts to permanent status, regardless of the amount of time that passes. Some refugees in the South are never even granted secure temporary status, as has been the situation of Mauritanian refugees in Senegal, six years after they fled Mauritania.⁷⁶

Prolonged temporary protection fails to take account of refugees' psychosocial needs. Entire generations of refugee children may grow up in uncertainty and despair.⁷⁷ Refugees who are unable to return home and yet are ineligible for permanent membership in their asylum state are likely to be less self-sufficient and will find it more difficult to integrate locally. Where there is no hope of integration in the state

70. Ali Mazrui, *The African State as a Political Refugee: Institutional Collapse and Human Displacement*, 7 INT'L J. REFUGEE L. SPECIAL ISSUE 21 (1995).

71. INTER-GOVERNMENTAL CONSULTATIONS, TEMPORARY PROTECTION, *supra* note 50, at 165.

72. *Id.* at 79.

73. *Id.* at 146.

74. *Id.* at 231; Frelick & Kohnen, *supra* note 62, at 351.

75. In France, "temporary permission to stay will be prolonged for as long as a troubled situation in the region of origin of the beneficiaries continues to exist." INTER-GOVERNMENTAL CONSULTATIONS, TEMPORARY PROTECTION, *supra* note 50, at 104. Similarly, in Germany "[p]ersons from Bosnia-Herzegovina who do not have any other type of permission to stay in Germany, are allowed to stay temporarily . . . until such time as their return is considered possible." *Id.* at 117.

76. See CARVER, *supra* note 41, at 55.

77. Neil Boothby, *Displaced Children: Psychological Theory and Practice from the Field*, 5 J. REFUGEE STUD. 106, 119-20 (1992).

of asylum or elsewhere, refugees may even take up arms and attempt to force their way home. This can destabilize the host state and the region in general. For example, many Tutsi Rwandan refugees fled to neighboring countries in 1959. Rwandans in Tanzania obtained permanent status and, eventually, most became Tanzanian citizens. Rwandans in Uganda, on the other hand, were denied permanent status even after thirty years.⁷⁸ The long-term presence in Uganda of unintegrated Rwandan refugees, and the growth of armed opposition within the refugee community, induced the Rwandan military to carry out armed incursions into southern Uganda.⁷⁹ As Rwandan refugees began to take up arms, they also became involved in Uganda's own domestic conflict and lent considerable support to the National Resistance Army of now President Museveni.⁸⁰

D. *The Fallacy of the "Right to Remain"*

As the right of refugees to access secure and dignified asylum fell out of favor in both the North and South, states prevailed upon intergovernmental institutions to devise a less intrusive alternative to the duty to receive refugees. UNHCR responded by proclaiming the "right to remain."⁸¹ Given the determination of the governments that control and fund it to deemphasize the right to seek asylum, UNHCR saved face and institutional stature by redefining its *raison d'être*, away from the goal of ensuring access to quality asylum, in favor of an avowed commitment to eradicate the need to flee in the first place:

Refugee movements are not inevitable, but can be averted if action is taken to reduce or remove the threats which force people to leave their own country and seek sanctuary else-

78. AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR AND DEFIANCE 23 (1994). In Uganda, Rwandan refugees experienced three decades of harsh ethnic victimization, convincing most that "they could only find lasting security by returning to Rwanda." *Id.* at 24. See also Rachel van der Meeren, *Three Decades in Exile: Rwandan Refugees 1960-1990*, 9 J. REFUGEE STUD. 252, 259 (1996).

79. Rwandan refugees in Uganda founded the Rwandan Patriotic Front (RPF). Eager to return home and bring an end to the longstanding oppression of Rwanda's Tutsi minority, the RPF attempted an armed invasion of Rwanda in 1990, and then took power in the country during the civil war that followed the 1994 genocide. Van der Meeren, *supra* note 78, at 261-62.

80. *Id.* at 261.

81.

While responding to refugee situations in countries of asylum, the [UNHCR] also started focusing activities in countries of origin, seeking to prevent and contain refugee movements . . . Invoking the human right to remain in one's country of origin, the [UNHCR] sought to ensure that people were not forced to flee from their homes in the first place.

Report of the United Nations High Commissioner for Refugees, U.N. GAOR, 48th Sess., Supp. No. 12, para. 3, U.N. Doc. A/48/12 (1993).

where. That is a fundamental principle of the emerging approach to the issue of human displacement.⁸²

The language of a "right to remain" is attractive. It is impossible to deny the value of enabling people to stay in their homes, rather than leaving them no option but to escape. The "right to remain" is also often used in conjunction with a plea to respect the human rights of refugees.⁸³ Yet, because in practice it has been treated as an alternative to the traditional institution of asylum, the measure of the value of a "right to remain" must be its ability to compel the home government to respect the human rights of its citizens or to deliver surrogate protection *in situ*.

As implemented, the "right to remain" fails this test. First, there is no evidence to date of an international commitment to intervene against the root causes of refugee flows, a condition precedent to the exercise of any genuine right to remain.⁸⁴ For the majority of the world's refugees, located in parts of the South not perceived by the North to be of strategic importance, the "right to remain" is illusory. Michael Ignatieff has accurately noted:

[T]he inability of the U.N. to stop the nightmarish civil war in Afghanistan; the collapse of Sierra Leone and Liberia; the Indonesian repression of the East Timorese; the Russians' bloody attempt to crush the Chechens. These are what Boutros-Ghali calls 'the orphaned conflicts,' the ones which the West's promiscuous and selective attention span ignores⁸⁵

82. UNHCR, *WORLD'S REFUGEES*, *supra* note 1, at 43.

83.

The crucial link between the human rights system and the protection of refugees . . . assists the Office in raising awareness of the relationship between refugee issues and broader human rights concerns, particularly those related to the right to seek and enjoy asylum and the right to freedom of movement, which includes "the right to return" and "the right to remain."

Report of the United Nations High Commissioner for Refugees, U.N. GAOR, 50th Sess., Supp. No. 12, at para. 13, U.N. Doc. A/50/12 (1995) [hereinafter 1995 UNHCR Report].

84. *Peacekeeping on a Shoestring*, MANCHESTER GUARDIAN WKLY., Aug. 7, 1994, at 12.

85. Michael Ignatieff, *Decline and Fall of a Blue Empire*, MANCHESTER GUARDIAN WKLY., Oct. 29, 1995, at 33. In his farewell speech, former Secretary General Boutros-Ghali expressed frustration at the failure of powerful states to make a firm commitment to meaningful intervention:

Where peacekeepers were asked to deal with warfare, serious setbacks occurred. The first came in Somalia, and weakened the will of the world community to act against genocide in Rwanda. In Bosnia, too, hard choices were avoided. The concept of peacekeeping was turned on its head, and worsened by the serious gap between mandate and resources. . . .

A U.N. Exit and Entrance: Words of Regret and Hope, N.Y. TIMES, Dec. 18, 1996, at A8.

Refugees from these and other distant conflicts have received no value in return for the abandonment by states and UNHCR of the traditional commitment to provide asylum.

When the "right to remain" has been invoked, it has been for the wrong reasons. Specifically, the "right to remain" has been relied on only to legitimate *non-entrée* policies that have contained would-be refugees in perilous situations.⁸⁶ For example, when Turkey closed its border to Iraqi Kurds, the international community responded by creating a safe haven ("no fly zone") in northern Iraq.⁸⁷ When European states imposed visa controls to prevent the escape to safety of Bosnians, the international community created U.N. "safe areas," which became home to about 800,000 people.⁸⁸ When France decided to stop the flow of Hutus out of Rwanda in order to shore-up its regional political influence, it directed would-be refugees into camps under French protection in southwestern Rwanda.⁸⁹ None of these interventions gave the at-risk population a meaningful choice between remaining secure in their own homes and seeking asylum. Access to refugee protection abroad had already been denied, leaving the populations at risk stranded inside their own countries. The "right to remain" was therefore a hollow rationalization offered by powerful states for their clear infringement of the right to seek asylum. There has been no recognition of the crucial difference between a *right to remain* (voluntarily, in safety and dignity) and *no right to flee* (when that is the most effective means to escape danger).⁹⁰ Would-be refugees may indeed have remained

86. In a 1992 statement, the High Commissioner for Refugees appears to have recognized both the utility of the "right to remain" as a deterrent to seeking asylum abroad, and the consequential risks of such a strategy:

[I]n response to the burden on asylum states, how can my Office further develop the preventive dimension of its operations so as to reduce the impetus to flight? . . . How far can we persuade people to remain where they are in order to prevent displacement and "ethnic cleansing"? By doing so, are we not exposing their lives to danger? . . . I am convinced that preventive activities can help to contain the dimensions of human catastrophe by creating time and space for the political process.

Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, to the Third Committee of the General Assembly (Nov. 10, 1992), *reprinted in* 4 INT'L J. REFUGEE L. 541, 542-44 (1992).

87.

The security zone was less a way to ease the suffering of the Kurds than a U.S. effort to assist Turkey—a NATO member and an important partner in the international sanctions effort against Saddam. . . . There is no longer any doubt that the "no fly" zone provides no protection against Iraqi grounds incursions.

Katherine Wilkens, *How We Lost the Kurdish Game*, MANCHESTER GUARDIAN WKLY., Sept. 29, 1996, at 17.

88. Mikhael Barutciski, *The Reinforcement of Non-Admission Policies and the Subversion of the UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992-94)*, 8 INT'L J. REFUGEE L. 49, 74-75, 85 (1996).

89. Chris McGreal & David Harrison, *Continent's spoils slip from French fingers*, MANCHESTER GUARDIAN WKLY., Dec. 15, 1996, at 7.

90. James C. Hathaway, *New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection*, 8 J. REFUGEE STUD. 288-94 (1995); Barutciski, *supra* note 88.

within their own states, but not because they exercised a "right to remain." They had no option but to remain.

Moreover, the empirical evidence suggests that, even when the "right to remain" is operationalized, it fails to provide sufficient protection. Human rights violations have continued even in the high profile Kurdish "safe" area, and the Turkish military frequently carries out cross-border operations in search of suspected members of armed Kurdish opposition groups.⁹¹ Most important, Saddam Hussein's successful military incursion into the Kurdish city of Irbil in September 1996 clearly demonstrates the continuing risk of Iraqi aggression.⁹² The Bosnian "safe zones" were never demilitarized as promised by the U.N. Consequently, they were used as launching pads for government raids, logically attracting Serb reprisals.⁹³ Nor was the number of troops needed to defend these areas ever dispatched to Bosnia.⁹⁴ By at least the spring of 1995, it had become clear that the United Nations' "'safe areas' [we]re the most dangerous places in Bosnia."⁹⁵ Fighting and atrocities ultimately led to the deaths of thousands of civilians trapped in such "safe areas" as Srebrenica and Zepa.⁹⁶

Similarly, France effectively abandoned the Hutus it had discouraged from fleeing to Zaire. In the midst of extreme insecurity and instability, the French ended their peacekeeping mission and withdrew their forces. Fighting between the Rwandan military and Hutu extremists in one refugee camp led to the deaths of several thousand people.⁹⁷ Compounding the hypocrisy, France blocked the applications of Rwan-

91. UNHCR, *THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION* 84-85 (1993); U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 99-100 (1993).

92. Wilkens, *supra* note 87, at 16.

93. *Defending the Defensible*, MANCHESTER GUARDIAN WKLY., July 23, 1995, at 12.

94. William Shawcross, *Don't Blame U.N. Personnel for the Bosnia Failure*, INT'L HERALD TRIB., Dec. 3-4, 1994, at 8.

95. Julian Borger, *U.N. Gives Peace-Keeping a Last Chance*, MANCHESTER GUARDIAN WKLY., June 25, 1995, at 3.

96. Boutros Boutros-Ghali acknowledged "that certain safe areas [were] used by the two parties to the conflict to sustain their confrontation." Established without the consent of the Bosnian Serbs, and used as military bases by the Bosnian government forces, the safe areas provoked attacks on the residents and relief personnel they were intended to protect. UNHCR, *WORLD'S REFUGEES*, *supra* note 1, at 129. Between 10,000 and 12,000 Bosnian Muslim men and boys are believed to have been killed when the Srebrenica "safe area" fell to Bosnian Serb forces in July 1995. Another 8000 men were unaccounted for after the fall of Zepa three weeks later. U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 130 (1996).

97. In its report, the Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda concludes that the presence of militant communities operating inside the French-protected zone "made the Kibeho massacre possible, though certainly not inevitable." HOWARD ADELMAN & ASTRISUHRKE, *EARLY WARNING AND CONFLICT MANAGEMENT* 56 (Joint Evaluation of Emergency Assistance to Rwanda, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience*, Study 2, 1996).

dan refugees seeking asylum in France, on the basis of its half-hearted efforts to protect Rwandans inside their own country.⁹⁸

Iraq, Bosnia, and Rwanda provide three examples of the "right to remain" being used to provide superficial compensation for the denial of asylum to individuals at risk of serious human rights abuse. None of these in-country havens was safe. Instead, the concentrations of underprotected civilians in defined areas within hostile or unstable states proved an irresistible target to their enemies. In sum, rather than serving to mobilize the resolve of the international community to suppress human rights abuse, the "right to remain" has operated only to legitimize the denial of protection options to refugees where the interests of powerful governments were involved.⁹⁹ Ironically, refugees in strategically less significant parts of the world may be comparatively fortunate, as they have not been forced to "benefit" from international efforts to establish in-country protection. For most refugees, the shift from the right to seek asylum to the "right to remain" simply formalizes the de facto withdrawal of states from their legal duty to protect refugees, and makes clear that refugees should no longer expect to benefit from the legal protections historically provided by UNHCR.

E. The Withdrawal of States from Refugee Protection

As described above, the international refugee protection system serves fewer and fewer people, less and less well, as time goes on. Refugee law as traditionally conceived is therefore no longer a meaningful determinant of the treatment afforded involuntary migrants. Yet the inhumane actions increasingly taken by states outside the rubric of law clearly demonstrate that the alternative of relegating refugee protection to the realm of political discretion or humanitarian goodwill is fundamentally unacceptable. We therefore believe that the answer is to affirm the need for international law to bring both order and principle to bear on the way states address refugee flows, while recognizing that international law will be respected by governments only if it is seen to be attentive to their basic concerns. In our view, the breakdown in the authority of refugee law can largely be ascribed to two fundamental shortcomings: the absence of a meaningful solution orientation and the problem of individuated state responsibility.

98. Andrew Gumbel, *France Blocks Refugees from Rwanda Pogroms*, MANCHESTER GUARDIAN WKLY., July 3, 1994, at 3.

99. See generally Bill Frelick, *Preventive Protection and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia*, 4 INT'L J. REFUGEE L. 439 (1992); Andrew Shacknové, *From Asylum to Containment*, 5 INT'L J. REFUGEE L. 516 (1993).

1. The Absence of a Meaningful Solution Orientation

Particularly in the North, resistance to honoring duties owed to refugees follows from a growing resistance on the part of governments to externally imposed changes to the composition of their societies. Because there is no longer a pervasive interest-convergence between refugees and asylum states,¹⁰⁰ the legal right of refugees to trump immigration control rules means that persons not of a state's choosing will effectively be entitled to join its community. In states having a tradition of equating refugee status with the right to remain permanently in the asylum state, there is a fear that the arrival of refugees may, if sufficiently widespread, lead to social changes not desired by the host society.¹⁰¹ Even in those Northern states that have a long tradition of receiving immigrants, there is concern about the non-selective nature of the duty to admit refugees.

Concern about the impact of refugee arrivals on the make-up of an asylum state's community is not limited to Northern states. Viti Muntarbhorn has argued that many states of East Asia, including Brunei, China, Japan, and Malaysia, are preoccupied with avoiding the arrival of refugees of distinct cultural or ethnic backgrounds.¹⁰² As the bonds created by common opposition to colonialism and apartheid fade, some African governments are now affording truly dignified protection only to those refugees who are most similar to the citizens of the asylum state.¹⁰³

Where the community or its officials resist externally determined social transformation, efforts to control the arrival of refugees, harsh or otherwise, are the predictable result. One response is to condemn governments for their prejudice, or at least for pandering to the uninformed nativism of parts of their citizenry.¹⁰⁴ Nativism, and even racism, have undoubtedly shaped the refugee policies of many govern-

100. See *supra* text accompanying notes 6-7.

101.

Unlike the East Europeans, many of the new asylum seekers have arrived without readily transferable skills. This, combined with their different race and their alien religions, is seen as posing extremely difficult social and political problems both now and in the future.

Gil Loescher, *The European Community and Refugees*, 65 INT'L AFFAIRS 617, 623 (1989).

102. VITTI MUNTARBHORN, THE STATUS OF REFUGEES IN ASIA 16-17, 68, 98, 116, 143 (1992).

103. "[T]ribal ties, not hospitality, have integrated the Togolese refugees in Benin. Other refugees endure life in camps all over West Africa, including Benin, where thousands of Chadians, Zairians, and Central Africans are in camps." Elizabeth Abbott, *One Large Family Condemned to Live Together*, [TORONTO] GLOBE & MAIL, Nov. 26, 1994, at D4.

104. VICTOR MALAREK, HAVEN'S GATE: CANADA'S IMMIGRATION FIASCO 62-80 (1987); Arthur C. Helton, *United States Immigration Policy: The Conflict Between Human Rights and Perceptions of National Identity and Self-Interest*, in LEGITIMATE AND ILLEGITIMATE DISCRIMINATION: NEW ISSUES IN MIGRATION 235 (Howard Adelman ed., 1995).

ments. The growing influence of ethnic nationalism in many states, leading to a desire for segregation from "outsiders," clearly intensifies the problem.¹⁰⁵ It is important to promote a breaking down of irrational fears of foreigners and, in particular, a credible understanding of the democratic limits to communal closure.

However, it is presently politically unwise to insist that states permanently enfranchise all refugees. Such a stance holds refugees hostage to a major project of social transformation. We need instead to accommodate the need of refugees to flee with the prevalence of often narrow understandings of community inspired by the rise of ethnic nationalism and the demise of the Cold War interest-convergence. This accommodation will clearly not amount to a complete recognition of the right of the present inhabitants of states to exclude all outsiders. Yet the terms upon which refugees enter a foreign state could be qualified to prevent refugees from becoming pawns in the internal struggles of asylum states over the meaning of community. In particular, a solid and dependable system of refugee protection need not have any enduring impact on the receiving state's communal self-definition. It could instead be oriented to ensuring that, at least in most cases, refugees ultimately repatriate to their own country when conditions permit.

This endorsement of temporary protection follows logically from the fact that refugees are exempted from the usual rules of immigration control solely on the basis of what amounts to a claim of necessity.¹⁰⁶ While they should be received with full respect for their human dignity and attention to the disabilities inflicted upon them by involuntary migration, there is no principled reason to insist that they be routinely admitted to permanent residence. We believe that it makes sense to define the duration of stay for refugees as a function of the risk that gives rise to the duty to admit them.

In referring to this approach as solution-oriented temporary protection, we do not mean to suggest that it should aspire to the generation of solutions. Refugee status ends only when the violence or other human rights abuse that induced flight is eradicated, matters clearly beyond the province of the refugee protection system itself. To the extent that the international community has begun to intervene against the phenomena that force refugees from their homes,¹⁰⁷ the only true

105. MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* 7-9 (1993).

106. Walzer suggests that refugees have a special entitlement to be taken into a national community. This is because their claims "cannot be met by yielding territory or exporting wealth; they can be met only by taking people in . . . [because their] need is for membership itself, a non-exportable good." MICHAEL WALZER, *SPHERES OF JUSTICE* 48-49 (1983).

107. Before 1988, the United Nations Security Council had only passed 15 resolutions outlining a role for the U.N. in maintaining international peace and security. By 1994, the

solution to the plight of refugees is at last being promoted. The refugee protection system, in contrast, is a palliative regime that protects desperate people until a fundamental change of circumstances allows them to go home safely.

Therefore, our reference to solution-oriented protection means that, while not a source of solutions, refugee protection should be implemented in a way that takes full advantage of opportunities for solutions. To counter the perception of refugee protection as an unwanted and externally imposed immigration system, repatriation must be made viable. As discussed in Part III,¹⁰⁸ repatriation will often be unsuccessful when family and collective social structures of refugees have not been preserved during the period of protection abroad, when refugees are denied opportunities to develop their skills and personalities in the asylum state, or when the place of origin sees the return of refugees as a threat or burden. In such circumstances, repatriation efforts may lead only to poverty, violence, and even further flight. On the other hand, temporary protection can be structured in a way that recognizes and protects core human rights, encourages self-reliance, and preserves the social, political, and cultural identity of the refugee community. If return is made practicable by an empowering system of repatriation aid and development assistance, the solution-oriented protection system we propose has the potential to renew asylum capacity regularly. As a reasonable and principled compromise between the needs of refugees and the migration control objectives of host governments, temporary protection will encourage states to live up to their international protection responsibilities, rather than avoid them.

This is because the repatriation of most, if not all, refugees sends a clear signal that the system is not just a "back door" route to permanent immigration. As it becomes understood that refugees are received on an extraordinary basis, and that their presence does not require any fundamental adjustment to the host community's self-definition, the implied threat presently associated with the arrival of refugees can be defused. The failure to promote repatriation, on the other hand, is inconsistent with the logic of refugee status as a situation-specific trump on immigration control rules. Because refugees are admitted on the basis of necessity, it cannot legitimately be asserted that they should routinely be entitled to stay in the host state once the harm in their own country has been brought to an end.

number of resolutions had increased to 78. At the same time, the U.N.'s annual peacekeeping budget has grown from around U.S. \$230 million in 1987-1988 to U.S. \$3.6 billion in 1993-94. "[M]ore money was spent on U.N. peacekeeping operations in 1993 alone than in the whole of the preceding 48 years." UNHCR, *WORLD'S REFUGEES*, *supra* note 1, at 98.

108. See *infra* text accompanying notes 257-289.

2. The Problem of Individuated State Responsibility

Even if the mechanisms of refugee protection are re-tooled to minimize conflict with migration control objectives, states may still seek to avoid their responsibilities because of the problem of individuated state responsibility. Under the present protection system, the government of the asylum state is solely responsible for delivering and funding the protection of all refugees who arrive at its jurisdiction.¹⁰⁹ A shift to solution-oriented temporary protection would not alter that fact.

In states of the South, concern about individuated state responsibility arises because the duty to protect refugees is primarily allocated on the basis of accidents of geography and the relative ability of governments to control their borders. States closest to countries of origin and those least able to afford systematic border controls or technologies of deterrence will inevitably receive the most refugees. Consequently, the poorest countries of the South are legally required to meet the needs of most of the world's refugees. Some countries do offer to resettle refugees from overburdened countries of first asylum on a limited basis, but they are under no obligation to do so.

This chaotic distribution of the responsibility to provide refugee protection is not offset by any mechanism to ensure adequate compensation to those governments that take on a disproportionate share of protective responsibilities. To the contrary, any fiscal assistance received from other countries or the UNHCR is a matter of charity, not of obligation, and is not distributed solely on the basis of relative need. For example, in 1993, UNHCR allocated more funds to refugee protection in Europe alone than it did for the protection of *three times as many refugees* in Africa, Asia, and the Middle East combined.¹¹⁰ Even by 1995, UNHCR had spent less to assist the nearly 1.7 million Rwandan refugees in Burundi, Tanzania, and Zaire than on its residual material assistance and other programs inside the former Yugoslavia.¹¹¹

109. While the Refugee Convention urges international cooperation in its Preamble, its specific provisions do not operationalize that objective. See generally *infra* text accompanying notes 245–251.

110. *Report of the United Nations High Commissioner for Refugees*, U.N. GAOR, 49th Sess., Supp. No. 12, Table 1, U.N. Doc. A/49/12 (1994) [hereinafter 1994 UNHCR Report].

111. Total UNHCR expenditures in Burundi, Tanzania, and Zaire for 1995 were \$183,597,500, whereas total expenditures in the former Yugoslavia were \$221,581,300. These statistics actually understate the disparity of contributions, as additional expenditures of \$293,238,700 were made by other agencies to assist with relief work in former Yugoslavia, bringing the total international relief work contribution there to \$514,800,000. In contrast, UNHCR notes that "the international community's response has so far been limited" to a plea for a comparatively modest supplementary amount of \$70,500,000 to help the countries impacted by the arrival of Rwandese refugees to repair damage to the environment and infrastructure. *Report of the United Nations High*

Concerns about the inequitable allocation of the duty to protect refugees do not preoccupy wealthier countries of the North, where the number of asylum-seekers is considerably smaller and the resources to respond to them are clearly much greater. In developed states, the problem of individuated state responsibility manifests itself instead in the arrival of significant numbers of persons who make fraudulent claims to refugee status. Refugee law as implemented requires that refugee status claims be verified and protection afforded in the particular country to which a refugee travels. The decision about where to seek protection is, at least for the mobile and those with access to the funds needed for international travel, largely that of the asylum-seeker.¹¹² This right of the asylum seeker to choose the state in which to solicit recognition of refugee status is a critical, if modest, compensation for the failure of governments to ensure a uniformly inclusive understanding both of the refugee definition and of legally mandated standards of protection across states.

Because it is virtually impossible for most would-be immigrants in the South to meet the highly selective immigration criteria set by states of the North,¹¹³ some persons who are not at risk in their own country make asylum claims in developed countries as the basis for securing at least physical admission into their desired country of immigration. Once inside, they hope to forge connections during the often lengthy time required to process the refugee claim that will allow them to immigrate, legally or otherwise.¹¹⁴ The normally complex procedural systems and access to general guarantees of due process in developed states means that approximately one billion dollars are wasted each year to receive and process the applications of these non-genuine claimants.¹¹⁵ At least as important is the fact that the presence of fraudulent asylum-seekers provides fodder to those who encourage the

Commissioner for Refugees, U.N. GAOR, 51st Sess., Supp. No. 12, paras. 82, 169, and Table 1, U.N. Doc. A/51/12 (1996).

112. See Executive Committee of the High Commissioner's Programme, Conclusion No. 15 (XXX) (1979), *Refugees Without an Asylum Country* [hereinafter ExCom Conclusion No. 15], para. h(iii) and (iv). But see *infra* text accompanying notes 157–160.

113.

All of the world's more affluent countries keep their doors open to migrants from other parts of the world—as long as they have skills which are in short supply, substantial amounts of capital to invest or close family links with the state concerned. For the person who lacks such attributes, however, the opportunities for admission are extremely limited.

UNHCR, *WORLD'S REFUGEES*, *supra* note 1, at 192.

114. EUROSTAT AND THE SECRETARIAT OF THE INTER-GOVERNMENTAL CONSULTATIONS ON ASYLUM, REFUGEE AND MIGRATION POLICIES IN EUROPE, NORTH AMERICA AND AUSTRALIA, *ASYLUM-SEEKERS IN EUROPE 1985–1995* 3 (1996).

115. If, for example, only 20% of asylum-seekers who travel to the North are non-genuine claimants, their share of reception and processing costs amounts to U.S. \$1.4 billion per annum. See *infra* note 155.

public to question the continuing logic of a commitment to international refugee law.¹¹⁶

For reasons discussed above,¹¹⁷ the answer to this manifestation of the problem of individuated state responsibility is not mechanistic burden-shifting toward states of transit. It is morally reprehensible and legally wrong summarily to remove an asylum-seeker without regard for the quality of protection ultimately provided. Most important, the Northern commitment to deterrence of fraudulent claims can be advanced in a way that simultaneously responds to Southern concerns that less developed countries are required to contend with unrealistic and unsupportable refugee protection burdens and responsibilities. There is, in short, an untapped interest-convergence between North and South having the potential to address the problems inherent in a system of individuated state responsibility.

The answer we propose is to shift away from particularized duties and toward substantially greater collectivized protection efforts.¹¹⁸ The current system of unilateral, undifferentiated obligations is unfair and ultimately unsustainable.¹¹⁹ Building on previous examples of interstate cooperation in refugee protection and other fields, we therefore propose a new model of systematic and ongoing sharing within associations of states that we term "interest-convergence groups."¹²⁰ There are precedents for efforts to collectivize the responsibility to protect refugees, including the Comprehensive Plan of Action for Indochinese Refugees (CPA),¹²¹ the International Conferences on Assistance to Refu-

116. In 1995, legislation was introduced by U.S. Senator Alan Simpson that would have abolished the right to claim refugee status on the territory of the United States, deferring all protection issues to U.S. consulates abroad. Martin Walker, *Congress Ruled by Politics of Outrage*, MANCHESTER GUARDIAN WKLY., Apr. 30, 1995, at 6.

117. See *supra* text accompanying notes 13-14.

118. See Peter Harder, *Migration: A New International Dimension*, 5(1) INT'L. J. REFUGEE L. 101, 104 (1993). See also Gervase Coles, *Approaching the Refugee Problem Today*, in REFUGEES AND INTERNATIONAL RELATIONS 373, 408 (Gil Loescher & Laila Monahan eds., 1989).

119.

As the "system" malfunctions, the politics of refugee assistance and resettlement are rather a diplomatic prisoner's dilemma. Any state unilaterally deciding to be generous thereby eases pressure on non-cooperating states and reduces the incentive on the international community to develop the type of strong machinery for cooperation which is needed.

RICHARD B. LILICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 66 (1984).

120. See generally Asha Hans & Astri Suhrke, *Responsibility Sharing*, in *RECONCEIVING INTERNATIONAL REFUGEE LAW* (James C. Hathaway ed., forthcoming 1997).

121. The international community's response to the mass flow of asylum-seekers in Southeast Asia is the most substantial example of formal interstate cooperation to address a refugee protection issue. The Meeting on Refugees and Displaced Persons in South East Asia, held in 1979, introduced a system of responsibility sharing based on intra-regional first asylum and comprehensive extra-regional resettlement. Driven by a combination of humanitarian concern for the plight of the "boat people" and the political interests of the United States and its alliance

gees in Africa (ICARA I and II),¹²² and the International Conference on Central American Refugees (CIREFCA).¹²³ In Part III, we draw on the lessons of these and other examples of transnational cooperation to suggest the basic elements of a practical and dependable system of interstate allocation of the responsibilities and burdens of refugee protection.

Not all states are able to contribute to refugee protection in an identical manner. Interest-convergence groups therefore ought to define obligations on the basis of a theory of "common but differentiated responsibility" toward refugees.¹²⁴ There is a need to decide both how

partners, approximately 1.6 million refugees were resettled out of the region over the course of a decade. By the late 1980s, however, countries outside the region were no longer willing to accept large numbers of refugees for resettlement, leading countries of first asylum to return to earlier interdiction policies. A second International Conference on Indochinese Refugees met in June 1989, and adopted a "Comprehensive Plan of Action" (CPA) to respond to this new reality. Under the CPA, first asylum remained contingent upon guarantees of extra-regional resettlement. However, a highly contentious process for assessing eligibility for refugee status was introduced, and those persons "screened out" were to be returned to Vietnam under the terms of a formal agreement between UNHCR and the Vietnamese government. See generally *The Comprehensive Plan of Action for Indo-Chinese Refugees: An Experiment in Refugee Protection and Control*, in LAWYERS COMMITTEE FOR HUMAN RIGHTS, UNCERTAIN HAVEN: REFUGEE PROTECTION ON THE FORTIETH ANNIVERSARY OF THE 1951 UNITED NATIONS REFUGEE CONVENTION 11-60 (1991); Hathaway, *Labelling the "Boat People"*, supra note 29; Hiram Ruiz, *The CPA: Tempestuous Year Left Boat People Adrift*, in U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 82-83 (1996).

122. The first International Conference on Assistance to Refugees in Africa (ICARA I), held in 1982, was explicitly conceived as a pledging conference. It attracted primarily bilateral aid from donor states who chose among programs designed by African states with the assistance of UNHCR. A second conference (ICARA II), held in 1984, focused on forging a consensus that ongoing refugee-related development assistance to host states was required to sustain the viability of asylum in Africa. See generally Barry Stein, *Refugee Aid and Development: Slow Progress Since ICARA II*, in REFUGEE POLICY: CANADA AND THE UNITED STATES 143 (Howard Adelman ed., 1991); Robert F. Gorman, *Taking Stock of the Second International Conference on Assistance to Refugees in Africa (ICARA II)*, 4 J. AFR. STUD. 4-11 (1987); Robert F. Gorman, *Refugee Aid and Development in Africa: Research and Policy Needs from the Local Perspective*, in AFRICAN REFUGEES: DEVELOPMENT AID AND REPATRIATION 227 (Howard Adelman & John Sorenson eds., 1994).

123. The International Conference on Central American Refugees (CIREFCA), held in 1989, is viewed as a particularly successful example of regional cooperation that attracted extra-regional fiscal support. CIREFCA was conceived in the context of the Esquipulas Peace Accord, and involved the provision of development assistance to refugees, returnees, and displaced persons. Donor states worked collaboratively with governments in the region, assisted by UNHCR and the United Nations Development Programme (UNDP). Fifty-nine projects were funded between 1989 and 1994, at a total cost of approximately U.S. \$420 million. The most important conduits for assistance were U.N. bodies and NGOs, each attracting about 40% of total funds, mostly provided by European states. See generally DENNIS GALLAGHER & JANELLE MILLER, CIREFCA: AT THE CROSSROADS BETWEEN UPROOTED PEOPLE AND DEVELOPMENT IN CENTRAL AMERICA (Commission for the Study of International Migration and Cooperative Economic Development Working Paper No. 27, 1990); GONZALO PEREZ DEL CASTILLO & MARIKA FAHLEN, CIREFCA: AN OPPORTUNITY AND CHALLENGE FOR INTER-AGENCY COOPERATION (May, 1995); ADOLFO AGUILAR ZINSER, CIREFCA: THE PROMISES AND REALITY OF THE INTERNATIONAL CONFERENCE ON CENTRAL AMERICAN REFUGEES (1991).

124. The concept of common but differentiated responsibility has developed in international environmental law, highlighting the reality that while states may share a common commitment to a healthy environment, they have contributed differentially to environmental degradation and

to provide safe and humane protection to the refugees (responsibility sharing) and how to apportion the fiscal costs of meeting protection needs (burden sharing). We argue for an approach to collectivized protection that allows a balance to be struck between meeting the responsibility to grant asylum and shouldering the burden of financing protection. This balance is what we term "common but differentiated responsibility."

Under a regime of common responsibility, all members of the interest-convergence group agree in advance to contribute to protect refugees who arrive at the territory of any state member of the group. States will cooperate in a manner akin to participation in an insurance scheme. It must be stressed that we are not suggesting that states insure themselves against refugees, but rather that they minimize their particularized risks by joining with others to make protection feasible throughout the territories of all interest-convergence group member states. The notion of differentiated responsibility recognizes that it is unrealistic to expect all states to make an identical contribution both to receiving refugees and to financing the costs of the protection regime. We advocate allocational principles that take account of real differences in the relative abilities and circumstances of states and seek to maximize the overall commitment to protection by drawing on the comparative strengths of each member government. Each participating state would contribute by providing temporary protection, receiving refugees whose special needs make temporary protection inappropriate, resettling those refugees who cannot return home at the end of the period of temporary protection, funding the protection system, or through a combination of these roles:

A system of collectivized responsibility would respond to the desire of Northern states to avoid the fraudulent claims resulting from the individuated duty to admit every asylum-seeker into their territories until the claim to refugee status is denied. To the extent that developed states commit themselves to membership in refugee protection interest-convergence groups, they would secure access to a legitimate means by which to dissociate the site of arrival from the place of asylum. This is legally possible because the right of refugees to decide where to solicit protection is *not* absolute, but follows from the risk of *refoulement* or other rights abuse that might result if a refugee were compelled to rely on the efforts of a government that may have lower standards than those prevailing in the state whose protection the refugee has in-

have varying capacities to take action to reverse the harm that has been done. Rio Declaration on Environment and Development, June 14, 1992, principle 7, 31 I.L.M. 874. See generally Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675 (1993).

voked.¹²⁵ Governments are legally entitled to allocate the responsibility to protect refugees, so long as the assignment of protective responsibility is the result of common agreement among the states concerned, and poses no risk to the refugee's right to protection against *refoulement*, and to enjoy other basic human rights.

With agreements in place that authorize the asylum-seeker to be sent to a safe country in his or her region of origin for refugee status determination, there would be no incentive to make a fraudulent claim in a country outside the region. As a result, Northern governments would be able to preserve their migration control objectives without blocking access to asylum-seekers by resorting to deflection and other *non-entrée* mechanisms. The problems of wasted resources and diminished support for refugee protection that confront Northern countries could therefore be addressed without constraining access to first asylum in any way.

The result of this trade-off would clearly be an increase in the number of refugees protected in the South. But, because eighty percent of the world's refugee population is already protected in the less developed world,¹²⁶ even an agreement to assign the *entire* refugee population of the North to protection in the South (which would not be possible, for reasons elaborated in Part III)¹²⁷ would increase the refugee population in the less developed world only marginally. The resulting system, however, could address the growing concerns of Southern governments regarding fairness and sustainability in meeting the needs of the bulk of the refugee population.

In particular, a system of collectivized responsibility would mean that states within a refugee population's region of origin would not be required to contend independently with whatever refugees might arrive at their territory. Each government belonging to an interest-convergence group would instead have access to a system that would fairly distribute refugee protection responsibilities. A guarantee of shared responsibility would enable states of the South faced with even a mass

125. Refugee Convention, *supra* note 4, art. 33(1). By way of comparison, asylum-seekers may validly be returned to a country in which they have found protection if "they are protected there against *refoulement* and they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them." Executive Committee of the High Commissioner's Programme, Conclusion No. 58 (XI) (1989), Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection, para. (f).

126. Of the total world refugee population of 15,337,000, the developed countries of Europe, North America, Oceania, and Japan host only 2,715,300 refugees, or 17.7% of the world total. This includes all Bosnians who have applied for asylum, who have been excluded from applying for asylum, or who have been admitted under special temporary protection regimes. U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 4-5 (1996).

127. See *infra* text accompanying notes 384-387.

influx to remain open to refugee arrivals, secure in the knowledge that a speedy decision would be made to allocate protective responsibilities among partner states. Equally important, because the state of arrival would benefit from a binding guarantee of financial support from extraregional members of the interest-convergence group, its own obligations would be limited to what it could reasonably afford.

We believe that developed states will be prepared to finance burden sharing with the governments that agree to host refugees as the *quid pro quo* for access to a system of responsibility sharing.¹²⁸ This is because under the system we propose, all countries would remain bound by the Convention's duty of *non-refoulement*. This obligation prevents a state from returning the asylum-seeker to his country of citizenship, normally the only state that is legally required to grant readmission.¹²⁹ The ability of the sending state to remove the refugee to any other country therefore requires the consent of the proposed state of destination. Because the agreement of potential partner states in the region of origin is essential to securing the flexibility desired by Northern governments, it should prove possible to negotiate the collectivized protection arrangement in a way that advances the key goals of the less developed world.¹³⁰ In particular, there is a need for dependable and adequate funding not only of basic refugee needs, but also of the sorts of empowering and solution-oriented temporary protection mechanisms that can make return viable while advancing the national interests of the asylum state.¹³¹ Most, or even all, of the funds required could be garnered from the savings realized by the dismantling of *non-entrée* mechanisms and from the significant reduction in the number of fraudulent claims to be processed in the North. The bargaining leverage of the South ought to suffice to ensure that these funds are reallocated to those who assume the responsibilities and burdens of protection.

For the same reasons, and as a response to asylum and refugee scholars who would justifiably oppose a complete bar on the reception

128. The viability of such agreements is suggested by the United States' successful bilateral negotiation of refugee processing center arrangements for Haitian refugees with Jamaica and the Turks and Caicos Islands, and of temporary safe haven accords with each of Dominica, St. Lucia, Suriname, and Panama. See generally Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 96, 99-102 (1995).

129. "The proposition that every State must admit its own nationals into its territory is widely accepted and may now be regarded as an established principle of international law." THE MOVEMENT OF PERSONS ACROSS BORDERS 39 (Louis B. Sohn & Thomas Buergenthal eds., 1992).

130. For instance, former Tanzanian President Julius Nyerere is said to have made an offer to settle a million Rwandan refugees in return for economic aid. Bonaventure Rutinwa, *Beyond Durable Solutions: An Appraisal of the New Proposals for Prevention and Solution of the Refugee Crisis in the Great Lakes Region*, 9 J. REFUGEE STUD. 312, 316 (1996).

131. See generally Jacques Cuénod, *Refugees: Development or Relief?*, in REFUGEES AND INTERNATIONAL RELATIONS, *supra* note 118, at 219, 241.

of refugees from other regions of the world,¹³² it should be possible for Southern countries to secure formal commitments from the developed world to take on those aspects of the reception of refugees for which extraregional states are often best suited. For example, very few Southern countries have been prepared to grant refugees permanent status, even when return home has proved impossible for many years.¹³³ Both by meeting the special needs that cannot be met locally and by filling the residual resettlement role, extraregional states can contribute to the viability of collectivized protection in a way that is consistent with their preference for managed and regulated immigration.

The preceding discussion suggests three ways in which collectivized protection would also benefit the vast majority of the world's refugees. First and foremost, access to asylum would be promoted. Because the arrival of refugees would no longer pose the risk of either unfair or unsustainable obligations, states within the region of origin could remain open to the provision of asylum. Access to asylum would also be improved for the minority of refugees who need to flee to a state outside their own region. Many such refugees are presently deflected by visa control and other blunt responses to the problem of fraudulent claims. Collectivized responsibility, in contrast, would allow governments to deter unfounded asylum claims without closing extraregional escape routes.

Second, the dismantling of *non-entrée* systems would free up substantial sums of money presently spent to enforce *non-entrée* and to process fraudulent claims. Re-channelling funds presently wasted on the processing of non-genuine claims in the North would ensure a more adequate funding base to address the needs of the majority of the refugee population that is already protected within the regions of origin.

Third, collectivized responsibility should result in firm guarantees of access to extraregional resettlement in special needs cases, and in cases where safe repatriation remains impossible after a reasonable period of temporary protection. Whereas the present system allocates protection outside the region largely on the basis of the relative wealth and mobility of particular asylum-seekers,¹³⁴ a more structured sharing

132. For example, Deborah Anker of the Harvard Law School argues that the admission of refugees has been an important means of countering xenophobic tendencies in the United States. Moreover, Anker is of the view that the presence of refugee groups has had a positive impact on U.S. human rights policies in relation to such countries as El Salvador and Haiti, and provided the impetus to ensure that refugee law addresses important gender-based reasons for protection, including female genital mutilation. Telephone interview with Deborah Anker (Dec. 15, 1996).

133. See *supra* text accompanying note 76.

134. See *supra* text accompanying note 112 and *infra* text accompanying notes 157-160.

regime would allow these decisions to be made on the basis of relative need.

There is also a fourth critical refugee interest that can be advanced under a shift to collectivized responsibility. Sadly, refugee law as presently implemented affords few opportunities for the meaningful oversight of legal duties owed by governments to refugees. The interstate complaint procedure envisaged by the Refugee Convention has never been used,¹³⁵ and the surrogate protector role assigned to UNHCR¹³⁶ has evolved into little more than a matter of discrete and private representations to states. UNHCR has never drawn on the express undertaking of Article 35 to formalize a system of periodic reporting and collective scrutiny of respect for refugee rights. As a result, there is no forum within which to require governments to engage in the kind of dialogue of justification that is a standard feature of nearly all other human rights systems.¹³⁷ Even the legal significance of the promotional role played by UNHCR's Executive Committee is in decline.¹³⁸ With no sign that states are likely to advocate refugee rights in their bilateral relationships, there is good reason to be concerned about the direct enforceability of the refugee rights regime.

Under a system of collectivized responsibility, in contrast, governments will have a built-in incentive to take an interest in the ways refugees are treated by other states. Even the states not designated to provide temporary protection under the application of a particular interest convergence group's responsibility sharing arrangement would remain bound by the duty of *non-refoulement* set by Article 33 of the Refugee Convention. The duty of *non-refoulement* proscribes not just the direct return of refugees to the country of origin, but also actions that risk the return of a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened." Thus, any country that wishes to avail itself of the flexibility afforded by a responsibility sharing mechanism would be legally bound to ensure that removal to a partner state does not amount to indirect *refoulement*.

135. Any dispute between state parties regarding the interpretation or application of the Convention that cannot otherwise be settled may be referred to the International Court of Justice. Refugee Convention, *supra* note 4, art. 38.

136. National implementing legislation, regulations, and decrees, as well as detailed information concerning the conditions of refugees are to be routinely supplied by state parties to the UNHCR. More generally, states undertake to cooperate with UNHCR, and to facilitate its duty to supervise the application of the Convention. Refugee Convention, *supra* note 4, arts. 35, 36, 41(c). It falls to UNHCR and to the state parties to ensure that refugee rights are implemented, as the Convention does not provide a mechanism by which individuals can pursue their rights directly. ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 59 (1966).

137. See Louis B. Sohn, *Human Rights: Their Implementation and Supervision by the United Nations*, in *HUMAN RIGHTS IN INTERNATIONAL LAW* 369, 373-79 (Theodor Meron ed., 1984).

138. Guy Goodwin-Gill & David Petrasek, *The 44th Session of the UNHCR Executive Committee: A View from the Side*, 6(1) INT'L J. REFUGEE L. 63 (1994).

The system we envisage will promote practical accountability in two ways.

In some countries, such as Canada, domestic constitutional rights could be invoked.¹³⁹ The European Court of Justice (ECJ) has developed a comprehensive line of cases recognizing that all individuals, including aliens physically present within a member state, are entitled to key human rights protections, including access to an effective remedy against rights violations.¹⁴⁰ The United Nations Human Rights Committee similarly recognizes that it is an individual's presence in the jurisdiction that triggers the right to claim protection under the International Covenant on Civil and Political Rights (ICCPR).¹⁴¹ Alien status does not reduce that entitlement.¹⁴² The Committee specified that the right to liberty and security of the person governs "immigration control" measures.¹⁴³ More generally, the Committee has stated that ICCPR Article 13 forbids arbitrary expulsions of aliens.¹⁴⁴

Perhaps most significantly, the opportunities for legal oversight presented by replacing *non-entrée* schemes with responsibility sharing arrangements would benefit more than just the particular refugee claimants involved in a specific challenge. In essence, the refugee protection community in developed states would be positioned to police the quality of protection afforded refugees even in quite distant parts of the world. This is because under a responsibility sharing agreement, the relevant issue in a legal challenge to removal would clearly be the quality of protection provided in the state designated to receive the asylum-seeker. If the rights of persons similarly situated to the particular asylum-seeker who launched the challenge are not being respected, removal would probably be prohibited. Because it would be in the interest of the governments seeking to effect removals to avoid legal challenges of this kind, there would be an automatic incentive for developed states both to take an active interest in the quality of

139. See James C. Hathaway & R. Alexander Neve, *Fundamental Justice and the Deflection of Refugees from Canada*, 34(2) OSGOODE HALL L.J. 1, 4-7 (1996).

140. See, e.g., *Vilvarajah et al. v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) (1992); *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) (1992); and *Beljoudi v. France*, 234-A Eur. Ct. H.R. (ser. A) (1992).

141. International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967) (adopted Dec. 16, 1966, entered into force Mar. 23, 1976) [hereinafter ICCPR].

142. See, e.g., *UN-Human Rights Committee: Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 470/1991*, 14 HUM. RTS. L.J. 307 (1993).

143. General Comment 8 of the Human Rights Committee, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, International Human Rights Instruments, at 7, U.N. Doc. HRI/GEN/1 (1992) [hereinafter HRC General Comments].

144. General Comment 15 of the Human Rights Committee, in HRC General Comments, *id.* at 20.

protection in destination states, and to ensure that the funds necessary to protect refugees there are forthcoming.

Second, comparable scrutiny would occur within the interest-convergence group structure we suggest as the venue for implementation of collectivized responsibility. As discussed in Part III,¹⁴⁵ specific decisions regarding the allocation of the responsibility to protect refugees should be taken on the basis of four criteria, the most important of which is the refugees' physical security. Group members must therefore grapple collectively with the quality of protection available in the states under consideration. In Part III, we outline a key role in interest-convergence group discussions for the UNHCR and for lead non-governmental agencies working with refugees.¹⁴⁶ By creating a new forum in which refugee rights must of necessity be discussed and by providing for reasonable transparency of decision-making within that forum, we believe that collectivized responsibility will significantly advance the objective of promoting new mechanisms to scrutinize refugee well-being.

Our goal, in sum, is to reconceive the mechanisms of refugee protection in a way that safeguards practical access to meaningful asylum. In an international legal system based on the self-interest of states, principled reform should anticipate and respond to official concerns to maintain or establish effective migration control systems, and to minimize exposure to serious fiscal or other risks. We believe that governments will see that these priorities can be reconciled to a rights-regarding refugee protection system in which repatriation occurs at the earliest safe opportunity, and states work together to share burdens and responsibilities.

F. The Ethics of Refugee Law Reform

Suggestions that the mechanisms of refugee protection need to be reconceived are often met with trepidation by those deeply concerned for the welfare of refugees.¹⁴⁷ This concern is understandable, given the pattern of protection-reducing reforms introduced by most governments in recent years. We believe, however, that the deficiencies of the present asylum system are so severe that the *failure* to explore change would be unethical. The moral imperative is to move forward with a reform strategy that is both principled and pragmatic.¹⁴⁸

145. See *infra* text accompanying notes 378–381.

146. See *infra* text accompanying notes 348–355.

147. See, e.g., Bill Frelick, *Toward the Reformulation of International Refugee Law: Symposium Report*, 15(1) REFUGE 2 (1996).

148. John Haley, *Some Thoughts on the Ethical Dimensions of the Project to Reformulate International Refugee Law*, 15(1) REFUGE 5 (1996).

Access to protection by those in need is surely the primary objective. Yet it is precisely this basic principle that is being undermined as states erect an increasing number of barriers to access, force refugees from their territories by severe rights denials, or contain them in unsafe havens. If we have accurately ascribed the strategies of governments determined to avoid unilateral and potentially indefinite responsibility, then constructive alternatives to the present mechanisms of refugee law should be considered. A clearly temporary approach to refugee protection, coupled with an effective interstate process for sharing the responsibilities and the burdens of protection, responds to the legitimate operational concerns of states. It does not, however, compromise the right of refugees to access solid and dignified protection.

Particularly in the North, the avoidance of refugee protection responsibilities plays to public perceptions that immigration policies are out of control.¹⁴⁹ The imperative for governments to take crude steps to keep refugees away as a demonstration that border control remains viable will only abate if a credible policy alternative is proposed.¹⁵⁰ The cycle of protection and repatriation that is the essence of a temporary protection regime may offer that alternative.

It is in the interest of refugees to affirm that refugee protection is a human rights remedy, which should be separated from immigration policies. When refugees are grouped together with all other manner of migrants, be they legal or illegal, skilled or unskilled, law-abiding or undesirable, the fundamental distinction between refugees and other migrants, namely the involuntary nature of the refugee's journey, is lost.¹⁵¹ Advocates have demanded that governments take steps actively to remind the public that refugees are not like other immigrants because they have been *forced* to flee their homes.¹⁵² A commitment to temporary protection, backed up by policies that will normally lead to repatriation, would help separate refugee protection from immigration policy in general, thereby restoring the focus of attention to the human rights basis of refugees' presence in host countries. As Jordan's Crown Prince El Hassan Bin Talal has observed:

149. This public perception has led states to undertake highly publicized programs of deterrence, such as "Operation Hold-the-Line" on the border between Mexico and the United States. While the real value of such initiatives in deterring illegal immigration is questionable, officials promote them as a means of reassuring the public that governments are responding to a perceived problem. See *CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE* 34-36 (Wayne A. Cornelius, Philip L. Martin, & James F. Hollifield eds., 1994).

150. Commission on the European Communities, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM(94)23 final, at para. 12 [hereinafter *European Commission Communication*].

151. See generally UNHCR, *WORLD'S REFUGEES*, *supra* note 1, at 196-98.

152. See, e.g., DAVID MATAS WITH ILANA SIMON, *CLOSING THE DOORS: THE FAILURE OF REFUGEE PROTECTION* 27-28 (1989).

A human rights basis for refugee law would not only invigorate a stagnant law, but would also stimulate the essentially humanitarian tendencies of nations and jurists, reminding them that behind the faceless words "refugee," "returnee," "economic migrant," lie the faces of a starving child, a desperate mother, or a sick old man.¹⁵³

A second ethical argument in favor of refugee law reform is the promotion of a more equitable distribution of funds available for refugee protection. As noted above,¹⁵⁴ the relatively recent breakdown of refugee protection within Southern states derives in large measure from competition for scarce resources between refugee and host communities. Under a more collaborative approach to refugee protection, the same resources presently spent to receive refugees could be re-assigned where they would be most likely to benefit the greatest number of refugees. Industrialized states spend billions of dollars annually to process the claims of the small minority of the world's refugee population that manages to evade *non-entrée* schemes and to claim protection in the North.¹⁵⁵ These same wealthy governments contribute less than U.S. \$1.2 billion each year to address the needs of the more than eighty percent of refugees remaining in the South.¹⁵⁶ We believe that it is nearly impossible to justify the present skew of resource allocations in favor of the small minority of refugees—disproportionately young, male, and mobile—who can seek asylum in the developed world.¹⁵⁷ The relative magnitude of the needs of refugees and of the host communities in many less developed countries demands serious consideration of a system under which resource allocations are better aligned with the real distribution of protective responsibility.

153. Crown Prince El Hassan Bin Talal, *Refugee Law: Protection for the Minority*, 6(1) J. REFUGEE STUD. 4 (1993).

154. See *supra* text accompanying notes 38–40.

155. According to one estimate, the cost of administering asylum procedures and providing social welfare benefits to refugee claimants in 13 of the major industrialized states increased from around U.S. \$500 million in 1983 to some U.S. \$7 billion in 1991. UNHCR, *WORLD'S REFUGEES*, *supra* note 1, at 199.

156. *Id.* at 255.

157. Canada, like Western Europe and the United States, accepts only a small proportion of asylum-seekers worldwide, and the majority of those accepted on humanitarian grounds or as refugee claimants, are men. The majority of women with and without children, find temporary (often leading to long term) asylum in refugee camps, or in resettlement zones where they await repatriation to their home country or resettlement to a third country. It is well known that women and girls constitute the majority of the population of camps. According to some estimates, at least 75% of refugees are women and children, and in some countries women and children make up 90% of the refugees, with large numbers of female-led households. See Wenona Giles, *Aid Recipients or Citizens? Canada's role in managing the gender relations of forced migration*, in *DEVELOPMENT & DIASPORA: GENDER AND THE REFUGEE EXPERIENCE* 44 (Wenona Giles, Helene Moussa & Penny Van Esterik eds., 1996).

If the arrival of asylum-seekers in the North continues to be understood as giving rise to individuated obligations on the states of arrival, wealthy governments will continue to spend even larger sums to avoid responsibility for the welfare of all refugees who might come to their borders.¹⁵⁸ If, on the other hand, a regime of collectivized responsibility were to de-link the site of arrival from the duty to meet all protection needs,¹⁵⁹ present investments in *non-entrée* mechanisms could then be reallocated to meet refugee needs more equitably in parts of the world that are presently forced to contend with a disproportionate share of protection responsibilities.¹⁶⁰ Extraregional resettlement could be reserved for those who truly require it, on the basis of need rather than relative mobility.

A third ethical consideration follows from the practical opportunities that collectivized protection affords for supervision of respect for refugee rights around the world. Because the ability to benefit from responsibility sharing mechanisms legally depends on the respect of refugee rights in the countries of asylum, even distant governments have an incentive to monitor the quality of protection afforded. Moreover, unlike many contemporary bilateral and other burden-shifting arrangements that exclude NGOs and even UNHCR from any meaningful participation, the more open interest-convergence groups structure proposed here would enhance the transparency of interstate decisions in regard to the protection of refugees.

What, though, of the possibility that at least some governments will accept nothing short of *complete* discretion over immigration, and that even a shift to the temporary and collectivized protection of refugees may not be viewed as reconcilable to their interests? Similarly, how will it be possible to ensure that shared responsibility for refugees does

158.

[T]he representative of one major donor country, and valued partner of UNHCR, . . . [has observed that] "unless we can develop appropriate international machinery we will see an intensification of pressure on all governments involved to concentrate on unilateral and nationally based solutions which will focus most heavily on immigration controls and less and less on internationally agreed procedures and regimes."

Michel Moussalli, *International Protection: The Road Ahead*, 3 INT'L J. REFUGEE L. 606 (1991).

159. See *infra* text accompanying notes 378-385.

160. While there is a legitimate concern to ensure that the savings realized are in fact re-allocated to share the burden of overseas refugee protection, a recent review of refugee policy carried out by the Norwegian government suggests this may be possible:

Refugee reception in Norway generally involves considerable costs borne by society. A shift in refugee policy facilitating the repatriation of more persons will liberate more resources in Norway. In this way we may be able to help more people should new acute refugee problems occur. This help could either be given by concentrating our efforts abroad, or by giving more persons protection in Norway.

MINISTRY OF JUSTICE AND THE MINISTRY OF LOCAL GOVERNMENT AND LABOUR OF NORWAY, WHITE PAPER NO. 17: ON REFUGEE POLICY 10 (1994-95) [hereinafter NORWEGIAN WHITE PAPER].

not amount in practice to an abdication of responsibility and, in particular, that resources saved in developed countries will actually be dedicated to funding protection in the South more adequately? The concern is that the refugee protection community may agree to a shallower and more flexible mode of protection in order to secure unimpeded access to quality protection, only to find that states do not dismantle barriers to entry, or fail to bind themselves to a more equitable distribution of protective resources.

It would be irresponsible to do no more than encourage governments to embrace a policy of collectivized and solution-oriented protection, then trust that all will work out for the best. This is not, however, what is proposed here. We argue for an openness to reform of the mechanisms of refugee law on purely instrumentalist grounds. Reform makes sense not because temporary protection and shared responsibility are necessarily better than permanent protection and particularized responsibility, but as a means to counter the withdrawal of states from their protective responsibilities. A willingness to discuss change is the first step required to engender an honest and principled discussion with states about the restoration of access to rights-regarding asylum and of meaning to refugee law.

We are suggesting a package of reforms in which unimpeded access to quality asylum is ensured under a collectivized model of temporary protection. If, as some suggest, governments are not really interested in finding a solution to these genuine problems, but are covertly antagonistic to refugee protection in any form, this will become clear in the process of debating and structuring reform. If states ultimately refuse to join issue with a constructive alternative that preserves the essential commitment to refugee protection, it will then be quite right for the refugee protection community to denounce their duplicity. There is, however, a need for us to open a dialogue with governments that demonstrates a good faith approach to meeting the concerns of states. If that effort ultimately fails, the refugee protection community will still benefit from the strategic advantage of having forced governments to articulate any now-obscured reasons for them to refuse to protect desperate people.

II. CAN REFORM OCCUR WITHIN THE PREVAILING LEGAL FRAMEWORK?

For the reasons discussed in Part I, the moment is right to promote a new paradigm of refugee protection that is both human rights-based and pragmatic. Governments, however, exhibit little enthusiasm for engaging in the kind of major negotiations needed to establish a new international refugee convention. Moreover, members of official and

nongovernmental communities alike have expressed concern that a decision to abandon the present Refugee Convention when most states appear focused on the promotion of narrowly defined self-interests may result in a serious diminution in the quality of protection formally guaranteed to refugees by international law.¹⁶¹ Sensitive to these concerns, we therefore demonstrate in this Part that the kinds of reform we propose can be undertaken without amending the formal legal obligations owed to refugees.

A. Solution-Oriented Temporary Protection

We advocate a system of rights-regarding temporary protection that is dedicated to preparing refugees adequately for the eventuality of return. Language and meaning are important in the debate about temporary refugee protection. The use of the term "temporary protection," as opposed to permanent protection, can be confusing and troubling. In fact, the present international legal framework refers neither to temporary nor permanent protection. While Article 34 of the Refugee Convention urges governments to "facilitate the assimilation and naturalization of refugees,"¹⁶² the Convention requires states to afford only temporary protection guaranteeing a critical series of fundamental human rights to refugees.¹⁶³ As observed during its drafting, the Refugee Convention "was intended to give refugees a minimum number of advantages which would permit them to lead a tolerable life in the country of asylum."¹⁶⁴ Assimilation is required if and when return proves impossible, but need not be immediately pursued.¹⁶⁵

The purpose of international protection is not . . . that a refugee remain a refugee forever, but to ensure the individual's renewed membership of a community and the restoration of national protection, either in the homeland or through integration elsewhere [T]he Convention makes clear that refugee status is a transitory condition which will cease

161. Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229 (1996).

162. Refugee Convention, *supra* note 4, art. 34.

163. See generally James C. Hathaway, *The Meaning of Repatriation*, INT'L J. REFUGEE L. (forthcoming).

164. *Statement of the Chairman of the Ad Hoc Committee on Statelessness and Related Problems, Mr. Chance of Canada*, U.N. ESCOR, at 4, U.N. Doc. E/AC.32/SR.22 (1950).

165. "It would of course be unrealistic to expect complete assimilation in less than a generation or two, and the best course would be to allow refugees to preserve their integrity as a community at first and to welcome their assimilation when it became possible." *Statement of Mr. Cha of China*, U.N. ESCOR, at 5, U.N. Doc. E/AC.32/SR.34 (1950). It is noteworthy that the Chinese representative took this position in favor of respecting the integrity of refugee communities even though he was among those most strongly committed to an assimilationist optic.

once a refugee resumes or establishes meaningful national protection.¹⁶⁶

The temporary nature of the obligation to provide protection is most explicit in the permission the Convention grants states to revoke refugee status whenever there is effective and meaningful change in a refugee's country of origin, such that the need for protection no longer exists.¹⁶⁷ Just as under the Convention against Torture¹⁶⁸ and the ICCPR,¹⁶⁹ the duty of *non-refoulement* under the Refugee Convention is conditioned on the persistence of a threat to relevant human rights.¹⁷⁰

In this section, we define the critical baseline of rights in relation to *non-refoulement*, security, basic dignity, and self-sufficiency presently set by international law, which we endorse as an appropriate and necessary starting point for our model of reform. In Part III,¹⁷¹ we posit additional steps not mandated by international law that build upon these fundamental rights and have the potential to make temporary protection leading to viable repatriation a practical policy alternative.

1. The Refugee Convention

Some states erroneously believe that they are free to determine what rights will be granted to temporarily protected refugees.¹⁷² In fact, because temporary protection is precisely what is required by the Refugee Convention, the regime of refugee rights of the Convention applies. The structure of the Convention establishes a continuum under which entitlement to rights increases as a refugee's attachment to the asylum state deepens. The applicability of each right is a function of whether a refugee satisfies the definition of one of five levels of attachment.¹⁷³ Some rights apply the moment a refugee becomes subject to

166. UNHCR, *VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION* v, 8 (1996).

167. Refugee Convention, *supra* note 4, art. 1(C).

168. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., at 4, U.N. Doc. A/RES/39/46 (1984) [hereinafter *Torture Convention*].

169. ICCPR, *supra* note 141. The Human Rights Committee has considered the possibility that extradition and expulsion decisions may expose individuals to violations of rights assured under the Covenant and determined that the focus of analysis should be on the currency of the risk. See *Kindler v. Canada*, Communication No. 470/1991, Human Rights Committee, 48th Sess., para. 13.1, U.N. Doc. CCPR/C/48/D/470/1991 (1993).

170. Even non-binding statements of principle, such as the Universal Declaration of Human Rights, U.N. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*], and the Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), U.N. GAOR, 23d Sess., Supp. No. 16, U.N. Doc. A/6716 (1968) [hereinafter *Territorial Asylum Declaration*], fail to posit a duty to grant refugees permanent admission to an asylum state.

171. See *infra* text accompanying note 262.

172. INTER-GOVERNMENTAL CONSULTATIONS, *TEMPORARY PROTECTION*, *supra* note 50, at 19.

173. See JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (forthcoming).

the authority of a state, an interpretation that is implicit in the failure to specify any particular degree of attachment.¹⁷⁴ Other rights, however, arise only once the refugee is actually physically present within the territory of a state party,¹⁷⁵ when the refugee is lawfully within its territory,¹⁷⁶ when the refugee is lawfully residing or staying there,¹⁷⁷ or after the satisfaction of a durable residence requirement.¹⁷⁸

The governments that drafted the Convention therefore did not envisage a situation in which all rights would be bestowed at the moment of status recognition. Rights were instead to be granted incrementally, and as a function of the increasing depth of the relationship between the refugee and the asylum state, presumed to result from the passage of time.

However, governments frequently assert that they do not owe any rights to refugees until they have determined that an asylum-seeker is actually a Convention refugee and hence entitled to Convention rights. Because it is one's *de facto* circumstances, and not the official recognition of these circumstances, that give rise to Convention refugee status,¹⁷⁹ some genuine Convention refugees are disadvantaged by this practice. Unless status assessment is virtually immediate, the only acceptable solution is to recognize that any person who claims to be a Convention refugee is presumptively entitled to receive the provisional benefit of, at least, the first two categories of Convention rights (namely, those rights that apply to refugees regardless of their level of attachment to an asylum state, and those that accrue upon mere physical presence in a state party to the Convention).¹⁸⁰ More sophisticated rights (those

174. Refugee Convention, *supra* note 4, arts. 3 ("non-discrimination"), 5 ("rights granted apart from this Convention"), 12 ("personal status"), 13 ("movable and immovable property"), 16(1) ("access to courts"), 20 ("rationing"), 22 ("public education"), 29 ("fiscal charges"), 30 ("transfer of assets"), 31 ("refugees unlawfully in the country of refuge"), 33 ("prohibition of expulsion or return—refoulement"), and 34 ("consideration for naturalization").

175. *Id.*, arts. 4 ("religion") and 27 ("identity papers").

176. *Id.*, arts. 18 ("self-employment"), 26 ("freedom of movement"), and 32 ("freedom from expulsion").

177. *Id.*, arts. 14 ("artistic rights and industrial property"), 15 ("right of association"), 16(2) ("access to courts"), 17 ("wage-earning employment"), 19 ("liberal professions"), 21 ("housing"), 23 ("public relief"), 24 ("labour legislation and social security"), 25 ("administrative assistance"), and 28 ("travel documents").

178. *Id.*, arts. 7(2) ("exemption from reciprocity") and 17(2) ("exemption from alien labor restrictions"). Refugees are also to be exempted from alien labor restrictions when married to or the parent of a national of the asylum state.

179.

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition He does not become a refugee because of recognition, but is recognized because he is a refugee.

UNHCR, HANDBOOK, *supra* note 16, at para. 28 (emphasis added).

180. The interpretation of the Refugee Convention as granting rights even prior to formal verification of status is also clear from the specific incorporation of Article 9 in the Refugee Convention. Article 9 allows governments provisionally to suspend the rights of persons not yet

that require lawful presence, staying, or durable residence) need be granted only when those more demanding levels of attachment are, in fact, satisfied.

This formulation is compelled by the duty of states to implement the Refugee Convention in good faith.¹⁸¹ Absent the interpretation posited here, a government could avoid all obligations under the Refugee Convention by the simple expedient of refusing to consider whether or not a person satisfied the refugee definition. Moreover, as a matter of practical fairness, governments that wish to be relieved of their presumptive (if minimalist) responsibilities toward all asylum-seekers have the legal authority to take steps to expedite formal determination of refugee status.¹⁸² Convention rights can thereupon be withdrawn from persons found not to be Convention refugees. Refugees, on the other hand, have no comparable ability to force a disposition of their claims to be protected by the Convention.

In the result, asylum-seekers, even those not yet admitted to any form of protection, should be understood to benefit from those rights that inhere generally or by virtue of simple physical presence, until and unless they are found not to be refugees. Once authorized in law or in fact to remain in the asylum state, refugees are further entitled to claim the rights that apply to refugees who are lawfully within the territory of a state party. During any ensuing period of temporary protection, those rights that are contingent upon lawful stay or residence must also be honored. Finally, in the event that "temporary" protection becomes prolonged, its beneficiaries may claim those rights that are contingent upon satisfaction of a durable (three-year) residence requirement.

Beyond the requirements of the Refugee Convention, international human rights standards are also directly relevant. The ICCPR guarantees most rights to all persons under a state's authority, not just to nationals.¹⁸³ The International Covenant on Economic, Social and Cultural Rights (ICESCR) is of similarly general application, though it is

confirmed to be refugees *if* the asylum state is faced with war or other exceptional circumstance. It follows from the inclusion of this provision in the Convention that, absent such extreme circumstances, states cannot suspend rights pending verification of status. *See* HATHAWAY, *RIGHTS OF REFUGEES*, *supra* note 173.

181. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 119–20 (1984).

182. If necessary, states can resort to a fairly constructed procedure for "manifestly unfounded claims." For a definition of "manifestly unfounded claims," see Executive Committee of the High Commissioner's Programme, Conclusion No. 30 (XXXIV) (1983), para. (d).

183. ICCPR, *supra* note 141, art. 2(1). The Human Rights Committee has emphasized that "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens." General Comment 15 of the Human Rights Committee, in HRC General Comments, *supra* note 143, at 18.

within the discretion of less developed states to determine to what extent economic rights will be extended to non-nationals.¹⁸⁴

a. *Non-Refoulement*

The most critical of all refugee rights is protection against *refoulement*. Article 33 of the Refugee Convention¹⁸⁵ requires that refugees not be returned to situations where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. The right to protection against *refoulement* applies as soon as a refugee comes under the authority of an asylum state, whether or not status has been formally adjudicated.¹⁸⁶

The Refugee Convention requires that protection against *refoulement* be guaranteed equally to those refugees who have entered a country lawfully, and to those who have entered or remained illegally. Article 31 prohibits the penalization of refugees for illegal entry or presence, provided that they present themselves to authorities without delay, and show good cause for their illegal presence.¹⁸⁷ Pursuant to Article 32 of the Convention, refugees who are lawfully in the territory of an asylum state cannot be expelled at all, except for reasons of national security or public order.¹⁸⁸

UNHCR consistently identifies a commitment to *non-refoulement* as an absolutely essential element of temporary protection, further specifying that admission to the country of asylum goes hand in hand with ensuring true respect for that right.¹⁸⁹ This right must be fully respected under any regime of temporary protection.

As a result, asylum seekers, even those not yet admitted to any form of protection, should be understood to benefit from those rights that

184. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A, U.N. GAOR, 21st Sess., Supp. No. 16, art. 2(3), U.N. Doc. A/6316 (1966).

185. Refugee Convention, *supra* note 11. *Non-refoulement* also finds expression in Article 3 of the Torture Convention, *supra* note 168, the Declaration on the Protection of All Persons from Enforced Disappearances, art. 8(1), G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, at 207, U.N. Doc. A/47/49 (1992), and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, para. 5, E.S.C. Res. 1989/65, Annex, U.N. ESCOR, Supp. No. 1, at 53, U.N. Doc. E/1989/89 (1989). Protection against *refoulement* derived from these non-refugee specific standards is not limited to persons at risk on account of one of the five Refugee Convention grounds. Instead, all persons at risk of specific concerns such as torture, extra-legal execution, or enforced disappearance are entitled to protection against return.

186. *See supra* note 174.

187. Refugee Convention, *supra* note 4, art. 31(1).

188. *Id.*, art. 32(1).

189. "The minimum requirements of temporary protection include admission to the country of refuge, [and] . . . respect for the principle of *non-refoulement*." 1994 UNHCR Report, *supra* note 110, at 6.

inhere generally or by virtue of simple physical presence, until and unless they are found not to be refugees. Once authorized in law or in fact to remain in the asylum state, refugees are further entitled to claim the rights that apply to refugees who are lawfully within the territory of a state party. During any ensuing period of temporary protection, those rights that are contingent upon lawful stay or residence must also be honored. Finally, in the event that "temporary" protection becomes prolonged, its beneficiaries may claim those rights that are contingent upon satisfaction of a durable (three year) residency requirement.

b. Security

Given the levels of fear, trauma, and vulnerability experienced in flight, refugees have a pressing need for a restored sense of security. This goes far beyond the simple need to be protected from the threat of *refoulement*. Most immediately, the security needs of refugees include shelter from the risk of physical attack and assistance to meet basic human needs.

There is no explicit guarantee of a right to physical security in the Refugee Convention itself. The ICCPR's guarantee of the "inherent right to life"¹⁹⁰ and to protection against "torture [and] cruel, inhuman or degrading treatment"¹⁹¹ are, however, directly applicable.¹⁹² Conclusion 72 of the UNHCR Executive Committee also affirms the importance of ensuring the physical security of refugees, while other conclusions require that special attention be paid to attending to the particular security needs of women refugees¹⁹³ and of refugee children.¹⁹⁴

One of the most serious risks faced by many refugees is the possibility of military or armed attack on refugee camps or settlements.¹⁹⁵

190. ICCPR, *supra* note 141, art. 6(1).

191. *Id.* art. 7.

192. The Human Rights Committee has held that states are not only obliged to refrain from acts that may violate the rights enshrined in the Covenant, but that they also bear an affirmative duty to take "legislative, administrative, judicial and other measures" so as to "prevent and punish" any acts that violate Covenant rights, in any territory under their jurisdiction. General Comment 20 of the Human Rights Committee, in HRC General Comments, *supra* note 143, at 30.

193. Executive Committee of the High Commissioner's Programme, Conclusions No. 39 (XXXVI), "Refugee Women and International Protection," 54 (XXXIX), "Refugee Women," 60 (XL), "Refugee Women," 64 (XLI), "Refugee Women and International Protection," and 73 (XLIV), "Refugee Protection and Sexual Violence."

194. Executive Committee of the High Commissioner's Programme Conclusions No. 47 (XXXVIII), "Refugee Children" [hereinafter ExCom Conclusion No. 47], and 59 (XL), "Refugee Children." See generally DEVELOPMENT & DIASPORA: GENDER AND THE REFUGEE EXPERIENCE, *supra* note 157.

195. See, e.g., ROBERT GORMAN, MITIGATING MISERY: AN INQUIRY INTO THE POLITICAL AND HUMANITARIAN ASPECTS OF U.S. AND GLOBAL REFUGEE POLICY 173-74 (1993).

Executive Committee Conclusions, in particular Conclusion 48,¹⁹⁶ require governments to take steps to mitigate the possibility of refugees becoming the objects of armed attack.¹⁹⁷ Tragedy can clearly ensue when governments fail to meet this responsibility, as attacks on refugee camps in Zaire made clear.¹⁹⁸

Beyond protection against attack, refugees frequently are in need of critical forms of material assistance, including food, shelter, health care, and clothing. Article 20 of the Refugee Convention requires states to grant all refugees national treatment in terms of access to rationing systems.¹⁹⁹ Refugees who are lawfully staying in the territory of a state party, including those in receipt of temporary protection, are further entitled to receive the same access to public housing, public relief and assistance, and social security as is afforded to nationals.²⁰⁰ This generally applicable duty is reinforced by Articles 9, 11, and 12 of the ICESCR,²⁰¹ though the ICESCR, unlike the Refugee Convention, allows less developed countries to decide the extent to which economic rights will be extended to non-nationals.²⁰²

Finally, an exceedingly important aspect of security is the provision of identity documents to refugees. Article 27 of the Refugee Convention stipulates that refugees without a valid travel document have an absolute right to be issued identity papers.²⁰³ Yet governments are often reluctant to grant identity documents to individuals who are not permanent residents or citizens. For example, recipients of temporary protection in Germany who do not have a national passport are granted an identity document by German authorities only in exceptional and compelling circumstances.²⁰⁴ Refugees need to be provided with valid

196. Executive Committee of the High Commissioner's Programme Conclusion No. 48 (XXXVIII), "Military or Armed Attacks on Refugee Camps and Settlements," para. 3.

197. See also Executive Committee of the High Commissioner's Programme Conclusions No. 27 (XXXIII), "Military attacks on refugee camps and settlements in Southern Africa and elsewhere," 32 (XXXIV), "Military attacks on refugee camps and settlements in Southern Africa and elsewhere," and 45 (XXXVII), "Military and Armed Attacks on Refugee Camps and Settlements."

198. See, e.g., James C. McKinley, Jr., *Strife on Zaire Border Erupts Into Open War With Rwanda*, N.Y. TIMES, Nov. 2, 1996, at 1.

199. Refugee Convention, *supra* note 4, art. 20.

200. *Id.*, arts. 21, 23, 24.

201. ICESCR, *supra* note 184, art. 9 ("the right of everyone to social security, including social insurance"), art. 11 ("the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"), and art. 12 ("the right of everyone to the enjoyment of the highest attainable standard of physical and mental health").

202. The relative stringency of the duty on all state parties to the Refugee Convention to extend socioeconomic rights to refugees is discussed in HATHAWAY & DENT, *supra* note 40, at 39-40, 45, 50.

203. Refugee Convention, *supra* note 4, art. 27.

204. INTER-GOVERNMENTAL CONSULTATIONS, TEMPORARY PROTECTION, *supra* note 50, at 122-23.

identity documents to ensure that they will be able to access the basic services to which they are entitled. More fundamentally, identity documents are an important symbol of security, and convey to a refugee an important message of recognition and protection.²⁰⁵

c. Basic Dignity

The hardships inherent in refugee flight often serve to strip away the basic human dignity of refugees. International law accords particular attention to the restoration of some of that lost dignity by requiring respect for rights of nondiscrimination, family unity, freedom of movement and association, and freedom of religion.

Refugees, or particular groups of refugees, are subjected to discriminatory treatment on many fronts, including even the degree to which they can count on officials of the asylum state to provide them with physical protection.²⁰⁶ Article 3 of the Refugee Convention guarantees that refugees shall benefit from all Convention rights without discrimination as to race, religion, or country of origin.²⁰⁷ More broadly, Article 2(1) of the ICCPR and Article 2(2) of the ICESCR require state parties to ensure that all persons subject to their jurisdiction benefit from the broad-ranging rights recognized in those Covenants *without distinction of any kind*.²⁰⁸ Most important of all, Article 26 of the ICCPR provides that all persons are entitled to the equal protection and equal benefit of the law.²⁰⁹ This means that refugees cannot be discriminated against in either the enforcement of existing laws or in the allocation of legal rights. Any differential rights allocation relative to nationals must therefore derive from the distinct capabilities and potentialities of refugees relative to citizens.²¹⁰

One of the strongest emotional needs of refugees is to be reunited with close family members who have been left behind in the country of origin, or in a country of provisional asylum or transit. While the Refugee Convention is silent as to the question of reuniting refugees

205. Maciej Domanski, *Insights from Refugee Experience: A Background Paper on Temporary Protection*, in RECONCEIVING INTERNATIONAL REFUGEE LAW, *supra* note 120.

206. See AMNESTY INTERNATIONAL, FEDERAL REPUBLIC OF GERMANY, FAILED BY THE SYSTEM: POLICE ILL-TREATMENT OF FOREIGNERS (1995). For example, authorities initially did little to curb widespread violence against asylum-seekers by neo-Nazi groups in Germany, perhaps due to a combination of pressure from legal right-wing extremist groups and what appeared to be tacit support for such action among large segments of the German public. Louis Wiesner & Steve Edminster, *Asylum Seekers, Other Foreigners, and Neo-Nazi Violence in Germany*, in U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 121-25 (1993).

207. Refugee Convention, *supra* note 4, art. 3.

208. ICCPR, *supra* note 141, art. 2(1); ICESCR, *supra* note 184, art. 2(2).

209. ICCPR, *supra* note 141, art. 26.

210. This understanding of the duty of nondiscrimination is developed in HATHAWAY, RIGHTS OF REFUGEES, *supra* note 173.

with close family members, the Final Act of the Conference of Plenipotentiaries, at which the Convention was adopted, recommends that states "take the necessary measures for the protection of the refugee's family."²¹¹ UNHCR Executive Committee Resolutions 22 and 24 similarly call upon governments to respect the principle of family unity.²¹² More generally, Article 10 of the ICESCR requires that the widest possible protection and assistance be granted to the family;²¹³ Articles 17, 23, and 24 of the ICCPR have been interpreted by the Human Rights Committee to prohibit arbitrary or unlawful interference by states with the families of non-citizens;²¹⁴ and Article 10 of the Convention on the Rights of the Child urges the expeditious reunification of children with their parents.²¹⁵

These general provisions notwithstanding, international law does not yet require affirmative actions to bring families together. Governments have therefore sometimes drawn a distinction between a duty to maintain the unity of refugee families when they arrive together, and a discretion to reunite families that have become separated during flight.²¹⁶ While not mandated by international law, it is our view that positive efforts to effect reunification are the most effective method of delivering temporary protection in a dignified manner that promotes return.

A third aspect of human dignity that is protected under the refugee rights regime is freedom of movement and association. States often severely restrict the freedom of movement of refugee communities because of security concerns, or in an attempt to avoid a degree of local integration felt to be inconsistent with successful repatriation.²¹⁷ Yet Article 26 of the Refugee Convention grants refugees lawfully in the territory of any asylum state the same freedom of movement as is

211. Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Refugee Convention, *supra* note 4, part IV, para. B.

212. ExCom Conclusion No. 47, *supra* note 194, para. 1; Executive Committee of the High Commissioner's Programme Conclusion No. 22 (XXXII), "Protection of Asylum Seekers in Situations of Large-Scale Influx" [hereinafter ExCom Conclusion No. 22]. See also Executive Committee of the High Commissioner's Programme Conclusion No. 47 (XXXVIII), "Refugee Children."

213. ICESCR, *supra* note 184, art. 10.

214. ICCPR, *supra* note 141, arts. 17, 23, 24. The Human Rights Committee has affirmed that these family-related rights apply equally to citizens and non-citizens. General Comment 15 of the Human Rights Committee, in HRC General Comments, *supra* note 143, at 19.

215. Convention on the Rights of the Child, Nov. 20, 1989, art. 10, *reprinted in* 28 I.L.M. 1448.

216. Even the reunification of unaccompanied refugee children with a close relative is often dealt with on an exceptional and discretionary basis. See EVERETT M. RESSLER, NEIL BOOTHBY, & DANIEL J. STEINBOCK, UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS 256 (1988).

217. Manuel Angel Castillo & James C. Hathaway, *Temporary Protection, in RECONCEIVING INTERNATIONAL REFUGEE LAW*, *supra* note 120.

applicable to aliens generally.²¹⁸ Article 12(1) of the ICCPR goes farther, and extends absolute freedom of movement to all persons lawfully within a state's territory, subject only to restrictions that are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others.²¹⁹ Article 15 of the Refugee Convention, again applicable to all refugees lawfully staying in the territory, guarantees the same right to freedom of association as is accorded to most favored nationals of a foreign country, though it does not extend to political or profit-making associations.²²⁰ The ICCPR extends freedom of association absolutely, subject only to the kind of truly vital limitations noted above in relation to Article 12(1).²²¹ As we highlight later in this Article, freedom of movement and freedom of association are both central to a solution-oriented approach to refugee protection.²²²

Finally, freedom of religion is guaranteed to all refugees within a state's territory by Article 4 of the Refugee Convention, at least to the same degree accorded to nationals.²²³ Article 18 of the ICCPR more broadly protects freedom of thought, conscience, and religion, limited only to the extent necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others.²²⁴

d. Self-Sufficiency

The drafters of the Refugee Convention were conscious of the need to enable refugees to become self-sufficient as quickly as possible, so as to reduce the burden on asylum states.²²⁵ Self-sufficiency promotes dignity, helps refugees provide for their own economic security, and allows refugee communities to develop skills that will ultimately assist in making repatriation successful. The Refugee Convention accords refugees lawfully staying in an asylum state the right to pursue wage-earning employment on the same terms guaranteed to most favored foreigners.²²⁶ After three years residence in the country, or if the refugee's spouse or children are nationals of the asylum state, no

218. Refugee Convention, *supra* note 4, art. 26.

219. ICCPR, *supra* note 141, art. 12(1).

220. Refugee Convention, *supra* note 4, art. 15.

221. ICCPR, *supra* note 141, art. 22(1).

222. Specifically, we suggest that refugee communities should be encouraged to self-organize and freely associate in Refugee Development Councils (RDCs), which would play a significant role in representing refugee needs in the asylum state and during repatriation. *See infra* text accompanying notes 266–268.

223. Refugee Convention, *supra* note 4, art. 4.

224. ICCPR, *supra* note 141, art. 18.

225. *See Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems*, U.N. ESCOR, at 6–7, U.N. Doc. E/AC.32/2 (1950).

226. Refugee Convention, *supra* note 4, art. 17(1).

restrictions whatsoever on access to employment are permitted.²²⁷ Opportunities for self-employment and for professional practice are also guaranteed to refugees lawfully staying in the state, albeit only to the extent guaranteed to aliens generally.²²⁸

Self-sufficiency is also advanced through the education system. As soon as refugees come under the authority of any asylum state, Article 22 of the Convention requires that elementary education be made available to them on terms of equivalency with nationals of the asylum state.²²⁹ Education beyond the elementary level is to be afforded on the same basis as is granted to aliens generally in the same circumstances.²³⁰ The ICESCR requires states to move progressively toward accessible and free secondary and higher education for all persons.²³¹

2. Recent Challenges to the Applicability of the Refugee Rights Regime

The combination of rights derived from international refugee law and international human rights law sets a critical baseline that governs any regime for the temporary protection of refugees. In particular, temporarily protected refugees are to be protected against *refoulement* and granted rights necessary to ensure their security, basic dignity, and self-sufficiency. In contrast to this fairly clear statement of duties owed to refugees, UNHCR has recently given tacit approval to the use of temporary protection as an opportunity or excuse to restrict refugee rights. Soon after the outbreak of the Yugoslav conflict, UNHCR stated that "persons fleeing from the former Yugoslavia who are in need of international protection should be able to receive it on a temporary basis."²³² UNHCR recognized that in the context of a mass movement of refugees, it is impractical to require all asylum-seekers to undergo individualized determination of status. Emphasizing that refugee protection does not presuppose permanent exile, UNHCR acknowledged the logic of responding to the exodus from the former Yugoslavia by a simplified admissions procedure that would lead only to temporary protection. Temporary protection was endorsed as a pragmatic and flexible means to provide refugees with safety and a reasonable degree of stability.²³³

227. *Id.* art. 17(2).

228. *Id.* arts. 18-19; ICESCR, *supra* note 184, art. 7.

229. Refugee Convention, *supra* note 4, art. 22(1).

230. *Id.* art. 22(2).

231. ICESCR, *supra* note 184, art. 13(2).

232. A Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia, at 4, U.N. Doc. HCR/IMFY/1992/Y (1992).

233. UNHCR, *Background Note to the Informal Meeting on Temporary Protection*, Jan. 18, 1993, at 1.

UNHCR has, however, demonstrated an inconsistent approach to the definition of precisely what rights are owed to refugees protected on a temporary basis. On the one hand, UNHCR has occasionally insisted on the full application of the Refugee Convention to the beneficiaries of temporary protection.²³⁴ It has accurately observed that many of those who fled the former Yugoslavia are in fact Convention refugees, and should therefore be afforded substantially the same treatment as formally recognized refugees.²³⁵ Regrettably, UNHCR has sometimes departed from this principled position, suggesting that the legal content of temporary protection is not well-defined and not necessarily fully governed by the Refugee Convention.²³⁶ It has engendered unnecessary confusion by suggesting that temporary protection is a "complementary protection measure,"²³⁷ rather than a means of implementing obligations under the Refugee Convention as such. In elaborating what temporary protection is, and what rights it entails, the UNHCR has consistently emphasized only the duty of admission, respect for the principle of *non-refoulement*, for basic human rights as defined in Conclusion 22 of the UNHCR Executive Committee, and repatriation to the country of origin when conditions permit.²³⁸

In taking this position, UNHCR may be seen to suggest that states are not required to respect all obligations under the Refugee Convention in the context of providing temporary protection to refugees. Conclusion 22, often identified by UNHCR as the primary source of applicable minimum standards, lays out a fairly comprehensive list of some of the basic rights, protections, and standards of treatment that

234. *Draft Report of the 21 June 1995 Inter-Sessional Meeting of the Sub-Committee of the Whole on International Protection*, U.N. Doc. EC/1995/SCR/CRP (1995), at 2. See also 1995 UNHCR Report, *supra* note 83, at 4.

235.

The need for international protection in situations of mass influx is normally manifest and, as in the case of the former Yugoslavia, most of the asylum-seekers may also be refugees within the meaning of the Convention and Protocol. Such a group should not, in accordance with the principle of non-discrimination, be subjected to any substantial difference in the standards of treatment given to other refugees.

UNHCR, *The Scope of International Protection in Mass Influx*, U.N. ESCOR, at 4, U.N. Doc. E/1995/SCP/CRP.3 (1995).

236.

The standards applicable in situations of mass influx may be regarded as complementary, interim measures of protection, and not as a substitute for the provisions of the Convention and Protocol After a limited period, and in the absence of other developments, these standards should evolve into, or be replaced by, refugee status or a legal status and protection standards commensurate with refugee status.

Id. at 2-4.

237. UNHCR, *UNHCR strategy towards 2000*, Sept. 21, 1996, at 5.

238. See, e.g., Comprehensive Response, *supra* note 232, at 4; UNHCR, *Background Note*, *supra* note 233, at 2; UNHCR, *Background Note: Informal Meeting of Government Experts on Temporary Protection*, U.N. GAOR, 49th Sess., at 2, U.N. Doc. A/AC/820 (1994); UNHCR, *Note on International Protection*, U.N. GAOR, 49th Sess., at 23, U.N. Doc. A/AC.96/830 (1994).

govern a grant of temporary protection.²³⁹ It is nonetheless an insufficient definition of applicable rights, as it makes no reference to a number of fundamentally important rights that are explicitly required by the Refugee Convention, including rights to identity documents, to education, and to seek employment.²⁴⁰

In addition to understating the duty of states, UNHCR's failure to link standards of treatment expressly to the Refugee Convention and international human rights law sends an unfortunate and unwarranted signal that these legal standards are negotiable. There is often no recognition by UNHCR of the fact that refugees, whether protected temporarily or permanently, whether they arrive individually or as part of a mass influx, are *prima facie* entitled to the protections set by the Refugee Convention and international human rights law. By grounding its protection efforts in a non-binding resolution of its Executive Committee rather than working from clear statements of relevant international law, UNHCR has, perhaps unwittingly, given solace to those who prefer to treat refugee protection as a matter of discretion, rather than of binding obligation.

While some human rights treaties allow states to suspend rights in times of dire national emergency,²⁴¹ the Refugee Convention includes no provision for a generalized suspension of duties owed to refugees.²⁴² UNHCR, as supervisory authority for the Refugee Convention, therefore ought not to have given its approval to rights suspensions not authorized by international law. The ambivalence and internal conflict in UNHCR's position may, to a degree, reflect the difficult balance inherent in designing and delivering an effective system of protection that is truly rights-regarding but operates at all times with an eye to safe and successful repatriation. States have sometimes asserted that automatic, full recognition of rights may accelerate integration in the country of asylum and make return home less likely.²⁴³ As such, they continue to invest considerable amounts of time and financial resources in efforts designed to avoid obligations under the Refugee Convention.

239. ExCom Conclusion No. 22, *supra* note 212.

240. See *supra* text accompanying notes 203–205 and 225–231.

241. See generally JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY (1994).

242. Article 9 allows provisional measures to be taken "in time of war or other grave and exceptional circumstances," but only pending the conclusion of particularized investigations necessary to verify a claim to refugee status. Refugee Convention, *supra* note 4, art. 9.

243. However, some states now acknowledge that according temporarily protected refugees their rights is not necessarily inconsistent with a commitment to the promotion of repatriation.

Experience has shown that those who master their life in exile often are better qualified for managing the transition that is involved in resettling in the country of origin . . .

[T]here is really no contradiction between measures aimed at an active, self-reliant life in Norway and measures aimed at repatriation and participation in reconstruction.

NORWEGIAN WHITE PAPER, *supra* note 160, at 7–8.

UNHCR undoubtedly felt pressured to accept European-style temporary protection (including reductions in the rights entitlement of refugees) in order to keep European doors at least partially open to receiving Bosnian refugees.²⁴⁴

The question nonetheless remains why UNHCR failed to demonstrate to governments the ability of the Refugee Convention and international human rights law in general to deliver the flexibility required. The model of temporary protection advocated here, in contrast, takes as its starting point the rights regime established by the Refugee Convention and international human rights law. Notwithstanding UNHCR's sometimes ambivalent defense of these standards, we believe that a full respect for the general framework of refugee rights under all circumstances need not be a serious impediment to the feasibility of protection, particularly where responsibilities toward refugees are shared among states.

B. *Collectivized Responsibility*

The second reform proposed here is that the system of solution-oriented temporary protection be implemented in a less atomized way. While each state party assumes particularized obligations under the Refugee Convention, nothing in the current legal regime prevents governments from working together and sharing resources to meet those duties. In fact, sharing the burdens and responsibilities of refugee protection not only makes practical sense as a means to combat the withdrawal of states from the duty to protect refugees, but is consistent with general norms of international law.

The Preamble to the Refugee Convention endorses a degree of collaboration among states that has yet to be operationalized,²⁴⁵ and subsequent international instruments, regional conventions, and conclusions of the Executive Committee of UNHCR also stress the importance of burden sharing.²⁴⁶

244. Vincent Cochetel, *Position du HCR par rapport à la protection temporaire et au statut humanitaire*, in *LE DROIT D'ASILE AU REGARD DE LA CRISE YOUGOSLAVE—PROTECTION TEMPORAIRE ET STATUT DE RÉFUGIÉ 6* (France Terre d'Asile ed., 1993).

245.

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation . . . (emphasis added)

Refugee Convention, *supra* note 4, preamble.

246. Article 2(2) of the United Nations' 1967 Declaration on Territorial Asylum recognizes that when a state finds it difficult to continue granting asylum, other states shall, "in a spirit of international solidarity," take steps to "lighten the burden on that state." Territorial Asylum Declaration, *supra* note 170, art. 2(2). The 1969 OAU Convention similarly emphasizes the

The Conclusions of the UNHCR Executive Committee contain frequent references to the principle of sharing the burden and responsibility of refugee protection. For example, Conclusion 22 on the Protection of Asylum Seekers in Situations of Large-Scale Influx stresses the need to "establish effective arrangements in the context of international solidarity and burden sharing for assisting countries which receive large numbers of asylum seekers."²⁴⁷ The Conclusion points out that a satisfactory solution of the problem cannot be achieved without international cooperation, and then goes on to frame such cooperation as an obligation.²⁴⁸ Conclusions 52 and 62 stress the importance of the "principle of international solidarity" in ensuring effective refugee protection.²⁴⁹ More recently, in its 1996 Note on International Protection, the UNHCR reiterated "the need for tangible international solidarity with low-income developing countries confronted by a sudden mass refugee influx."²⁵⁰ Numerous U.N. General Assembly resolutions echo these conclusions. General Assembly Resolution 46/106, for example, which notes the importance of attaining durable solutions to refugee problems, calls on the UNHCR to explore "ways in which State responsibility and burden sharing mechanisms might be strengthened."²⁵¹

General international legal principles support cooperation among states in addressing issues of transnational importance. For example, Articles 55 and 56 of the U.N. Charter obligate states to take "joint and separate action in cooperation with the [United Nations]" to promote peaceful and friendly relations among states, including by the promotion of universal respect for and observance of human rights.²⁵² This principle is affirmed in more specific documents, including the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States.²⁵³ Clearly, states are com-

importance of "African solidarity and international cooperation" in "lighten[ing] the burden" of a state granting asylum. OAU Refugee Convention, *supra* note 4, art. II(4).

In the Inter-American context, the 1984 Cartagena Declaration on Refugees also underlines the need for the international community to be involved in refugee protection in the region. OAS Cartagena Declaration, *supra* note 4, part II, para. (k).

247. ExCom Conclusion No. 22, *supra* note 212, part I, para. 3.

248. "States shall, within the framework of international solidarity and burden sharing, take all necessary measures to assist, at their request, States which have admitted asylum-seekers in large-scale influx situations." *Id.*, part IV, para. 1 (emphasis added).

249. Executive Committee of the High Commissioner's Programme Conclusion No. 52 (XXXIX), "International Solidarity and Refugee Protection." See also Executive Committee of the High Commissioner's Programme Conclusion No. 62 (XLI), "Note on International Protection."

250. UNHCR, *Note on International Protection*, U.N. GAOR, 51st Sess., para. 17, U.N. Doc. A/AC.96/863 (1996).

251. G.A. Res. 46/106, U.N. GAOR, 46th Sess., Supp. No. 49, at 176, U.N. Doc. A/46/49 (1991).

252. U.N. CHARTER, arts. 55, 56.

253. Declaration on Principles of International Law Concerning Friendly Relations and Co-

mitted in principle to sharing burdens and responsibilities, and are in some circumstances legally obliged to act collectively.

There is no impediment to a system under which claims to refugee status and protection are delivered by a state other than that in which asylum is first requested. Safeguards must exist to eliminate the prospect of indirect *refoulement* or the violation of other human rights, as discussed in Part I.²⁵⁴ Such a risk would exist, for example, where there is a significant and relevant disparity between the two states in the interpretation of Convention refugee status, or in the essential fairness of the procedure by which status is verified. The nature of the responsibility sharing system also must not interfere with the right of UNHCR to supervise the application of the Refugee Convention,²⁵⁵ a concern addressed by including UNHCR as a formal member of each interest-convergence group. So long as these requirements are respected, the Refugee Convention affords the flexibility necessary to allow governments to make decisions among themselves as regards the place in which status is assessed and asylum is granted.

III. RECONCEIVING THE MECHANISMS OF REFUGEE PROTECTION

The present international legal framework will support a shift to the implementation of refugee law through a system of rights-regarding temporary protection. In a more fundamental sense, though, the Refugee Convention suffers from what Gervase Coles has accurately termed an "exile bias."²⁵⁶ That is, while it links the duration of refugee status to the continuation of risk in the refugee's home state, it says nothing about how best to make repatriation a viable form of solution. This lapse reflects the Cold War-era pessimism that refugees would never return home. The prerogative of governments to withdraw protection when durable safety is restored in the country of origin is codified, but states are left largely to their own devices to decide how to *implement* termination of status. General human rights standards, such as the duty to avoid cruel, inhuman, or degrading treatment,²⁵⁷ clearly set a minimalist standard for the way in which repatriation should be effected. There is, however, no international legal duty to proactively make repatriation viable. Similarly, the Refugee Convention says noth-

operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXXV), Annex, U.N. GAOR, 25th Sess., Supp. No. 28, at 122, U.N. Doc. A/8028 (1971).

254. See *supra* text accompanying notes 125, and 133-146.

255. See *supra* text accompanying note 136.

256. Coles, *supra* note 118, at 390.

257. ICCPR, *supra* note 141, art. 7; Torture Convention, *supra* note 168, arts. 1, 2.

ing about how states might cooperate to make refugee protection a fairly apportioned and sustainable endeavor.

We therefore propose activist measures that build on the guarantees of the Refugee Convention to facilitate a workable reform of the mechanisms of international refugee law. Five principles should govern this transition.

First, governments will only make a continuing commitment to refugee protection if a reform proposal is firmly solution-oriented. Temporary protection must be an empowering experience for refugees and their communities, delivered in a way that is dedicated to preparing refugees for a successful return when and if conditions allow.

Second, some needs-based exceptions to the norm of temporary protection must be recognized. In particular, temporary protection ought not continue when there is a risk of psychosocial damage to the refugee population. Equally important, the overall duration of temporary protection should be subject to principled limits. The system must therefore have the capacity to offer residual solutions to those refugees whose special needs make temporary protection an inappropriate response, or who are ultimately unable to return home at the end of a reasonable period of temporary protection.

Third, the protection system should anticipate and facilitate viable repatriation. Whether voluntary or mandated, return to the country of origin in conditions of safety and dignity is an important means to continually regenerate asylum capacity. The feasibility of repatriation is enhanced when a clear commitment is made from the outset to support the family and communal structures of refugee communities, to keep links between the refugee and stayee communities alive, and ultimately to support return by a meaningful system of repatriation aid and development assistance.

Fourth, sub-global interstate associations, organized on the basis of trade, security, and other common interests, are an effective forum within which to collectivize this commitment to a more solution-oriented system of refugee protection. Because governments are already accustomed to practical collaboration in such associations, they are a sensible site in which to promote efforts to implement concrete mechanisms of collectivized protection.

Fifth, the obligations assumed by cooperating states should be defined on the basis of a theory of common but differentiated responsibility. This approach takes account of the very real differences in the manner in which different countries can best contribute to the successful implementation of a collectivized refugee protection regime. It is a practical means to preserve a continuing shared commitment to refugee protection without persisting in the unrealistic assumption that all

countries are able and willing to make identical contributions to the implementation of refugee law.

Taken together, we believe that these five "building blocks" suggest a holistic structure that will enable states to protect their legitimate interests in migration control and fiscal and other resource accountability without withdrawing from the legal duty to meaningfully protect refugees.

A. *Solution-Oriented Temporary Protection*

The refugee rights framework lays the groundwork for a solution-oriented approach to temporary protection.²⁵⁸ Respect for *non-refoulement*, security, basic dignity, and self-sufficiency establishes a context of mutual trust within which solutions to refugeehood are possible.²⁵⁹ Beyond these basic legal requirements, however, an effective commitment to preparation for repatriation during asylum entails four additional elements: respect for social structures, development of skills and resources, promotion of linkages with internally displaced and stayee communities, and confidence-building.

1. Respect for Social Structures

If repatriation is to be a viable solution, it is important that refugees not be deprived of the structures that define their social identity and provide critical support in their daily lives. When refugees are compelled to abandon patterns of life rooted in family or community cooperation, they are less productive during temporary protection, and will often be less able to ultimately resume life in their country of origin.

For most refugees, the preservation of family ties is of primary importance. Separation from family is a source of extreme anxiety and fear for many refugees, and often interferes with efforts to become self-sufficient in the asylum country.²⁶⁰ Even though international law has yet to recognize a full-fledged right to family unity,²⁶¹ governments that wish to have the option of eventual repatriation clearly have an interest in keeping family units together.²⁶² In particular, families are critically important sites for preserving language, religion, and cultural traditions. Lengthy separation may also lead to family break-ups and

258. See *supra* text accompanying notes 162–231.

259. See *infra* text accompanying notes 315–316.

260. CANADIAN COUNCIL FOR REFUGEES TASK FORCE ON FAMILY REUNIFICATION, REFUGEE FAMILY REUNIFICATION 14–20 (1995).

261. See *supra* text accompanying notes 211–215.

262. Castillo & Hathaway, *supra* note 217.

encourage separated individuals to build new relationships in the country of asylum, thereby generating a barrier to returning home.²⁶³

Even when governments allow family reunification, only a narrow category of relatives, most often a spouse and children, are typically allowed to join the refugee.²⁶⁴ This approach fails to recognize that there are significant cultural differences in how family relationships are defined. In many parts of the world, the extended family is an essential part of a common survival strategy. Family reunification should be approached on a functional, rather than on a purely categorical basis.²⁶⁵ Officials should be encouraged to examine the nature of the family relationship, and to allow reunification in instances where it satisfies a functional understanding of family.

The promotion of community life among refugee populations is a second important means to encourage refugees to devise collective and shared solutions to meet their own needs.²⁶⁶ So often almost all decisions impacting refugees' lives are made by people outside the refugee community. Particularly for refugees who have fled authoritarian or repressive regimes, this paternalism may reinforce a past sense of powerlessness and discourage independent efforts by the refugee community to plan for and facilitate repatriation.²⁶⁷ Protection needs to be delivered in a manner that avoids these pitfalls. In many instances of mass influx, entire communities will have fled, and can be recreated or relied upon in establishing refugee organizations. States should use some creativity in encouraging a process of self-organization. Robert Gorman and Gaim Kibreab recommend that formal standing be given to a Refugee Development Council (RDC), which would become both a means of reflecting needs and interests, and of unleashing the community's skills and energies.²⁶⁸

263. John R. Rogge, Repatriation of Refugees: A Nor-So-Simple "Optimum" Solution, Paper Presented to the Symposium on Social and Economic Aspects of Mass Voluntary Return of Refugees from One African Country to Another (Jan. 1991), at 39 (on file with authors); Castillo & Hathaway, *supra* note 217.

264. *See generally* James C. Hathaway, Towards a Contextualized System of Family Class Immigration, Background Paper for the National Consultation on Family Class Immigration (June 1994) (on file with authors).

265. *Id.* The functional approach is endorsed by the Canadian Human Rights Commission, and judicially approved by Justice L'Heureux Dubé of the Supreme Court of Canada. "It is the social utility of families that we all recognize, not any one proper form that 'the family' must assume; it is the responsibility and community that the family creates that is its most important social function and its social value." *Canada (A.G.) v. Mossop* [1993] 1 S.C.R. 554, 632 (L'Heureux Dubé, J., dissenting) (quoting Jane E. Larson, *Discussion*, 77 CORNELL L. REV. 1012, 1014).

266. *See generally* N. Lavik, H. Christie, O. Solberg, & S. Varvin, *A Refugee Protest Action in a Host Country: Possibilities and Limitations of an Intervention by a Mental Health Unit*, 9(1) J. REFUGEE STUD. 73, 86 (1996).

267. *See* Maciej Domanski, *supra* note 205.

268. Robert F. Gorman & Gaim Kibreab, *Repatriation Aid and Development Assistance*, in RECONCEIVING INTERNATIONAL REFUGEE LAW, *supra* note 120.

At present, however, some states discourage efforts by refugee communities to self-organize and self-govern.²⁶⁹ This attitude is problematic, as the failure to evolve as a collectivity interferes with any real chance the refugee community may have to become substantially self-supporting during temporary protection. It may also thwart traditional means of providing emotional support, particularly in dealing with crisis and trauma. A lack of a collective identity moreover means that cultural life, religion, and language will not flourish, and that the community will instead eventually come to identify with the practices and language of the host society.²⁷⁰ The likelihood of successful repatriation is, of course, correspondingly reduced.

Caution is, however, warranted on two counts. First, any person who is excluded from refugee status must be removed from the refugee population with dispatch. If there are "serious reasons for considering" that an individual has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the asylum state, or an act contrary to the principles and purposes of the United Nations, *mandatory exclusion* from refugee status follows automatically.²⁷¹ International law affords states no latitude to treat such persons as refugees, given the inevitable risk that their commingling with genuine refugees may undermine the public commitment to refugee protection.²⁷² When serious criminals are allowed to remain among the refugee population, as were the architects of the Rwandan genocide in Zairian refugee camps, they may use force to distort the refugee community's exercise of free will.²⁷³

Second, care is warranted where there is evidence that indigenous communal structures are oppressive or discriminatory toward women or minorities. To revalidate that inequality and domination during refugee protection would be unjust and ironic, as the circumstances of refuge have been shown to have the potential to empower marginalized

269. Both Zaire and Tanzania banned the *Rassemblement pour le retour des réfugiés et de la démocratie au Rwanda* (RDR), established by Huru refugees in 1995. There was no accusation that they had been involved in the Rwandan genocide. RDR actively campaigned for increased security in Rwanda to enable Rwandese refugees to return, and for dialogue with the Rwandese government. In August 1996, seven RDR leaders had their refugee status withdrawn without any clear explanation. They were then arrested and detained for two days before being handed over to Rwandese authorities. The leaders who were forcibly expelled appear to have been targeted because their political opinions and activities undermined efforts to encourage early repatriation. AMNESTY INTERNATIONAL, RWANDA: HUMAN RIGHTS OVERLOOKED IN MASS REPATRIATION 11 (1997).

270. See *supra* text accompanying note 260.

271. Refugee Convention, *supra* note 4, art. 1(f).

272. HATHAWAY, LAW OF REFUGEE STATUS, *supra* note 4, at 214–31; GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 95–114 (2d ed. 1996).

273. James C. McKinley, Jr., *Zaire Rebel Calls a Truce, but Refugees Remain in Danger*, N.Y. TIMES, Nov. 5, 1996, at A8.

groups, particularly women.²⁷⁴ Concern to avoid support for oppressive social structures must, however, be balanced against recognition that the meaningful enfranchisement of dispossessed members of a community does not result from imposition by outsiders of new structures of authority. Real change, while it may be externally stimulated, comes from within the community.²⁷⁵ To the extent that there is no realistic short-term alternative to collaboration with collective organizations that are dominated by men and/or by members of a predominant ethnic or religious group, the needs of women and minorities should be acknowledged by assisting individuals or groups to disengage from the larger refugee community to avoid serious oppression, or to escape violence. When the protection needs of marginalized sub-groups are not temporary in nature, permanent protection in a resettlement state will be required.²⁷⁶

2. Development of Skills and Resources

We have earlier summarized the international legal rights of refugees to access both wage-earning employment and education.²⁷⁷ These rights serve the twin aims of fostering self-sufficiency in the country of asylum and developing skills that will be useful after repatriation. The promotion of harmonious and solution-oriented temporary protection argues for reinforcement of these basic rights in several ways.

In particular, it is critical that economic development programs oriented to refugee needs be instituted in asylum states. It can be extraordinarily debilitating for refugees to be required to depend on formal assistance programs.²⁷⁸ A serious commitment to creative forms of economic development will reduce the medium-term fiscal burden of providing asylum, and will allow the refugee population to remain vital and able to contribute to their home communities upon repatriation.

Refugee development programs should be designed in a way that takes the needs of the host community into account. Resentment can

274. The experience of Guatemalan women refugees in Mexico is illustrative. See Guadalupe Garcia Hernandez & Natividad Garcia, *Mama Maquin Refugee Women: Participation and Organization*, in DEVELOPMENT AND DIASPORA: GENDER AND THE REFUGEE EXPERIENCE, *supra* note 157, at 258, 262.

275. Gorman & Kibreab, *supra* note 268, at 63–64, 78–79, 119–20.

276. See generally SUSAN FORBES MARTIN, REFUGEE WOMEN 16–23 (1991).

277. See *supra* text accompanying notes 226–231.

278. "Provision of free inputs may foster dependence and paternalism, which inhibits the long-term viability of resettled communities. Settlers continue to expect that everything will be done for them and may develop a welfare syndrome." Véronique Lassailly-Jacob, *Government-Sponsored Agricultural Schemes for Involuntary Migrants in Africa: Some Key Obstacles to their Economic Viability*, in AFRICAN REFUGEES: DEVELOPMENT AID AND REPATRIATION, *supra* note 122, at 209, 221.

otherwise develop in situations where a local community perceives that a refugee community enjoys a better standard of living than it does. In countries where the local community itself may be disadvantaged or impoverished, the sudden arrival of international relief agencies keen to provide assistance to a refugee community can lead to hostility, or even violence, intended to force the refugees out.²⁷⁹ Nor are such attitudes confined to the poor states of the South. Northern stereotypes increasingly portray refugees as exploiters of welfare and health care programs, and have led to armed attacks and other violence against refugees by citizens worried about their own economic security.²⁸⁰

The objective should therefore be to treat refugees as empowered agents *for* development instead of burdens *on* development.²⁸¹ Specifically, Gorman and Kibreab suggest that it would be beneficial to encourage Refugee Development Councils to work collaboratively with a Local Development Council (LDC), representing the economic, political, and geographical interests of the host community. Jointly, the RDC and the LDC, with the support of UNHCR, relief and development agencies, and governmental bodies where necessary, could structure a program of refugee economic development in a way that fosters local development as well.²⁸²

If a model of LDC/RDC cooperation is instituted as soon as a viable refugee community is in place, it should be possible to foster a pattern of collaborative economic and social interaction that erodes the mutual distrust between local and refugee communities.²⁸³ Even when refugees are fewer in number or widely dispersed, umbrella RDCs and LDCs, made up of many different nationalities and representing a variety of neighborhoods, would still offer a vehicle for ongoing dialogue between refugees and their neighbors. Given current attitudes of suspicion and intolerance in many asylum states, a process that facilitates a closer relationship and a direct exchange of information between refugees and their hosts would likely enhance the overall quality of protection.

279. Lassailly-Jacob highlights this concern in a variety of refugee settlement schemes in Africa. See *id.* at 221.

280. See Eva Wakolbinger, *Austria: The Danger of Populism*, in *NEW XENOPHOBIA IN EUROPE* 10 (Bernd Baumgartl & Adrian Favell eds., 1995); Charles Westin, *Sweden: Emerging Undercurrents of Nationalism*, in *NEW XENOPHOBIA IN EUROPE*, *id.* at 332.

281. Gorman & Kibreab, *supra* note 268, at 87–88.

282. *Id.* at 88–95.

283. In Canada, for example, large numbers of Somali refugees moved into a concentrated block of high-rise apartments in Toronto over the space of a few years. Tension and open disputes developed between the refugees and other residents, fuelled by poor communication and misunderstandings. By the time efforts were made to mediate the conflict, there was a great deal of bitterness and mistrust in both communities. See Edward Opoku-Dapaah, *SOMALI REFUGEES IN TORONTO: A PROFILE* 43 (1995). See also *A Home Called Dixon*, [TORONTO] *GLOBE & MAIL*, Nov. 28, 1993, at D1.

In addition to a creative approach to economic development, education for refugees should promote both self-sufficiency and return. While it is important that refugees be educated in the language of their host culture, the failure to also provide instruction in the language of the refugees' country of origin will work against the viability of repatriation. Bilingual education that is partially based on the curriculum in the refugees' home country is preferable.²⁸⁴

Beyond encouraging solution-oriented economic development and education, refugees should be encouraged to garner resources that will assist them in re-establishing themselves upon repatriation. At present, a number of Northern countries provide money to aid in the return process. These funds would cover the costs of transportation and moving, and sometimes finance basic needs or provide food for an initial period of time after return.²⁸⁵

The resources available to returning refugees could be enhanced by establishing a system of refugee saving and investment during asylum, designed to promote a sense of refugee self-reliance. Refugees should be encouraged to make deposits to a "repatriation savings account" during their time in the asylum state, which would be supplemented by matching funds from the host state or UNHCR.²⁸⁶ The savings account, including both contributions and matching funds, would be accessible to the refugee when repatriation occurs or when permanent resettlement becomes necessary.

3. Promotion of Linkages with Internally Displaced and Stayee Communities

The viability of refugee repatriation will be assisted by the promotion of contacts between refugee communities and the internally displaced and stayee populations in the country of origin. The internally displaced, like refugees, are forced to flee their homes, but are not able

284. For example, Rwandan children studying in refugee camps in Tanzania followed the Rwandan curriculum to ease their integration upon repatriation. UNHCR SUB-OFFICE NGARA, BASIC DATA ON REFUGEE CARE AND MAINTENANCE PROGRAMME, para. 2.4 (unpublished pamphlet on file with authors). See also INTER-GOVERNMENTAL CONSULTATIONS, TEMPORARY PROTECTION, *supra* note 50, at 82, 108, 131 (regarding the availability of mother-tongue education for Bosnian refugee children in Denmark, France, and Italy).

285. The Danish model sensibly recognizes the importance of providing financial assistance to cover the costs of moving equipment that may be integral to the practice of a trade back to the country of origin, thereby ensuring that repatriation does not require refugees to abandon new-found means of livelihood. INTER-GOVERNMENTAL CONSULTATIONS, TEMPORARY PROTECTION, *supra* note 50, at 84-85. Repatriation programs in the South, usually administered by UNHCR, similarly provide returnees with grants or allowances. For example, Mozambican refugees who repatriated in 1994 and 1995 received enough food for 10 months. U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 59 (1996). See also UNHCR, *supra* note 91, at 106.

286. Castillo & Hathaway, *supra* note 217, at 42.

or willing to flee to another country. They will sometimes suffer more severely than refugee communities, as it can be more difficult for international relief to reach them. In addition, they may continue to be subject to violence, human rights abuse, or other concerns that led to their displacement.²⁸⁷ Stayee communities are composed of persons who are not displaced from their homes. Some may not have been affected by the events that forced the refugees and internally displaced from their homes, while others may have been directly affected, but were unable to flee or were fiercely determined to remain.

Refugees away for some time will likely face the prospect that most of their property was taken by those who stayed behind. If the latter are required to relinquish these interests, they may resent the idea of receiving returnees. Gorman and Kibreab recommend that as part of the strategy to plan for repatriation from the outset of temporary protection, early efforts be made to organize meetings between "representatives of refugee communities, stayees, and internally displaced persons to start the process of reconciliation, healing, confidence building, and settlement of property rights."²⁸⁸ If adequately supported by UNHCR and international development agencies, this dialogue can lay the groundwork for sustainable programs that will effect the meaningful reintegration of refugees in their home communities.

Wherever possible, efforts should therefore be made to organize collective bodies within countries of origin, representing the varying interests of the internally displaced and stayee communities. These bodies, Country of Origin Development Councils (CODCs), would serve as counterparts to Refugee Development Councils. In some cases, it may be appropriate to include government officials from the country of origin in these meetings. Aside from preparing for return, this process might make a meaningful contribution to resolving the root cause of flight itself. The ultimate aim would be for CODCs and RDCs to merge after repatriation.

4. Confidence-Building

Most fundamentally, refugees need to know when it is genuinely safe to go home, and whether or not they will be able to survive and support their families upon return. Reliable and meaningful information about conditions in the country of origin must therefore be made available to the refugee community on an ongoing basis, and concrete steps must be taken to ensure the feasibility of re-establishment.

287. UNHCR, *WORLD'S REFUGEES*, *supra* note 1, at 173. See generally Francis M. Deng, *The International Protection of the Internally Displaced*, 7 INT'L J. REFUGEE L. SPECIAL ISSUE 74 (1995).

288. Gorman & Kibreab, *supra* note 268, at 103.

A variety of means can be used to foster confidence in the accuracy of information. In particular, periodic visits to the country of origin should be arranged for members of Refugee Development Councils, who would then be able to test the viability of a program of return, jointly administered with the local Country of Origin Development Council, and more generally be positioned to convey information firsthand to the refugee community. With appropriate safeguards, officials from the country of origin can also be brought in to meet with refugees in the country of asylum.²⁸⁹

A second important confidence-building measure is to allow individuals in receipt of temporary protection to attempt repatriation voluntarily when circumstances become viable, backed by a guarantee that they will be allowed to return to the country of asylum if the situation in the home country is ultimately judged by the refugee to be unviable.²⁹⁰

Where refugees have fled from war, a necessary part of confidence-building is to prepare them for some of the difficult and dangerous legacies of armed conflict, such as anti-personnel mines.²⁹¹ In such circumstances, training in mine awareness and mine detection should be an integral part of the lead-up to return. Similarly, individuals who witnessed human rights violations before fleeing are often fearful that they may be at risk of violence at the hands of the perpetrators. Carefully designed witness protection programs and other credible security measures are needed to provide refugees with the confidence to attempt return.

The explicitly palliative mandate of refugee law means that it should not, in and of itself, be expected to generate the solutions that make return in safety and dignity possible; this is the role of the international security and human rights regimes. Refugee law can, however, be made to operate in harmony with interventionist efforts, thereby giving

289. UNHCR stresses the importance of involving officials from the country of origin in the repatriation process, but cautions that visits from authorities of the home country should take place only if the refugees have been consulted and have no objections to such a meeting. UNHCR, *supra* note 166, at 14, 28–29, 44–49.

290. Some Northern governments are clearly sensitive to this concern. Refugees who opt to repatriate from Denmark, for example, can re-claim temporary residence in Denmark for up to three months after attempting to re-establish themselves in their country of origin. If the attempt to return proves unsuccessful within that time period, the Danish government will provide financial support, including transportation and some moving expenses, to enable the refugees to return to Denmark. INTER-GOVERNMENTAL CONSULTATIONS, TEMPORARY PROTECTION, *supra* note 50, at 84–85. In contrast, short-sighted bureaucratic action on the part of the UNHCR and the Malawian government had the effect of cutting food rations for refugees who had made provisional return visits to Mozambique, effectively penalizing them for making an early attempt at repatriation. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 41, at 113–37.

291. See CARVER, *supra* note 44, at 127.

governments the confidence they need to remain open to the arrival of involuntary migrants.

B. Principled Limits to Temporary Protection

There will always be some cases that should be diverted from the usual system of temporary protection. Unaccompanied minors and individuals who have been severely traumatized by torture should be treated as special cases, and resettled immediately. As discussed above,²⁹² women or minorities who need to escape from the risk of violence or serious oppression within the refugee community may also require permanent protection in a resettlement state.

More generally, the duration of temporary protection must be constrained to ensure that it does not simply amount to "warehousing," discussed in Part I.²⁹³ Extending temporary protection indefinitely is both inhumane (in that it does not allow refugees to recover a sense of stability and certainty in their lives) and impractical (as a time comes when a refugee community has been away from home for so long that successful repatriation and reintegration is nearly impossible).²⁹⁴

One of the most difficult questions that is asked about temporary protection is whether the threats that lead to refugee movements are ever sufficiently short-lived that protection can be viably delivered on a temporary basis. What is a reasonable period of time? What should happen when the reasonable period of time has expired? The analysis of state practice earlier in this Article reveals a considerable divergence in setting time limits.²⁹⁵ It is difficult to establish a universally applicable duration for all grants of temporary protection. Where the refugee and host communities are socially and culturally similar, the refugee community might more easily maintain culture, language, and heritage in a way that keeps repatriation alive as a viable and humane option for a longer period of time, as has been the case of Afghan refugees in Pakistan.²⁹⁶ In other situations, where the differences between the two communities may be considerable, it would be reasonable to grant permanent status after a shorter period of time has passed.²⁹⁷

292. See *supra* text accompanying notes 274–276.

293. See *supra* text accompanying note 66.

294. See Bill Frelick, *Afterword: Assessing the Prospects for Reform of International Refugee Law*, in *RECONCEIVING INTERNATIONAL REFUGEE LAW*, *supra* note 120.

295. See *supra* text accompanying notes 71–76.

296. See AUDREY C. SHALINSKY, *LONG YEARS OF EXILE: CENTRAL ASIAN REFUGEES IN AFGHANISTAN AND PAKISTAN* 126 (1993).

297. Prolonged exile inevitably leads to a degree of cultural assimilation of refugees with their host society. A study of Ethiopian refugees in the United States, many of whom had been outside Ethiopia for at least a decade, suggested that special measures would be necessary to bridge the considerable cultururation gap that had developed. Peter H. Koehn, *Refugee Resettlement and Repatriation in Africa: Development Prospects and Constraints*, in *AFRICAN REFUGEES: DEVELOPMENT AID*

It is, however, necessary to establish an outside time limit to temporary protection. In no situation should temporary protection continue indefinitely. The psychosocial needs of refugees ultimately call for enduring stability and security.²⁹⁸ Interminable refugee status may also contribute to national or regional insecurity. Disaffected youth who are born and raised in refugee camps, for example, sometimes turn to arms as a means of mitigating their sense of hopelessness.²⁹⁹ More generally, the long-term presence of a population with little or no stake in a political community can be socially destabilizing.³⁰⁰

There is very little empirical data to guide the designation of an appropriate outside time limit for temporary protection. In our view, however, there are two important perspectives to balance. First, the authorized duration of temporary protection must be long enough to make a meaningful contribution to the revitalization of asylum capacity. It should therefore be long enough to allow many, if not most, refugee-producing phenomena to come to an end. Balanced against the concern to ensure the viability of temporary protection, though, must be a clear commitment to constrain its duration to a timeframe that is reconcilable to respect for the psychosocial needs of refugees. If there is evidence that continued temporary protection exacts a serious and irremediable cost to refugee well-being at a particular point in time, that time ought logically to constitute the moment at which temporary protection is brought to an end.³⁰¹

Clearly, solid social science research is required to establish both these determinants of the length of temporary protection. There is, however, at least tentative evidence to suggest that five years is a reasonable approximation of a temporary protection period that is long enough to facilitate solutions, yet short enough to be a humane form of protection for most refugees. In relation to viability, a United

AND REPATRIATION, *supra* note 122, at 97, 100–01 (1995). See also Bill Frelick, *Afterword: Assessing the Prospects for Reform of International Refugee Law*, in RECONCEIVING INTERNATIONAL REFUGEE LAW, *supra* note 120.

298. Barry N. Stein, *Prospects for and Promotion of Voluntary Repatriation*, in REFUGEE OR ASYLUM? A CHOICE FOR CANADA 190, 200 (Howard Adelman & C. Michael Lanphier eds., 1990). See also UNHCR, *WORLD'S REFUGEES*, *supra* note 1, at 89.

299. Van der Meeren, *supra* note 78, at 262. See generally Nguyen Ba Thien & Brigitte Malapert, *The Psychological Consequences for Children of War Trauma and Migration*, in REFUGEES—THE TRAUMA OF EXILE 248 (Diana Miserez ed., 1988) (discussing the wide variety of serious psychosocial challenges that refugee children face, and the importance of an environment of security and stability to addressing those needs).

300. THOMAS HAMMAR, *DEMOCRACY AND THE NATION STATE: ALIENS, DENIZENS, AND CITIZENS IN A WORLD OF INTERNATIONAL MIGRATION* (1990).

301. For example, a recent U.S. Board of Immigration Appeals ruling refused to condone the removal of a young Nicaraguan man whose claim to refugee status was rejected when the Nicaraguan civil war ended, but who had been residing in the United States for eleven years. *In re O.J.Q.*, 1996 WL 393504 (B.I.A. 1996). See also Patrick McDonnell, *Man Ruled Too Americanized to Deport*, L.A. TIMES, July 12, 1996.

Nations survey of the 1970–1980 decade showed that large-scale repatriation took place within five years of the commencement of mass exodus in about one-half of cases.³⁰² With regard to the psychosocial need for permanency, a study of the integration of Vietnamese refugees in Finland reveals that acculturation did not take place for the majority of the refugees until after five years away from home.³⁰³ The cultural disjuncture between home and host communities in this case is obviously extreme, suggesting that five years is not an unreasonable estimate of the earliest point at which repatriation may be said to be unviable from a psychosocial perspective. Taken together, these two studies suggest that temporary protection could be a meaningful response to a significant proportion of the refugee population.

In fact, this historical record likely significantly understates the potential value of temporary protection. The fifty percent repatriation rate noted in the U.N. survey occurred during an era when conflicts were slow to abate due to the support received from superpower rivals. Also, temporary protection has rarely been delivered in a manner that focuses on preparing for successful repatriation, and there has been no systematic effort to define the site of protection to promote functional and cultural compatibility between refugee and host populations, as we propose below.³⁰⁴ If these concerns are taken seriously, temporary protection is likely to be viable even beyond five years, allowing it to meet the needs of an even greater proportion of the refugee population. Moreover, to the extent that improved international and regional efforts to address the “root causes” of refugee flight evolve in practice, repatriation will more frequently and more quickly become a realistic solution to refugeehood. Such a shift will further minimize the need to resort to more permanent forms of refugee protection. There is therefore every reason to see temporary protection as a realistic means of responding to the needs of many, though not all, refugees.

Nevertheless, some refugee crises clearly will not be resolved by the expiration of the temporary protection period, and the need for protection will remain very real. The state in which temporary protection was provided might elect to grant permanent status to some of those refugees who require permanent status,³⁰⁵ particularly where meaning-

302. Sadruddin Aga Khan, *United Nations Study on Human Rights and Massive Exodus*, U.N. ESCOR, U.N. Doc. E/CN.4/1503 (1981).

303. Karmela Liebkind, *Self-Reported Ethnic Identity, Depression and Anxiety Among Young Vietnamese Refugees and their Parents*, 6 J. REFUGEE STUD. 25, 34–35 (1993).

304. See *infra* text accompanying notes 378–380.

305. For instance, while the majority of Guatemalan refugees in Mexico have chosen to repatriate, many in the younger generation, after growing up in Mexico, preferred to stay and look for employment rather than return to agricultural life in Guatemala. U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY 190*, 195–96 (1996).

ful support is received from other governments. In other cases, refugees unable to go home will need to be offered permanent resettlement in other states. Refugees should benefit from a firm guarantee to make permanent residence in a safe state available at the expiration of the temporary protection period. We believe that this will be possible where governments adopt a commitment to differentiated forms of responsibility sharing, as discussed below.³⁰⁶

C. Viable Repatriation

If refugee protection has actually been delivered in a firmly solution-oriented manner as discussed above, voluntary repatriation when conditions allow should be a viable and attractive option. It may sometimes, however, be necessary for the countries of origin and asylum, along with UNHCR, to establish an orderly program to facilitate voluntary return, as a sudden influx of returnees in a short period of time may destabilize a situation that has only recently become secure.³⁰⁷ The UNHCR should be allowed to monitor the return and reintegration process and to provide aid and advice as required.

With appropriate support,³⁰⁸ and with ready access to impartial information regarding conditions in the country of origin,³⁰⁹ refugees themselves will generally be the best judge as to when it is safe enough to return and when the home country offers reasonable prospects for economic survival. Some refugees may decide to go home before an official decision has been taken to bring temporary protection to an

306. See *infra* text accompanying notes 378–391.

307.

Such plans commonly include amnesties for political offences, assurances of safe passage for returning refugees, material assistance to help them re-establish themselves and provisions for international presence of some kind to monitor their safety. Organized plans are also likely to have greater resources behind them, though rarely at the level desired.

UNHCR, *supra* note 91, at 106.

308. For example, France has provided some financial assistance in a limited number of repatriations to Sarajevo. *Id.* at 111.

The Norwegians are also said to be considering instituting a financial incentive scheme that would be available to returnees who have benefited from at least one year of temporary protection. NORWEGIAN WHITE PAPER, *supra* note 160, at 106.

In the United States, however, TPS incorporates no provisions to encourage or facilitate repatriation. At present, TPS beneficiaries who want to return home, but are uncertain about job and housing prospects in their home country, might decide against returning or simply be financially unable to go home. Refugee advocacy groups in the United States have emphasized that TPS is unlikely to succeed unless incentives to return are introduced. See, e.g., Frellick and Kohnen, *supra* note 62, at 354.

The Netherlands, the United Kingdom, and Germany have similarly failed to make any provision for the facilitation of repatriation. INTER-GOVERNMENTAL CONSULTATIONS, TEMPORARY PROTECTION, *supra* note 50, at 123, 155, 221.

309. See *supra* text accompanying notes 290–291.

end. In fact, refugees may even decide to return before the conflict or other reason for flight has been fully resolved.³¹⁰ It will be necessary to build in safeguards to discourage unsafe returns and to minimize the potential for abuse of repatriation grants and allowances. Ultimately, of course, it is fully within a refugee's rights to return home at any time.³¹¹

If and when the risk that gave rise to refugee status comes to an end, however, refugee status may legitimately be withdrawn and mandated repatriation pursued. Commentators sometimes fail to make clear that the issue of *refoulement* does not arise in regard to persons who have ceased to be refugees by reason of a fundamental change of circumstances in their country of origin.³¹² This transition in status is in keeping with an understanding of refugee protection as a human rights remedy, rather than an alternative path to permanent immigration. As observed in Part I, the necessity-based logic of temporary protection is important in convincing states to end efforts to avoid responsibility toward refugees altogether.³¹³

At precisely what point, though, is the termination of temporary protection and the commencement of mandated repatriation justified? Jurisprudence under the Refugee Convention adopts the view that repatriation consequent to a change of circumstances is permissible when the "root cause" of flight has come to an end by virtue of a fundamental change in the country of origin that is substantial, effective, and durable.³¹⁴ This test ensures that refugee status ends only when there is no longer an objective foundation for the refugee's fear of persecution.

The UNHCR should play an important part in decision-making about the appropriateness and viability of repatriation, including securing input from the Refugee Development Councils. With the benefit of this information, decisions on the cessation of refugee status would most logically be taken jointly by all interest-convergence groups that allocated responsibility for a particular refugee population, thereby

310. Return is not voluntary, however, if it is primarily motivated by a desire to escape conditions in the country of asylum. UNHCR, *supra* note 166, at 11.

311. Universal Declaration, *supra* note 170, art. 13(2); ICCPR, *supra* note 141, art. 12(4).

312. See, e.g., B.S. Chimni, *The Meaning of Words and the Role of UNHCR in Voluntary Repatriation*, 5 INT'L J. REFUGEE L. 442, 454 (1993).

It is my view that to replace the principle of voluntary repatriation by safe return, and to substitute the judgement of States and institutions for that of the refugees, is to create space for repatriation under duress, and may be tantamount to *refoulement*. If indeed "safe return" is possible, however, there is no legal basis for either the continuation of refugee status, or for invocation of protection against the risk of *refoulement*.

313. See *supra* text accompanying note 105.

314. See HATHAWAY, *supra* note 4, at 199-205; GOODWIN-GILL, *supra* note 273, at 84-88; UNHCR, *supra* note 166, at 9.

ensuring a consistent response. If temporary status has been granted on a group basis and similarly terminated, asylum states will have to be prepared for the possibility that some individuals will assert that the changes do not obviate the precise basis for their particularized claim to refugee status, or even that new dangers sufficient to warrant protection have emerged. Such claims will have to be examined to determine whether the individual is eligible for protection under the terms of the Refugee Convention or other international human rights instruments.

Ultimately, if true stability is restored in the country of origin yet efforts to promote voluntary repatriation do not succeed, mandated repatriation will become necessary. It should, however, be carried out in a way that is minimally violative of the dignity of returnees. Human rights groups should be involved in the return process to ensure that officials do not resort to treatment that violates the rights of the returnees.³¹⁵ Officials should also work actively with the Refugee Development Council representatives of the resisting returnees to attempt to negotiate a non-coercive means of effecting repatriation. This is both a matter of law and of logic: a punitive approach to mandated repatriation will be less successful than efforts that respond to the human dignity of those to be repatriated.³¹⁶

Repatriation, be it voluntary or mandated, is not an end in itself. The refugee crisis does not truly come to an end until it is clear that there has been successful reintegration. The UNHCR calls reintegration "the anchor of repatriation."³¹⁷ Governments will need to work with UNHCR and other intergovernmental organizations to ensure that conditions in the country of origin (now the country of return) stabilize, divisions are healed, law and order returns, civil society begins to flourish, and development prospects brighten. Carefully designed forms of empowering development assistance will continue to be of crucial importance, the cost of which should continue to be borne equitably by the international community. Equally important, durable repatriation requires that returning refugees not be excluded from systems of governance, but rather be fully included in the processes of political decision-making.³¹⁸

315. International human rights standards apply, particularly those that prohibit cruel, inhuman, or degrading treatment or punishment. See, e.g., ICCPR, *supra* note 141, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

316. In May 1995, for example, attempts to remove a group of 94 individuals scheduled to be repatriated to Vietnam from High Island Detention Centre in Hong Kong, led to a riot involving 2000 detainees and 1500 police. U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 84 (1996).

317. UNHCR, *supra* note 166, at 78.

318.

Events in Rwanda most dramatically support the hypothesis that repatriation is gen-

Put simply, the international community cannot abandon the returning population. Human rights monitoring should be implemented to ensure safety (especially if other refugees are still returning) and to identify, and hopefully prevent, potential for renewed conflict. There may also be an important international role in mediating conflicts that are likely to arise regarding property disputes and in the process of bringing human rights violators to justice. The importance of this final phase cannot be overstated. If reintegration does not occur, another refugee crisis may well be in the offing.³¹⁹

D. *Collectivized Protection*

The present, loosely constructed system of international cooperation in refugee protection is characterized by vague promises of solidarity among governments, accompanied by often undependable funding. It has proved unable to answer the concerns of front-line receiving states, which have become increasingly and understandably loathe to rely on purely discretionary support.³²⁰ The shift to a system of more collectivized protection advocated here can only be realized if a solid basis for interstate cooperation is established.

In an ideal world, a system to share the burdens and responsibilities of refugee protection would operate at the global level. A universal system could spread the costs of providing asylum among the largest number of states, thereby minimizing the risk of an unacceptably high cost being imposed on any particular government. It is also morally attractive.³²¹ But Asha Hans and Astri Suhrke urge that the historical record compels the conclusion that "any sharing scheme must be based on the *realpolitik* assumption that legal obligations and humanitarian considerations alone rarely suffice to persuade states to admit refugees . . ."³²² They convincingly argue that regimes of common responsibility are most logically pursued at the sub-global level where there is

erally destabilizing to the country of origin. Successful integration, not only economic but political, so that newcomers have a stake in the success of their new homeland, must become the priority of the international system if such events as occurred in Rwanda in 1994 are not to be repeated. Such integration will never be accomplished through relief programs.

Barbara Harrell-Bond, *Refugees and the International System: The Evolution of Solutions 15* (July, 1995) (unpublished manuscript, on file with the authors).

319. U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 80-81 (1996).

320. In mid-March 1995, 40,000 Rwandan and other refugees attempted to flee Burundi to Tanzania. Only about half managed to cross the border before the Tanzanian government closed the frontier on March 31. "Failure of the international community to give adequate assistance to Tanzania was the main reason for the closure of the border." Rutinwa, *supra* note 130, at 298.

321. ANTHONY H. RICHMOND, *GLOBAL APARTHEID: REFUGEES, RACISM AND THE NEW WORLD ORDER* 206-17 (1994).

322. Hans & Suhrke, *supra* note 120, at 159.

likely to be a greater sense of shared risk, commonality, and mutual responsibility. Because governments have traditionally been more prepared to make binding commitments at the sub-global level where their influence is greatest and their interests are more directly implicated, a sub-global focus is positioned to give substance to the rhetoric of interstate cooperation. While not ruling out the potential for the interlinking of sub-global systems to evolve into a more universal refugee protection regime, their conclusion is that there is presently an insufficient sense of "connectedness" among states at the universal level to generate a formal, binding commitment to collectivize the costs of refugee protection.³²³

In this Article, we adopt the term "interest-convergence group" to identify the sub-global associations of states that ought reasonably to feel drawn together to create a mechanism of shared responsibility for refugee protection. The primary motivation for states to cooperate in responding to the arrival of refugees will be the perceived cost of not responding. Cost, real or perceived, is therefore central to the model. It is perhaps helpful to consider the analogy of states choosing to participate in an insurance program to find ways to minimize the risk of incurring potentially unmanageable costs. International cooperation generally develops from a perception of a shared risk that can be attenuated by a collective response.³²⁴

It should be possible to develop the capacity to generate a collectivized response to refugee protection within existing organizational structures, such as the several formal regional organizations.³²⁵ In addition, most states belong to a variety of sub-global associations based on such factors as economic and trading relationships, shared religion, common language, shared political and legal traditions, or mutual security concerns. These organizations could be encouraged to expand their traditional mandate where there are important linkages between effective refugee protection and the realization of their broader objectives.

It is quite likely that particular refugee flows will be of interest to more than one potential interest-convergence group. For example, the plight of Muslim refugees from Bosnia and Herzegovina was most obviously of concern to states of the European Union and Council of Europe, for a combination of historical, cultural, and geographical reasons. However, the countries that cooperate in the Islamic Conference would also have an interest in ensuring that protection is available

323. *Id.*

324. Amitav Acharya & David Dewitt, *Fiscal Burden Sharing*, in RECONCEIVING INTERNATIONAL REFUGEE LAW, *supra* note 120.

325. Peter Nyong'o & Justus Nyang'aya, *Comprehensive Solutions to Refugee Problems in Africa: Bilateral, Regional and Multilateral Approaches*, 7 INT'L J. REFUGEE L. SPECIAL ISSUE 164, 168 (1995).

to fellow Muslims fleeing human rights abuse, and NATO states would want to ensure that the refugee flow was managed in a way that advanced regional security interests. Because we propose that UNHCR participate in the refugee protection discussions of all such interest-convergence groups, it should be possible to encourage inter-group cooperation where interests overlap.

While it is logical to build refugee protection competence within existing organizational structures wherever possible, few existing sub-global organizations have the perfect range of membership to implement a dependable regime of common but differentiated responsibility toward refugees. Most commonly, an existing organization or some subset of its members will be coterminous with what we define below as the "inner core" of an interest-convergence group. Other countries that have a shared interest with the "inner core" states in relation to refugee protection issues, whether or not affiliated with the existing organization in regard to other matters, would be encouraged to collaborate as "outer core" and "situation specific" members. This organizational concept is comparable to the notion of "flexible integration" advocated by the Centre for Economic Policy Research as a means to accommodate differences among European Union member states in regard to the scale and pace of integration.³²⁶

Rather than advocating a rigid structural form, we propose a model of cooperation based on contemporary understandings of collective security, implemented by groups of states that feel that common interests, albeit varying in degree and impact, merit a shared response. Collectivized responsibility toward refugees can be implemented within any sub-global association that is able to meet two basic requirements. First, the states concerned must develop a general framework of criteria that will guide their decisions about responsibility sharing and burden sharing within the parameters of international law. Second, its members must commit themselves to meet expeditiously in order to apply those general burden and responsibility sharing criteria to the facts of any situation referred to the group by a participating state or the UNHCR.

1. Interest-Convergence Groups

Not all states will be equally drawn to cooperate in the provision of refugee protection, nor will they be willing to commit themselves to other governments with equivalent intensity. Rather than arbitrarily demanding an identical form of affiliation from all potential members,

326. Will Hutton, *Why Europe Needs Flexible Friends*, MANCHESTER GUARDIAN WKLY., Dec. 17, 1995, at 14.

we believe that both overall participation and net protection resources will be maximized by allowing states to make varying kinds of commitments to an interest-convergence group. Those governments that wish to work extremely closely together should be encouraged to do so. Their efforts, however, will be more likely to succeed where supported, even if only in limited ways, by states whose self-interests dictate that they refrain from fully allying their refugee protection programs with those of other governments. In simplified terms, we describe the variants of affiliation as inner core, outer core, and situation-specific membership.

a. The Inner Core

The inner core members of an interest-convergence group are those states with the strongest reasons to cooperate by reason of their shared vulnerability to refugee flows. Ordinarily, but not always, these states will be neighbors within a geographical region. While the inner core states of some interest-convergence groups may be able to fund refugee protection efforts, the primary role of the inner core will normally be to share responsibility for the provision of temporary protection to refugees. In most cases, the delivery of temporary protection within the region of origin will be the only practical possibility. Moreover, several responsibility sharing criteria proposed below³²⁷ are also most readily met within the region of origin, including the ability of refugees to engage in productive activities consistent with the local economy, cultural harmony between refugees and members of the host community, and the maintenance of contact by refugees with stayee communities. Perhaps most fundamentally, the potential for repatriation will be greatest if the physical and cultural distance between the country of origin and place of asylum is minimized.³²⁸

We believe that a number of security concerns will motivate inner core states to obligate themselves to share the responsibility to provide temporary protection. First, inner core states will likely be prepared to commit themselves in advance to sharing the responsibilities of other members of the interest-convergence group if they perceive a real risk of someday facing a refugee influx with which they cannot contend independently. The model guarantees them access to intra-group cooperation in return for a promise to provide similar assistance to other

327. See *infra* text accompanying notes 378–397.

328. SECRETARIAT OF THE INTER-GOVERNMENTAL CONSULTATIONS ON ASYLUM, REFUGEE AND MIGRATION POLICIES IN THE STATES OF EUROPE, NORTH AMERICA AND AUSTRALIA, RECEPTION IN THE REGION OF ORIGIN: DRAFT FOLLOW-UP TO THE 1994 WORKING PAPER (1995) [hereinafter INTER-GOVERNMENTAL CONSULTATIONS, REGION OF ORIGIN FOLLOW-UP]; see also *infra* text accompanying note 379.

states when required. Particularly where the arrival of specific groups of refugees could threaten fragile internal security balances, states will be drawn to agree to responsibility sharing with other governments as a means to negotiate the re-direction of a politically contentious flow, in favor of admitting other refugee populations that pose little or no risk to domestic security.³²⁹

Second, states may opt for inner core membership if they have an expectation of more diffuse reciprocity from other inner core states. The *quid pro quo* of a binding commitment to responsibility sharing need not be identical to the assistance contributed to the interest-convergence group. Instead, a strong alliance with the inner core may make sense as a means to secure cooperation from the group in advancing some other important national interest, or to secure a guarantee of support to cope with some other kind of anticipated emergency.³³⁰

Third, states will feel motivated to commit themselves to share responsibility for providing protection in order to avoid regional instability that can arise from the concentration of a large refugee population in a single location. Where one country is the principal place of asylum for a particular group of refugees, it may be stigmatized by the refugees' country of origin as a sympathizer with rebel or other minority causes and punished accordingly.³³¹ Dispersal of the community by means of responsibility sharing can sometimes ease these concerns.³³²

b. The Outer Core

While the support of other inner core members will clearly improve the ability of a particular state to honor its refugee protection responsibilities, the maldistribution of refugee populations around the world argues the sufficiency of inner core cooperation. Most refugees today originate in poor countries, and are protected by other poor countries. Africa alone shelters nearly double the number of refugees protected

329. For example, Turkey would likely have valued the ability to negotiate a responsibility sharing arrangement that would have diverted the Iraqi Kurds who were arriving at its borders and were believed to represent a threat to its political security.

330. For instance, a number of countries in the Caribbean basin were willing to consider requests from the United States to assist in providing temporary refuge for Haitians, in return for diplomatic recognition, forgiving of national debt, and other bilateral benefits granted by the United States. Cf. U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY 188* (1996).

331. For example, the presence of Sudanese refugees in Uganda led to armed attacks against Uganda, raising the risk of regional armed conflict. *Id.* at 68-70, 72-73.

332. For instance, a shared approach might have made it more difficult for Hutu extremists to regroup and rearm in Zaire, where they found their power concentrated and relatively unchecked. See, e.g., James C. McKinley, Jr., *Strife on Zaire Border Erupts Into Open War With Rwanda*, N.Y. TIMES, Nov. 2, 1996, at 1.

in all of Europe, North America, and Oceania combined.³³³ It is clearly unreasonable to propose a system of collectivized responsibility toward refugees that amounts to no more than a proposal for already overburdened countries to share each other's burdens.

It is also unrealistic, however, to argue that all countries around the world should share the responsibility to receive every refugee population. Not only does this notion run counter to the logic of providing temporary protection close to the refugee's home country,³³⁴ but it is a proposal that could only succeed if supported by a much more profound global consciousness than presently exists. It would be virtually impossible to convince governments that presently believe themselves to be relatively safeguarded from most refugee flows that it is in their national interest to absorb a proportionate share of the world refugee population. On the other hand, we believe that it will be possible to attract such states as outer core members of interest-convergence groups.

Even states not likely to be affected by immediate or massive refugee flows often have important reasons to make an advance commitment to the inner core of an interest-convergence group. The involvement of these "outer core" governments will be formal and consistent, although not at the same level of intensity as that of the inner core. Because their motivation to join the group derives from a less intense sense of vulnerability, it is likely that the contribution of outer core members will be in the form of a combination of fiscal support and more managed forms of responsibility sharing, like providing permanent resettlement options for special needs cases and for refugees who are unable to return home at the end of a reasonable period of temporary protection.

The first motivation for outer core participation is the emerging concern among some officials in the developed world that the current array of deterrent policies may not prove viable in the long-term.³³⁵ As a purely practical matter, Jonas Widgren notes that "[o]ne could well ask how the system will cope in the long run, with the highly

333. The U.S. Committee for Refugees estimates a refugee population in Africa of 5.2 million, as of December 31, 1995, compared with a total of 2.7 million refugees in Europe, North America, Oceania, and Japan. The European figure includes an estimated one-half million refugees in Russia. U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 4-5 (1996). Côte d'Ivoire, for example, has one-twentieth the population of the United States yet is home to nearly twice as many refugees. *Id.* at 4-7.

334. See *supra* text accompanying notes 328-329.

335. Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, Doc. COM(94)23 Final, Feb. 23, 1994 [hereinafter European Commission Communication], para. 107. See also Anthony H. Richmond, *Open and Closed Borders: Is the New World Order Creating a System of Global Apartheid?*, 13 REFUGEE 6, 10 (1993).

penetrable borders of southern Europe, and the expected absence of European border controls (with, for instance, 3,000 persons running at peak hours through the Channel tunnel between Britain and France).³³⁶ The difficulty of policing arrivals across the southern border of the United States raises comparable concerns.³³⁷ The governments of developed states may therefore be attracted to collectivized protection because it will provide them with a less absolute, but more sustainable, mechanism to promote their migration control objectives.

Even if not convinced that deterrence is unviable in a mechanical sense, some countries will nonetheless be interested in joining an interest-convergence group because it will afford them a socially and politically acceptable alternative to present reliance on deterrent policies. Because crude mechanisms that block access to protection clash with basic social and legal values,³³⁸ some governments will be attracted to collectivized protection as a principled means to control unmeritorious claims to refugee status. Their basic migration control goals will be served, since persons tempted to treat the asylum system as an alternative immigration path will be deterred by an awareness that responsibility sharing allocations mean that their claims to refugee status will often be addressed in a country other than that in which they first arrive. Consequently, those who continue to travel to distant countries will more likely be persons for whom there is genuinely no other protection option closer to home.

A second motivation for outer core membership is the existence of relevant interests or concerns connected to the inner core states. These may include the perception that a region is of important strategic interest due to its location along a vital trade route, or the fact that it is an important source of resources, such as petroleum. Extraregional states were willing to commit themselves to the Comprehensive Plan of Action for Indochinese Refugees in large measure because their geopolitical and economic concerns were tied to the states of first asylum.³³⁹

336. Jonas Widgren, *International Migration and Regional Stability*, 66 INT'L AFFAIRS 749, 764 (1990). See also Loescher, *supra* note 101, at 631.

337. Kitty Calavita, *U.S. Immigration and Policy Responses: The Limits of Legislation*, in CONTROL-ING IMMIGRATION: A GLOBAL PERSPECTIVE, *supra* note 149, at 55, 58-61.

338. "[G]overnments evidence clear reluctance to proceed too far in [the] direction [of expulsion] because of the fear of the negative consequences, internally as well as externally." Coles, *supra* note 118, at 387. The negative social policy ramifications for developed states of resort to *non-entrée* policies are discussed in Sam Blay & Andreas Zimmermann, *Recent Changes in German Refugee Law: A Critical Assessment*, 88 AM. J. INT'L L. 361 (1994).

339. The CPA has in fact been called a "watershed" in international refugee protection. Not only were the "political interests of major powers . . . directly involved," but "[f]or the first time during this period a major group of refugees had appeared for whom the Western countries, especially the United States, felt a serious responsibility for ultimately ensuring a solution." Coles, *supra* note 118, at 379.

States seeking to develop trade or other economic links with countries in an interest-convergence group might also be willing to consider outer core membership. With the end of the Cold War, there are tremendous new possibilities for international cooperation, as states are not limited by their previous alliances. Worldwide, we now witness a headlong rush toward the creation of new economic associations and alliances. States that are anxious to demonstrate their good faith and solidarity with potential economic partners are likely to consider support for an interest-convergence group to be politically astute as well as a sensible investment in regional stability.

Third and similarly, states may be willing to be part of the outer core of an interest-convergence group on the basis of a more general affiliation with one or more inner core countries. While they may have few, if any, immediate strategic or economic interests at stake, looser bonds such as cultural or religious similarities may nonetheless motivate cooperation.³⁴⁰

Finally, in addition to states motivated by immediate or diffuse self-interest, it should be recognized that some governments will opt for outer core membership simply because they have a good-faith, principled commitment to the advancement of refugee protection and development issues. Many states recognize a moral obligation not only to those refugees who arrive at their own borders, but also to refugees who seek protection abroad. Well-organized and effective mechanisms for sharing the responsibility and burden of refugee protection will offer states a forum in which this genuine concern can be most productively and meaningfully realized.³⁴¹

c. Situation-Specific Involvement

Beyond states likely to become inner or outer core members of an interest-convergence group, other governments should be prepared to support protection efforts in specific cases. While not willing to commit themselves formally to an ongoing relationship to the group, some states will nonetheless be willing to support assistance either to particular refugee populations or in specific circumstances. The contribu-

340. The shared legal and political culture of member states of the Commonwealth of Nations prompted solidarity with the United Kingdom in giving asylum to ethnic East Indians forced to flee Uganda, a fellow Commonwealth state. Nicholas Van Hear, *Editorial Introduction to the Ugandan Asian Theme Papers*, 6 J. REFUGEE STUD. 226-29 (1993). This continuing bond among Commonwealth governments has now prompted the Commonwealth to establish an Intergovernmental Group on Refugees and Displaced Persons, a fundamental goal of which is to find ways to alleviate the burdens of its poorer members faced with large-scale refugee flows. Draft Summary of Discussions of the First Meeting of the Commonwealth Intergovernmental Group on Refugees and Displaced Persons (Oct. 2-3, 1996) (on file with authors).

341. See AGUILAR ZINSER, *supra* note 123, at 32-38.

tions made will range from fiscal support to significant involvement in responsibility sharing.

The first and most compelling reason to support an interest-convergence group on a situation-specific basis is a strong sense of connectedness to the refugee population. Israel, for example, has a proven record of responding when Jewish refugees in any part of the world are forced to flee.³⁴² In the late 1970s, China assimilated en masse 300,000 ethnic Chinese refugees from Vietnam.³⁴³ When hundreds of thousands of refugees fled Togo to neighboring countries in 1993, those who went to Benin were warmly welcomed by their ethnic kinfolk, to the point that thousands were taken into the homes of private citizens.³⁴⁴

Second, a state might ally itself with an interest-convergence group that is responding to a particular refugee flow that it induced, directly or indirectly. In what amounts to a form of restitution, a government might opt for situation-specific involvement where it believes that it would be unfair for regional states to be forced to cope on their own. For example, the willingness of the United States and its allies to become involved in providing financial aid and resettlement offers to Indochinese refugees is at least partly explained by feelings of responsibility for the refugee exodus.³⁴⁵

Third, governments may respond to an interest-convergence group on a situation-specific basis when it is clear that public opinion demands a response. Some have termed this phenomenon the "CNN effect," but its impact should not be underestimated.³⁴⁶ The suffering, deprivation, and loss that mark large scale refugee movements are often graphically and immediately covered by media and transmitted around

342. For instance, from the spring of 1991 to the end of 1992, about 50,000 Ethiopian Jews immigrated to Israel. U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 101 (1993).

343. MUNTARBHORN, *supra* note 102, at 16-17.

344. Abbott, *supra* note 103.

345. Coles, *supra* note 118, at 379-80. Similar considerations may account for the response crafted by the Americans and their allies to the Kurdish and Shi'i refugee crises that followed the Gulf War (albeit a response open to justifiable criticism for its restrictiveness and slowness). U.S. forces had encouraged those communities to rise up against the Iraqi government and recognized some responsibility to assist when those uprisings were met with brutal force. See generally Howard Adelman, *Humanitarian Intervention: The Case of the Kurds*, 4 *INT'L J. REFUGEE L.* 4, 5-7 (1992).

346.

[T]he [U.S.] Administration felt able to hold up a minor contribution to a UN force intended to stop mass murder [in Rwanda], but was compelled to spend far greater sums on emergency aid for refugees, moved by pictures of suffering children . . .

What pushed the United States to act was pictures of refugees in Goma shown on CNN.

AFRICAN RIGHTS, *supra* note 78, at 712, 715. See also THE MEDIA, HUMANITARIAN CRISES, AND POLICY-MAKING: A REPORT OF AN INTERNATIONAL MEETING I (World Peace Foundation Reports No. 7, 1995).

the world. These images of pain and tragedy do have an impact on the general public and can lead to domestic political pressure for an appropriate, effective response. Conversely, half-hearted and inadequate responses generate criticism and provide fodder to opposition politicians.

When pressure builds to a point that politicians have no choice but to act, the provision of aid through functioning and internationally supervised interest-convergence groups is a reliable and convenient route to follow. The influx of one million Rwandan refugees into Zaire in July 1994 created a humanitarian emergency that shocked the world and initially overwhelmed relief efforts. By the time a response was mobilized to the horrifying images and stories of violent and disease-ridden Rwandan refugee camps in Zaire, conditions had deteriorated to such an extent that the costs of properly responding had risen and security problems had become intractable.³⁴⁷ Had credible interest-convergence group plans to protect refugees been in place before the crisis emerged, extraregional states would undoubtedly have directed their contributions to support group initiatives, resulting in better protection at a lower cost.

d. Non-State Participation

Intergovernmental organizations have proved critical to the coordination of successful attempts at collectivized refugee protection. The participation and involvement of UNHCR and other intergovernmental agencies, including the United Nations Development Programme (UNDP), have been critical to the success of undertakings such as the ICARA II process in Africa and CIREFCA in Central America. They played a facilitative role, initiating and promoting dialogue and negotiations.³⁴⁸ Intergovernmental agencies are also able to draw on significant practical experience to propose and implement solutions to logistical and other operational concerns.

UNHCR is, of course, the primary intergovernmental organization charged with the responsibility for refugee protection, and should be granted a formal relationship to each interest-convergence group. While UNHCR's independence is compromised by both its governance structure and lack of a meaningful core budget,³⁴⁹ it is still somewhat

347. AFRICAN RIGHTS, *supra* note 78, at 712, 715; U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 73-76 (1996).

348. PEREZ DEL CASTILLO & FAHLEN, *supra* note 123; Gorman, *Refugee Aid and Development in Africa*, *supra* note 122.

349.

The actual operating budget of the organization is almost completely derived from the voluntary contributions of a fairly small number of developed states, while funding from the United Nations covers only routine administrative expenses Because

removed from the immediate political factors that may lead states to respond in ways that are insensitive or even hostile to refugee needs. This relative credibility and impartiality that UNHCR brings to refugee protection was an important element in the ICARA process, where the UNHCR played a leading role in identifying and quantifying the burden that needed to be shared.³⁵⁰

The Refugee Convention already mandates a working relationship between states and UNHCR. Under Article 35, state parties are to undertake to cooperate with UNHCR, and to facilitate its duty to supervise the application of the Convention. States also agree to report to UNHCR regarding the condition of refugees, the implementation of the Convention, and national laws relating to refugees.³⁵¹ This obligation could sensibly be implemented by inviting UNHCR to serve as a secretariat to interest-convergence groups on refugee protection issues. UNHCR should be privy to, and participate in, the interest-convergence groups' discussions of refugee protection at all times: when general principles for apportioning responsibilities and burdens are being developed, when those principles are applied in response to the arrival of refugees in a member state, and when respect for refugee rights during temporary protection and eventual repatriation or resettlement is monitored.

Nongovernmental organizations should also be formally incorporated in the interest-convergence group model. NGOs are often able to deliver services to refugees more cost effectively than governmental and intergovernmental bureaucracies.³⁵² They may also be more attuned to the needs of the refugee population, taking care to incorporate refugee voices into decision-making about aid and protection needs.³⁵³

Experience of government corruption and inefficiency, and even instances of governments withholding aid money repressively, have dissuaded many states from funding government-to-government aid projects, including those directed to refugees. For this reason, most governments involved in the CIREFCA process insisted on grassroots delivery of development assistance, coordinated by NGOs. Donor gov-

this body is traditionally dominated by the developed states that make a significant financial contribution to UNHCR, it provides a bulwark against any move to re-orient the organization's work away from the containment of Third World refugee problems.

James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 161 (1990).

350. Robert F. Gorman, *Beyond ICARA II: Implementing Refugee-Related Development Assistance*, 20 INT'L MIGRATION REV. 283, 286 (1986).

351. Refugee Convention, *supra* note 4, art. 35. See *supra* text accompanying notes 136-138.

352. ELIZABETH G. FERRIS, *BEYOND BORDERS: REFUGEES, MIGRANT, AND HUMAN RIGHTS IN THE POST-COLD WAR ERA* 45 (1993).

353. GIL LOESCHER, *BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS* 177 (1993).

ernments recognized that NGOs often provide the most reliable means of reaching refugee populations and delivering aid to those who need it most.³⁵⁴ The effort was particularly successful in El Salvador, where several indigenous NGOs were established to represent the needs of affected communities, and to administer and deliver development assistance.³⁵⁵ The ongoing involvement of the NGO sector in the planning and delivery of protection is also a pragmatic means to secure the involvement of a dependable group of outer core states.

While it would be unwieldy to allow all relevant NGOs to become full members of interest-convergence groups, states should invite the lead NGOs working with refugees in their area to participate formally in the work of the interest-convergence group. The NGOs might be granted the kind of consultative status afforded NGOs within the UN system, depending on their size and mandate.³⁵⁶

Not all NGOs would want this kind of cooperative relationship with the government members of the interest-convergence group. Organizations primarily involved in the delivery of aid to refugee populations will likely see this as an opportunity for better access to those in need of assistance, as they would be allowed to help in planning and delivering aid programs from the outset. As long as the sharing regime stays true to basic principles and is approached in good faith by all, aid agencies would probably find it easier to realize their protection objectives under a collectivized approach than within the present fragmented system.³⁵⁷ NGOs concerned with monitoring protection should also consider participation as a means of bringing enhanced transparency to the protection regime. Together with UNHCR, NGOs are well positioned to help ensure that decisions about sharing are being made realistically and fairly, in a manner that truly meets the needs of refugees.

2. The Process of Sharing

The operationalization of a responsibility sharing and burden sharing regime is of course what will ultimately determine its success. A reliable process that responds quickly and fairly to refugee flows needs to be established in advance, so that the members of each interest-con-

354. GALLAGHER & MILLER, *supra* note 123, at 26; Patricia Weiss Fagen, *Peace in Central America: Transition for the Uprooted*, in U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 30-39 (1993).

355. AGUILAR ZINER, *supra* note 123, at 42-43.

356. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 489-99 (1996), for a description and overview of the NGO consultative status process within the United Nations system.

357. NGOs already derive a significant portion of their budgets from the administration of aid projects on behalf of governments. FERRIS, *supra* note 352, at 41.

vergence group clearly understand their obligations before a request for assistance is actually made. The process needs to be strongly proactive in order to avoid the temptation of states to deter the arrival of refugees for fear of being required to assume individuated responsibilities.

A good-faith pledge should be a condition precedent to membership in an interest-convergence group. An active commitment to good faith among states might be encouraged by establishing an incentive fund to be administered by UNHCR's Division of International Protection. Of course, some interest-convergence groups, particularly those involving mainly wealthier countries, may prefer to forego the incentive funds rather than abandon aberrant practices. In those instances, it may simply be an unavoidable reality of the international system—including present protection mechanisms no less than those we propose—that the only serious check on the behavior of those states will be the power they wield over each other.³⁵⁸ This kind of state self-regulation is, in turn, largely a function of the negative attention that intergovernmental organizations and NGOs can bring to bear on activities that endanger refugees.³⁵⁹

In operational terms, the central element of the interest-convergence group process we propose is the ability of any member of an interest-convergence group or the UNHCR to convene a meeting of the group when faced with a refugee influx with which it feels unable to cope independently. The purpose of the meeting would be to concretize and operationalize pre-determined criteria for sharing responsibilities and burdens in a specific context.³⁶⁰ Members of the group would bind themselves in advance to attend any such meeting and to negotiate in good faith the nature of the shared response to the arrival of refugees.

An early precedent for this sort of flexible sub-global cooperation was set by the Charter of the Organization of American States (OAS), which allows any member state to request that a Meeting of the Consultation of Ministers of Foreign Affairs be convened to consider an urgent problem of common interest to the American states.³⁶¹

358. See SHAW, *supra* note 2.

359.

At the international level, and particularly in the United Nations context, the frequent reluctance of government actors to criticize their counterparts from other countries and the limited supply of independent information have contributed to making NGOs the linchpins of the system as a whole. In situations in which NGO information is not available or where the NGOs are either unable or unwilling to generate political pressure upon the governments concerned, the chances of a weak response by the international community, or none at all, are radically increased.

STEINER & ALSTON, *supra* note 356, at 456.

360. The criteria for responsibility sharing and burden sharing are outlined at *infra* text accompanying notes 396–397 and 409–413 respectively.

361. Charter of the Organization of American States, 1948, arts. 60, 61, 33 I.L.M. 981 (1994).

While the OAS procedure has not proved particularly successful as a means to generate fast and innovative responses, it has allowed states to address areas of common concern through a well-defined process of dialogue.

The Organization for Security and Cooperation in Europe's (OSCE) process for conflict resolution provides a useful model for structured collaboration with a relatively informal association of states. The OSCE mechanism for "consultation and cooperation with regard to emergency situations" was adopted at the Valletta Meeting on Peaceful Settlement of Disputes, and endorsed by the Berlin Meeting of the then-CSCE Council in June 1991. Under this procedure, if any member state concludes that an emergency situation is developing, it may request "clarification" from another member state or states involved. An emergency includes anything that might constitute a violation of one of the ten principles established in the 1975 Helsinki Final Act, including respect for human rights and fundamental freedoms. The recipient state has an immediate obligation to respond. If after forty-eight hours the initiating state considers the situation to be unresolved, it can ask the Chair of the Senior Council to convene a two-day emergency meeting. If, within a further forty-eight hours, twelve OSCE states second the request for a meeting, a meeting will be held no earlier than forty-eight hours and not later than seventy-two hours from that time.³⁶²

The strength of the OSCE mechanism is its ability to get a disparate group of states to come quickly to the negotiating table. It shows that states can agree to formalize a duty to consult with each other within tightly defined time limits in response to a perceived crisis. In the refugee context, however, the quorum requirement for convening a meeting of OSCE Senior Officials, like the majority vote requirement in the OAS Permanent Council, is unduly onerous. A government faced with a refugee influx that it believes threatens key interests might be tempted to resort to *refoulement* or other violations of refugee rights if it cannot immediately secure a high level of agreement to meet in order to share-out responsibilities and burdens. As well, the OSCE requirement that all decisions be arrived at by consensus may prove an obstacle to the ability of the process to generate clear and workable decisions, particularly if the refugees' country of origin is a member of the interest-convergence group.³⁶³

Of greatest direct relevance, the European Union has recently adopted an *Emergency Procedure for Burden Sharing with Regard to the Admission*

362. Regarding the OSCE mechanism see VOJTECH MASTNY, *THE HELSINKI PROCESS AND THE REINTEGRATION OF EUROPE, 1986-1991* 311-12 (1992).

363. *Id.*

*and Residence of Displaced Persons on a Temporary Basis.*³⁶⁴ The procedure allows a member state of the EU, the EU Presidency, or the EU Commission to convene an urgent meeting of a Coordinating Committee for the purpose of deciding whether a "situation exists which requires concerted action by the European Union for the admission and residence of displaced persons on a temporary basis."³⁶⁵ If that meeting concludes that an urgent situation exists, a proposal shall be prepared and submitted to the EU Council for approval, taking account of the recommendations of UNHCR. While the need for a two-step process may be questioned, the EU procedure is the clearest example of an interstate agreement to meet expeditiously in order to formulate a collective response to a refugee flow. Of particular importance are the decisions to base the consultative process on a previously agreed upon set of principles, and to ensure input from UNHCR into any proposed response.

The OAS, OSCE, and EU procedures all focus on ensuring that "the meeting" will take place. Guaranteeing that a reliable forum for dialogue will be available is a realistic effort to move away from unilateralism, yet is still faithful to the realpolitik of contemporary state collaboration. Even beyond meetings in response to particular requests for assistance, the members of an interest-convergence group, including state and non-state representatives, should have the opportunity for a regular review of their collective undertaking. This might take place on an annual basis, and could occur in the context of a meeting convened to deal with the group's broader agenda. It is, however, important that the interest-convergence group regularly turns its attention to refugee protection, and not just when a crisis arises.

E. Common but Differentiated Responsibility

The process of mandatory consultation described above will apply pre-existing principles about the allocation of responsibilities and burdens to particular refugee situations. If governments are to have confidence that the process will yield equitable results in minimum time, it is essential that the "rules of the game" be agreed upon in advance of a particular request for cooperation. The approach we advocate to the definition of allocational principles for interest-convergence groups is based on a theory of "common but differentiated responsibility."³⁶⁶

364. Burden Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis—Resolution, Final Text (95/C 262/01) (1995) [hereinafter E.U. Burden Sharing Resolution].

365. *Id.*

366. See *supra* text accompanying note 124–146.

The most difficult task in designing a system of common but differentiated responsibility is, of course, to define the measure of what is a fair and appropriate contribution for a state to make, both in terms of physical protection and financial assistance. A generally applicable form of measurement is necessary so that states have a sense of security and predictability about how the scheme will operate. While it is impossible to propose a completely formulaic approach, we develop below a list of relevant indicators. Interest-convergence groups should adapt and refine these principles to their own circumstances. Additional fine-tuning would occur as part of the mandatory consultation process discussed above,³⁶⁷ in which group members will meet to make concrete decisions about sharing and financing protection for particular groups of refugees.

1. Sharing the Responsibility to Protect

The Council of the European Union's *Resolution on Burden Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis*³⁶⁸ links the duty to receive refugees directly to efforts being made by states to resolve a particular refugee exodus. The responsibility of a particular state to receive refugees arriving in Europe will be reduced to take account of contributions it is making to prevent or resolve the root cause of the refugee flow, especially by the supply of military resources and humanitarian assistance.³⁶⁹ While the growing commitment of states to address the origins of refugee flight and to assist victims who remain within their own countries is important, such efforts *should not* be invoked to reduce or eliminate refugee protection responsibilities.

Root-causes intervention and the provision of palliative protection through refugee law are parallel, not alternative, responsibilities. Nor is there any practical benefit to trading off a duty toward refugees in order to stimulate action to eradicate the harms that induce flight: meaningful and effective root causes intervention, in and of itself, will reduce refugee flows, thereby providing governments with a sufficient incentive to action. For example, Germany proved willing to end a fifty year policy of not sending its troops abroad when it realized that failure to intervene in Bosnia raised the prospect of contending with more refugees.³⁷⁰ Fundamentally, the European Union approach plays

367. See *supra* text accompanying note 360.

368. E.U. Burden Sharing Resolution, *supra* note 364, para. 4.

369. *Id.*

370.

[German Foreign Minister] Kinkel appealed to enlightened self-interest, saying: 'We are more affected by the results of this conflict than others. Some 1.2 million people

into the myth of "the right to remain," discussed earlier.³⁷¹ It impliedly suggests that refugee protection as traditionally conceived can be exchanged for a commitment to take action within the boundaries of countries of origin. As we have shown, in-country protection remains, at best, an unreliable proposition. The failure of international efforts to establish true "safe-havens" in Iraq, Bosnia, and Rwanda clearly attests that it is seriously premature to consider attenuation of the commitment to (external) refugee protection as a means of securing support for the promise of solutions.³⁷²

In addition to making contributions toward resolving the causes of the refugee migration, the European Union Resolution provides that decisions about sharing should also take into account "all economic, social and political factors which may affect the capacity of a state to admit an increased number of displaced persons under satisfactory conditions."³⁷³ The Resolution does not, however, give any guidance on how those very broad factors should be measured or assessed. Peter Schuck urges a market-based process for the allocation of the duty to receive refugees.³⁷⁴ More commonly, it is suggested that each state's responsibility to receive refugees be set as a function of its assimilative capacity. This might be defined relative to a particular refugee flow,³⁷⁵ or on the basis of a general formula of the kinds proposed by Atle Grahl-Madsen and B.S. Chimni.

Writing in 1982, Atle Grahl-Madsen proposed a simple approach for the apportionment of resettlement quotas among Northern states, which may be a starting point for the kind of analysis advocated by the second branch of the European Union's Resolution. Grahl-Madsen suggested that refugee protection quotas be based on GNP and population, but with more emphasis on a state's GNP than on the size of its population. He proposed a ratio of $GNP^{1.5}/\text{population}$.³⁷⁶ Alterna-

from former Yugoslavia live here. We would be the first to have to cope with a new influx of refugees if the peacekeepers pull out.

Rick Atkinson, *Kohl Orders Troops to Bosnia*, MANCHESTER GUARDIAN WKLY., July 9, 1995, at 18.

371. See *supra* text accompanying notes 81-99.

372. See generally J. Hathaway, *Root Causes as Refugee Protection: A Chimerical Promise?*, in IMMIGRATION AND THE EUROPEAN UNION: BUILDING ON A COMPREHENSIVE APPROACH 117-121 (S. Perrakis ed., 1995).

373. E.U. Burden Sharing Resolution, *supra* note 364, para. 4.

374. See Peter Schuck, *Expanding Refugee Burden-Sharing and Protection: A Modest Proposal*, 22 YALE J. INT'L L. (forthcoming 1997).

375. "[A]n ideal method would determine the relative costs for each country associated with admitting a given alien and direct that alien to the country where the costs are least." Steven H. Atherton, *International Moral Obligations: An Integrated Approach*, 3 GEO. IMM. L.J. 19, 34-45 (1989).

376. Atle Grahl-Madsen, *Refugees and Refugee Law in a World of Transition*, 1982 MICH. Y.B. INT'L LEGAL STUD. 63, 74.

tively, considering the possibility of a global scheme of common but differentiated responsibility, B.S. Chimni has proposed that all states of sufficient size, which he defines as greater than 20,000 square kilometers, agree to take roughly the same number of refugees. The numbers would be adjusted by total land mass and population density, and there might be a numerical ceiling.³⁷⁷

In our view, however, this focus on absorptive capacity to define basic responsibility sharing allocations is misplaced. The kinds of measurement proposed by the European Union, Grahl-Madsen, and Chimni should at most serve only an auxiliary function in defining the basis for responsibility sharing.

A strict focus on the relative resources and circumstances of partner states may result in refugees being admitted to countries unable to deliver the kind of solution-oriented temporary protection that we believe is essential to keeping a commitment to refugee protection alive. Because the concept of differentiated responsibility allows us to counter *prima facie* inequities in responsibility sharing allocations through binding commitments to provide residual solutions and fiscal support, it makes most sense to protect refugees where they are safest, most self-sufficient, least likely to experience social conflict, and ultimately in the best position to repatriate if and when safety is restored in their country of origin. Only where a number of member states are similarly positioned to meet refugee needs should population, geographical size, and other demographic measurements be factored in to adjust responsibilities.

First and foremost, responsibility sharing allocations should be predicated on a careful assessment of implications for physical security.³⁷⁸ Second, functional compatibility between refugees and their potential host communities is of vital importance.³⁷⁹ Third, attention should be paid to cultural harmony. The existence of ethnic, religious, or other bonds between refugees and the population of a particular host state is often indicative of a situation in which refugees are most likely to be most readily accepted. Fourth, geographical proximity between the state of asylum and the country of origin is desirable to allow for ongoing contact between refugee and stayee communities, and ultimately to facilitate repatriation.³⁸⁰

377. B.S. Chimni, *The Operational Mechanism: International Burden Sharing*, in *Reconceiving Refugee Law as Human Rights Protection: Background Paper for the Meeting of the Legal Working Group 86*, 104–07 (April 1993) (unpublished manuscript, on file with authors).

378. The legal obligation to provide for the physical security of refugees is discussed *supra* in text accompanying notes 185–205.

379. The importance of refugee productivity to a solution-oriented understanding of temporary protection is discussed *supra* in text accompanying notes 225–231.

380. The importance of ongoing contact between refugees and the stayee and internally displaced communities is discussed *supra* at text accompanying notes 287–288.

In making specific decisions about the locus of protection, interest-convergence groups would be advised to give weight to the express wishes of the refugee population. The UNHCR Executive Committee has agreed that "the intentions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account."³⁸¹ It is both humane and pragmatic to heed this advice. In practical terms, refugees often make choices about where to flee based on the very factors that we believe should guide the interest-convergence groups' decisions about apportioning the responsibility to afford temporary protection: security, functional compatibility, cultural harmony, and geographical proximity. It is therefore logical that the wishes of the refugee population be a source of data for interest-convergence groups called upon to apply the four governing criteria for responsibility sharing.

There may be concerns that this four-part approach to the definition of responsibility sharing risks ghettoizing refugees, as the criteria identified here are likely to mean that most refugees will be physically protected within their region of origin.³⁸² States farther away, in contrast, would more often contribute by a combination of fiscal transfers and residual resettlement opportunities. As refugee populations originate disproportionately in the South, most refugees will remain in the South under a workable responsibility sharing plan, and Northern states might be viewed as "buying their way out" of an obligation to provide refuge.

The simple answer to this critique is that Northern states do not need this proposal in order to insulate themselves from most refugee flows, as that goal has already largely been achieved by means of *non-entrée* tactics and refugee containment under the banner of the "right to remain." The North has thus far acted unilaterally, to the detriment of both refugees and the Southern countries that shoulder the resultant responsibilities and burdens of protection. While it is true that our model does not challenge the trend to protect most refugees within their region of origin (though for such groups as Bosnians or Haitians, the region of origin clearly includes parts of the North), the suggestion that the shift proposed here would somehow "allow" powerful governments to "buy their way out" of providing refuge takes no account of the fact that there is very little left to buy. The developed world has already off-loaded most obligations onto the

381. ExCom Conclusion No. 15, *supra* note 112.

382. The Secretariat of the Inter-governmental Consultations has recently acknowledged criticism of its proposal to establish an exclusively "in-region" approach to refugee protection. It candidly recognized that such a project faces "significant moral (political and humanitarian) . . . obstacles." INTER-GOVERNMENTAL CONSULTATIONS, REGION OF ORIGIN FOLLOW-UP, *supra* note 328, at 7. See also Rosemary Byrne & Andrew Schacknove, *The Safe Country Notion in European Asylum Law*, 9 HARV. HUM. RTS. J. 185 (1996).

South, but without paying anything for the privilege. The difference between the status quo and what we propose is therefore not so much where refugees will be protected, but the equity of the conditions under which that protection will be provided.

Because developed states value manageability, and because they are increasingly aware that their economic and security interests are implicated in the South, we believe that the kinds of obligation we posit here will ultimately be understood to be reconcilable to Northern countries' self-interest.³⁸³ Both refugees and Southern states will benefit significantly as a result. There is, however, no *quid pro quo* that could induce the North to dismantle all barriers to access and to grant temporary protection, much less routine permanent admission, to all refugees who arrive at its borders. Ready access to durable asylum in the North is simply not on the table, and an approach to refugee law reform that assumes otherwise is bound to fail.

More fundamentally, there is no inherent wrong in most refugees being protected in their region of origin *if* the decision to afford protection there follows logically from a good-faith application of the four responsibility sharing criteria proposed above.³⁸⁴ Because fiscal burden sharing will be guaranteed to offset inequitably assigned costs, only geopolitical chauvinism could lead to the conclusion that the responsibility sharing mechanism is flawed simply because it frequently results in a decision to protect refugees in other than the developed world.

In any event, our proposal *does*, in fact, require extraregional states to assume responsibility for important parts of the duty to receive refugees.³⁸⁵ We specifically define the ability to ensure physical security as the primordial concern in making decisions about responsibility sharing.³⁸⁶ To the extent that secure asylum is not possible in a region, for example by reason of pervasive armed conflict, extraregional interest-convergence group members and other states will of necessity be called upon to receive refugees. Furthermore, as stressed earlier,³⁸⁷ there

383. See *supra* text accompanying notes 125–126, 128–133, and 335–341.

384. See, e.g., *Report of the Sub-Committee of the Whole on International Protection*, U.N. GAOR, Executive Committee on the High Commissioner's Programme, 43d Sess., at para. 20, U.N. Doc. A/AC.9/802 (1992):

A strong emphasis was placed by a number of delegations on regional cooperation to resolve refugee problems. One delegation commented, in particular, on the value of refugees staying, where possible, close to their home countries, so as to assist their return when conditions allowed and to facilitate their reintegration. Another delegation felt that asylum outside the region of origin should be considered relevant mainly for especially vulnerable groups, such as medical cases, which cannot be cared for inside the region.

385. See *supra* text accompanying notes 132–134.

386. See *supra* text accompanying note 377.

387. See *supra* text accompanying notes 274–276, 292, and 305.

will be a clear need both to exempt some refugees with special needs from the temporary protection system altogether, and to find permanent homes for those refugees who cannot return home in safety at the expiration of the period of temporary protection. In many and perhaps most cases, extraregional states should shoulder these responsibilities.³⁸⁸ While the number of persons admitted extraregionally by virtue of these responsibilities will be significantly smaller than the refugee population that remains in the region of origin, this imbalance is offset by the fact that the extraregional commitment is permanent, rather than temporary.

Finally, our model does not allow states to abdicate their responsibilities under the Refugee Convention, including the duty of *non-refoulement*.³⁸⁹ Northern governments will therefore not be able to write a check as a means of legitimating the deterrence of refugee claimants. The approach advocated here simply accepts the reality that the vast majority of the world's refugees do remain in the South, and that their needs are often poorly met, while grossly disproportionate sums of money are spent on *non-entrée* practices and assessing the protection needs of the small minority who reach the North.³⁹⁰ Better protection in the regions of origin, which we believe will flow from a principled sharing regime, will benefit the overwhelming majority of refugees. It will also make the difficult decision of staying closer to home or claiming refugee status abroad a more balanced one for refugees, who will not feel the need to take long and costly journeys because of a lack of security in countries of first asylum.³⁹¹ Under the logic of differentiated responsibility, fiscal transfers from wealthier countries become a matter of obligation rather than largesse. The obligation of extraregional governments toward refugees who receive asylum in their region of origin is no less real and concrete simply because it will often entail fiscal, rather than physical, support.

2. Apportioning Fiscal Burdens

An interest-convergence group will also need to establish principles to guide the allocation of the costs of providing protection. In keeping with the principle of differentiated responsibility, interest-convergence groups should recognize that those states that take on a substantial

388. The logic of assigning much of this responsibility to the outer core of an interest-convergence group is noted *supra* in text accompanying notes 276 and 306.

389. See *supra* text accompanying notes 128–129 and 185–189.

390. See *supra* text accompanying notes 154–160.

391. "[M]ost displaced persons would choose to remain in their region of origin, if adequate protection and conditions were provided." INTER-GOVERNMENTAL CONSULTATIONS, REGION OF ORIGIN FOLLOW-UP, *supra* note 328, at 2.

share of the responsibility of providing protection ought not also to be expected to shoulder a major part of the fiscal burden of protection. It will normally fall to outer core members to guarantee reliable funding, assisted by funds from situation-specific contributors. Disproportionately overburdened, and often impoverished, inner core states need to know that extraregional support and involvement are reliably forthcoming. Simply put, states will participate in the insurance program if they are confident that it is adequately funded, and that the cost of assuming responsibility toward refugees is thereby minimized.

The system of predetermined burden sharing is intended to avoid the frequently encountered danger of a gap between rhetoric and reality. Pledges of funding may encourage states to sign-on to a collectivized enterprise, but if the money does not materialize after the photo opportunities of international conferences, implementation will be delayed and possibly abandoned. This was a critical problem in the ICARA process for addressing the needs of African refugees. As many donor states failed to follow through with funds to back up their pledges, protection suffered accordingly.³⁹²

Collectivized responsibility also provides a means for outer core states, and states motivated to participate on a situation-specific basis, to know that they can rely on the local players to be effective and efficient in applying resources to protection needs. ICARA and CIREFCA demonstrated that while the careful preparation of project proposals can be time-consuming, it is integral to garnering the confidence of potential donors.³⁹³ If an interest-convergence group's proposed plan of responsibility sharing is realistic, efficient, and effective, even states not formally committed to the group are likely to see that it is in their interest to ensure that the necessary fiscal support is made available.

Beyond respect for the principle of differentiated responsibility noted at the outset of this section, there are a variety of ways in which determinations of the quantum of support logically assigned to particular members of the interest-convergence group should be made. In considering the possibility of a global scheme of burden sharing, B.S. Chimni has proposed a system of graduated taxation based on GNP.³⁹⁴ Alternatively, some cooperative environmental regimes have adopted a system of contributions based on the scale of funding obligations to

392. Gorman, *supra* note 122, at 230-31.

393. "[W]ith assistance from UN technical teams, African host countries elaborated project submissions that were more successful than the ICARA I submissions at attracting greater donor interest and support." *Id.* at 228 (citation omitted). Although the desired funding did not materialize, "ICARA II was a milestone in linking refugee aid and development." *Id.* at 228. See also PEREZ DEL CASTILLO & FAHLEN, *supra* note 123, for a general discussion of the importance of project proposal development to the attraction of financial assistance under CIREFCA.

394. Chimni, *supra* note 377, at 116-17.

the United Nations.³⁹⁵ There are also some useful parallels in how members of the U.N. and some regional bodies have apportioned the cost of various peacekeeping missions, balancing between those states that provide troops and weaponry and those states that primarily provide financial assistance.

The experience of international environmental protection regimes, as well as the seemingly intractable budget crisis faced by the U.N., clearly demonstrate that promises of financial assistance are meaningless if there is no follow-through. The whole collectivized regime may simply disintegrate if the inner core states do not receive the backing they require. A simple means of ensuring a reasonable degree of financial stability and reliability might therefore be for interest-convergence groups to establish a fund during non-crisis times. Outer core states would make ongoing contributions so as to keep the fund as close as possible to a desired level of preparedness. For example, a European Refugee Fund has been proposed from which funds would be made available to a state willing to assume a disproportionate share of the collective responsibility to protect refugees arriving at the common territory of the European Union.³⁹⁶

CONCLUSIONS

Much of the refugee regime's present dysfunction can be traced to two fundamental concerns: the failure of refugee law to minimize conflict with migration control objectives through the promotion of viable repatriation, and an atomistic understanding of legal responsibilities undertaken toward refugees. States increasingly want to avoid the particularized obligations that arise when refugees arrive at their territory. They are also unconvinced that refugees will ever return home. As a result, governments have adopted policies that envisage the deterrence of refugees by *non-entrée* and other containment practices, or drive refugees away by offering only an inhumane variety of "protection." This Article derives from a conviction that it is possible to meet

395. The U.N.'s scale of assessments is based, in theory, on the real capacity of member states to pay. There are, however, some striking disparities in the assessment levels that do not seem to be indicative of national wealth (for example, Saudi Arabia's assessment level is set at .96%, whereas the Ukraine's is 1.18%). The levels are set by an 18-member Committee on Contributions. No one state can contribute more than 25% of the entire budget, and all states must make a minimum contribution of .01%. INDEPENDENT ADVISORY GROUP ON U.N. FINANCING, *FINANCING AN EFFECTIVE UNITED NATIONS* (1993); DAVID R. PROTHEROE, *THE UNITED NATIONS AND ITS FINANCES: A TEST FOR MIDDLE POWERS* (1988).

396. European Commission Communication at paras. 100-01, referring to European Parliament Resolution A3-0280/92, at para. 7, Nov. 18, 1992. The proposal has received general support from the European Council on Refugees and Exiles. ECRE, *Position of the European Council on Refugees and Exiles on Sharing the Responsibility: Protecting Refugees and Displaced Persons in the Context of Large Scale Arrivals*, at 2.

these concerns of governments head-on, thereby mediating the restrictionist tendencies of asylum states. The Refugee Convention establishes a refugee rights framework that can easily lay the groundwork for solutions, and calls for international cooperation in protecting refugees. It is time to put those principles into practice on a dependable and pragmatic basis.

Temporary protection, leading in most cases to repatriation, makes clear that refugee law is a form of human rights protection, and not a "back door" to permanent immigration. It is concerned to safeguard human dignity only until and unless the home state is able to effectively resume its primary duty of protection. If temporary protection is conceived in a rights-regarding and solution-oriented manner, most refugees will be able to return home. This requires respect for the existing refugee rights regime, including admission to secure asylum in which human dignity is respected and self-sufficiency promoted. More fundamentally, the viability of repatriation calls for affirmative efforts to preserve the family and communal structures of refugees, develop skills that will be of value in the home country, promote cooperative planning between refugees and those who did not leave, and institute confidence-building measures that include both solid information-gathering and opportunities to "test the waters" in the country of origin. It will normally need to be sustained by a credible program of repatriation aid and development assistance, oriented to grounding a process of meaningful economic and social reintegration.

Steps can also be taken to convince governments that an openness to the arrival of refugees does not expose them to the risk of unilateral and undifferentiated legal responsibility. While a regime of shared global responsibility may still be beyond reach, sub-global associations of states bound by shared security interests, common heritage, or important economic or political relationships afford a ready base for collectivized implementation of duties owed to refugees. We have described how governments, in concert with the UNHCR and NGOs, should formalize processes and principles that delineate as clearly as possible, but with flexibility, the obligation to assist each other in responding to the arrival of refugees. There is a need for cooperating governments to benefit from solid and credible mutual undertakings, so that the states involved know that they can rely on each other. This includes an obligation on all states involved to respond expeditiously to refugee arrivals with which a cooperating state feels unable to cope independently, and to contribute on the basis of agreed criteria for the allocation of burdens and responsibilities.

Different states have differing capabilities to contribute to a collectivized process of refugee protection. Some states will be best suited to provide physical protection during the period of temporary protec-

tion. Other states will be motivated to assist by providing dependable guarantees of financial resources and residual resettlement opportunities. Still other governments will collaborate by funding protection or receiving refugees in particular contexts, on a case-by-case basis. Under a system of common but differentiated responsibility, the net resources available for refugee protection would be maximized by calling on states to contribute in ways that correspond to their relative capacities and strengths.

The approach to refugee protection outlined in this Article is intended to encourage a transition away from traditional ways of thinking about refugee flows and solutions. Consideration should be given to implementing refugee law on the basis of a duty to equitably share the responsibilities and burdens of refugee protection. Collectivized and solution-oriented temporary protection presents the best option to replenish at least a substantial part of the world's asylum capacity. While some refugees, perhaps even a substantial minority, will still require residual or special needs resettlement, temporary protection will help to keep the number of such cases manageable, thereby more effectively reconciling the protection needs of refugees to the migration control objectives of governments.

No approach to refugee protection, standing on its own, can eradicate the need for persons to flee the risk of serious harm. Our model of protecting refugees neither aspires to be, nor in any sense contradicts, a program of timely, meaningful, and apolitical action to bring an end to the causes of refugee flight. Our goal, and the goal of refugee protection as conceived in international law, is instead to ensure the availability of solid and rights-regarding protection to refugees until and unless it is safe for them to return. Protection, if carefully designed and delivered, is the critical complement to root causes intervention. Even as states give increasing attention to efforts intended to end the need to flee, we must not fail to renovate the means by which we protect those who cannot wait for our efforts to succeed. Solution-oriented temporary protection, conceived within a framework of common but differentiated responsibility toward refugees, offers the best hope of keeping the institution of asylum alive.