Creating an Other World
Restrictive Domestic Refugee and Asylum Policies

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This essay will show that refugees constitute an "other world" by arguing that policies of developed countries intentionally divert asylum seekers from their territories and undermine the intent of international refugee law regarding. It will particularly, but not exclusively, examine first country of asylum and safe third country policies as examples of policies that are intended to download responsibilities regarding refugees and asylum seekers, which violates international law and conventions that were designed to meet the needs of refugees themselves This essay will first provide a brief background on the development and content of international refugee law, including definitions of key terms in the discourse on this topic. It will then go on to examine two case studies: the European Union and the United States. This essay will then offer an analysis of the findings of the case studies, describing the implications of exclusionary policies for refugees and the proliferation of "other worlds".

History and Main Tenets of International Refugee Law

The foundational document on refugee law is the 1951 Geneva Convention relating to the Status of Refugees, as well as the subsequent 1967 Protocol to this Convention. The Geneva Convention was initially established to deal with the refugees created by the Second World War (Newland, 1994: 10). Hence, the refugees in question were mainly of European origin. However, the composition of the world's refugee population soon changed, as the independence wars and other conflicts of the 1950s and 1960s resulted in large numbers of displaced peoples from the developing world (Newland, 1994: 11).

This was the context in which the 1951 Convention was implemented. The 1967 Protocol simply made the Convention applicable to situations that occurred after

the signing of the Convention and populations outside of Europe. The 1951 Convention remains as the guiding document on which subsequent domestic policies and laws are generally based (in theory). The Convention defines a refugee as a person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (Office of the UNHCR, 1951: Article 1).

Thus, there are five grounds on which an asylum seeker can make his/her claim: discrimination based on race, religion, nationality, social group or political opinion.

One of the most important concepts in international refugee law is *non-refoulement* (or non-return). It is addressed in Article 33 of the Convention, which states that any person who is genuinely fearful of persecution cannot be sent back to his/her country of origin:

> 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.

In addition, Article 31 states that refugees cannot be penalized for entering or remaining in a country illegally, so long as they qualify under the definition of refugee. However, this principle of non-punishment is repeatedly violated through the detention of asylum seekers due to their illegal entry or presence in European and North American countries and Australia, which has been noted by the United Nations High Commissioner for Refugees (UNHCR) (Goodwin-Gill, 2003: 187).

Essentially, when analyzing the content and intent of international refugee law, it is crucial to recognize, as Liz Fekete puts it, "that it is need, not numbers,

which characterises a humanitarian approach to asylum was a fact recognised by the original drafters of the 1951 Convention" (2005: 66). Thus, domestic policies that prioritize, for instance, misguided national security interests by denying or detaining asylum seekers before their claims are even heard undermine the essence of international law, which prioritizes the needs of refugees themselves. International refugee law was created in order to ensure that states share the responsibility of caring for and providing safe haven to those people whose own governments will not or cannot provide such protection.

This raises the important question of what specifically are the obligations of destination countries to refugees and asylum seekers. In the interest of time, all of the international responsibilities of states will not be discussed here. Although, it can and should be said that the fundamental obligations of states are to provide appropriate consideration to *all* asylum claims and to treat those claiming to be refugees humanely while their claims are assessed (Tazreiter, 2004: 30). However, as will be argued in this presentation, states are not living up to these responsibilities.

Two other important terms that must be defined are the notions of 'first country of asylum' and 'safe third country'. 'First country of asylum' refers to a country in which a refugee received protection in some form, while a 'safe third country' is a country in which a refugee traveled through and could have requested protection, but chose not to (Legomsky, 2003: 570). Both concepts would be employed by the country that is the ultimate destination of a refugee. Countries that have such policies, which can be implemented unilaterally or using bilateral agreements, can send refugees back to a country that they passed through previously. In both cases, the responsibility to assess the asylum claim and, if the claim is deemed legitimate, to house the refugee is shifted from the destination country to some other

country (Legomsky, 2003: 570). Although states have the obligation of *non-refoulement* under the 1951 Convention, "it is argued [that] if asylum-seekers are returned, not to a country where they fear persecution, but to some other, safe third country, the Refugee Convention's obligations are respected" (Nicol, 2004: 172). However, there are many potential and proven problems with these policies, which will be explored below. Ultimately, these policies are mechanisms for countries to renege on their important obligation, not only to accept refugees into their territories, but also to evaluate asylum claims in the first place.

European Union

The European Union has developed its own comprehensive set of standards and policies regarding refugees, which Emek Ucarer (2006) calls the "emergent European asylum regime." This regime is entrenched in broader international norms and law. However, member states have often sought to avoid their international responsibilities through the EU regime. For instance, in 1990, the European Union introduced the Dublin Convention which assigned a procedure by which states could determine whose responsibility it would be to assess asylum claims in cases where asylum seekers passed through multiple European countries. In brief, it was agreed that the first member country that allowed the asylum seeker entry into EU territory would have to evaluate his or her claim, disregarding the wishes of the asylum seeker. Moreover, the Dublin Convention also allows states to return a refugee to a 'safe' country outside of the EU (Legomsky, 2003: 579). Member states can devise their own lists of countries they deem safe; according to the European Commission, a safe country is one that has a government that 'consistently observes' international law

regarding refugee and human rights or a country in which the asylum seeker has close ties or in which he/she attained protection (Legomsky, 2003: 579).

In 2004, the European refugee regime was further strengthened with movement towards a Common European Asylum System, which, it is hoped, will be fully implemented by 2010. Within this system, restrictions on asylum provision were further institutionalized with the adoption of the Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status. This Directive sets out criteria for application of the safe third country concept by member states and also allows member states to send asylum seekers to a safe country of origin.[2] In addition, the Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection states that a country can be qualified as safe if a party or organization other than the government is offering protection in a region of the country (Fekete, 2005: 67). Thus, even though international law states that a refugee is someone who cannot rely on the protection of his or her state, the EU has declared that adequate protection need not be provided by the state itself; it can also be provided by an international organization (like the UN) which controls a zone within the otherwise unsafe country. However, this practice may simply subject asylum seekers to refugee camps where they have no real opportunities for resettlement. This Directive is, therefore, one more method for states to reject asylum seekers without hearing their claims.

[2] A safe country of origin is different than a safe third country because it means that asylum seekers can be sent back to the actual country that they are fleeing (ie. their country of origin). This concept implies that "certain states are democratic enough not to produce refugees that would meet the definitional specifications of the Geneva Convention" (Ucarer, 2006: 226). This concept clearly raises questions about whether the *non-refoulement* requirement is being violated. However, the EU would argue that it is not violating international law, since the countries that qualify as safe meet their minimum requirements of respect for human rights.

The consequences of transporting refugees to other countries without assessing their claims are numerous. This type of system increases the likelihood of what is sometimes referred to as orbiting or chain *refoulement.* Orbiting or chain *refoulement* occurs when a country sends an asylum seeker to another country (in accordance with a safe third country or first country of asylum policy); through a series of subsequent transfers, the asylum seeker is eventually returned to his or her country of origin (Legomsky, 2003: 583). There are numerous instances of this scenario occurring in Europe. Stephen Legomsky cites an episode where 19 Guatemalan asylum seekers, after landing in the UK, were sent back to Spain where they had stopped previously (2003: 584). Spanish authorities sent them back to the United States (where they had also stopped), which subsequently returned them to Guatemala. During this entire process, the individuals' asylum claims were never assessed by any of the countries. Liz Fekete also notes instances where asylum seekers have been sent to Somalia, Turkey, Syria and Eritrea through a similar process and died after their return (2005: 72). The possibility of this orbiting scenario is one of the reasons why UNHCR expressed serious concern about the new EU Directive. UNHCR has stated that,

> If incorporated into national law without further safeguards, these provisions may create a serious danger of *refoulement*… No applicant should be denied access to an asylum procedure altogether, including applicants arriving from **countries designated as 'safe third countries' by national parliaments**. Given the lack of procedural standards for appeals, and the fact that the Directive does not require appeals to have suspensive effect, there is a real danger of return to persecution or serious harm in contravention of the 1951 Convention and other international treaties (UNHCR, 2005: 1).

UNHCR has also said that it prefers the establishment of bilateral or multilateral agreements, which explicitly state that each country will readmit asylum seekers who have passed through their countries, over "unilateral decision[s] to

transfer responsibility to a third state to examine an asylum request" (2005: 2). However, even these bilateral and multilateral agreements are problematic. For instance, Italy has signed a readmission agreement with Libya, which is not a signatory to the 1951 Convention and, therefore, is not bound to the principle of *non-refoulement* (Fekete, 2005: 73). In 2004, Italy deported about 1500 individuals from different countries to Libya, which then sent about 1000 of these individuals back to Egypt (Fekete, 2005, 73). Thus, the danger of safe third country and first country of asylum policies of violating international law is very real.

Fundamentally, the interests of member states have usurped the needs of refugees and undermined international law. There have been numerous instances of asylum seekers being returned to their countries of origin and other countries that have not been proven safe. The willingness of European countries to place asylum seekers in danger reveals their perception of asylum seekers as an 'other' group undeserving of the protection these countries provide to their own citizens.

The United States

The United States has employed some of the same policies and strategies as the EU in its attempt to restrict entry of refugees into its territory. Historically, the US's policies regarding refugees have often been politically and ideologically motivated. During the Cold War, for instance, the US had more lenient policies towards immigrants from communist countries, such as China and Cuba, because the US government viewed communist regimes as repressive and regarded people who lived under these regimes as deserving of refuge (Johnson, 2004: 39). However, the United States was less welcoming to people from countries that, although being known for violating human rights norms, happened to be allies of the US (Johnson,

2004: 39). Refugees from Haiti, for instance, were repeatedly denied entry to the US, partly because Haitian governments have generally not supported communism. Between 1981 and 1991, about 25 000 Haitians were interdicted on boats on their way to American shores, as part of a policy that was initiated by the Reagan administration to interdict all boats from Haiti (Johnson, 2004: 40). One of the advantages of this policy for the American government is that, by stopping refugees from reaching US soil in the first place, the government could avoid its responsibility to assess the individuals' asylum claims.

By the 1990s, the Cold War had ended and US refugee policy became more consistently restrictive (Kirschten, 1994: 2069). After the events of September 11, 2001, US refugee and immigration policies have again changed. One of the most significant changes was the creation of the Department of Homeland Security in March, 2003, which integrated the Immigration and Naturalization Service (INS) with national security services under one institution (Kerwin, 2005: 750). The official integration of these two issues validates and institutionalizes the misconception that immigrants and refugees inherently present a threat to the security of the receiving state. This notion is also legitimized by a 1996 policy called the Illegal Immigration Reform and Immigration Responsibility Act that allows the US government to detain asylum seekers who have proven they have a credible fear of persecution. Michelle Lowry has argued that migration issues should be considered in light of the notion of human security, rather than national security (2002: 29). If refugee and asylum policies were dealt with as human security issues, they would take into account "the structures that lead to poverty, unequal gender relations and other inequalities. A focus on social and economic factors that threaten the security of human beings necessitates a look at the "quiet killers": hunger, epidemics, internal violence,

environment, prenatal defects, malnutrition, repression, pollution, etc." (Lowry, 2002: 29).

As with the European Union, one of the manifestations of the association of refugees and threats in the US government is the establishment of safe third country policies. In December 2002, the United States signed a safe third country agreement with Canada. Under this new agreement, refugees must apply for asylum in the first country they reach (Canada or the US) or risk being deported back to that country; thus, asylum seekers will now be turned back at the Canada-US border. According to then-Canadian Deputy Prime Minister John Manley, this agreement was signed in order to decrease "the practice of asylum shopping by refugee applicants by allowing their return to the last safe country from which they came" (quoted by CBC, 2002). However, other Canadian officials have reportedly privately said that the agreement is meant to ease US security concerns about Canada's relatively lax asylum policy (Kerwin, 2005: 757). The impact of this policy will be felt most by people who attempt to seek refuge in Canada, but pass through the United States first, such as refugees from South America. There are about 15 000 such asylum seekers who arrive in Canada every year (Kerwin, 2005: 757). When compared to the 200 asylum seekers who arrive in the US after first stopping in Canada (Legomsky, 2003: 582), it is apparent that this agreement mainly targets individuals who want to resettle in Canada.

The agreement was implemented in 2004 and, since then, asylum claims at the US border have fallen by 40% compared to the previous year (CBC, 2005). The Canadian Council for Refugees points out that Colombian refugees seeking refuge in Canada have been particularly affected by the safe third country agreement because their claims are much less likely to be accepted in the US. The Council notes,

> In 2004, 81% of Colombian claims in Canada were accepted, whereas Colombian claimants in the US had an acceptance rate of only 45% if they were able to make an affirmative asylum claim, and only 22% when appearing before an immigration judge… This means that, in the first year of the safe third [country agreement] alone, some 922 Colombians who would have received protection in Canada will instead face detention and removal to Colombia, or lives without status and with constant fear of arrest in the US (Canadian Council for Refugees, 2005: 9).

Therefore, access to asylum processes in Canada has become increasingly limited because of this agreement. However, this is very likely an intended outcome of the safe third country agreement between the United States and Canada. Hence, this example shows that such policies are not intended to secure the rights of refugees but to ensure the interests of the destination countries, which means accepting as few refugees as possible.

Analysis

Some of the impacts of the restrictive policies and practices in the EU and the US have already been asserted. This section will more clearly define the effects of restrictive refugee policies on refugees, as well as the implications for the international refugee regime and the study of "other worlds."

Impact on Refugees and Asylum Seekers

The most significant danger with safe third country and first country of asylum policies is the possibility that asylum seekers who have a legitimate fear of being persecuted will be sent back to their countries of origin where their lives and rights are threatened. Indeed, UNHCR has noted this as one of their main concerns with the EU Directive that allows the transfer of asylum seekers. Moreover, it has been shown in this paper that this scenario has happened before and, it can reasonably be concluded, it is likely to happen again. In addition, because of the seriousness of

non-refoulement, as the fundamental element of international refugee law (Ucarer, 2006: 222), policies that are known to lead (even indirectly) to the return of asylum seekers undermine international law and weaken the authority of the international refugee system and international actors, such as UNHCR.

In addition, there is the issue of whether a particular third country can be considered safe for all asylum seekers. A country that is designated as safe may actually be quite unsafe for certain refugees. Thus, UNHCR has stated, "Application of the 'safe third country' concept should be limited and should include an effective opportunity to rebut a presumption of safety" (2005: 1). Applying a permanent 'safe' designation to a certain country would also allow border and immigration officials to automatically deny asylum seekers entry on the account that they passed through a 'safe' country, without listening to the circumstances upon which these individuals would base their claims of asylum (Ucarer, 2006: 231). Another factor that these policies do not consider is the suitability of the third country or first country of asylum for particular individuals. Asylum seekers may have particular ties to their destination country that led them to claim asylum there (Legomsky, 2003: 587).[3] Denying asylum seekers choice as to where they want to resettle promotes the notion that refugees should be grateful just to escape their countries of origin and should not be picky as to which country they are resettled in. This notion can be witnessed in Canadian Deputy Prime Minister John Manley's comment regarding the practice of "asylum shopping", implying that refugees are taking advantage of the generosity of Western governments that *allow* them into their countries. As Michelle Lowry

[3] The Safe Third Country Agreement between the US and Canada does allow asylum seekers to claim asylum in a country that is not their first country of arrival if they have close ties there. However, other than familial ties, refugees may also want to settle in a particular community for reasons such as the existence of a large population of immigrants of similar nationality or ethnicity. These factors are not considered in this Agreement.

explains, "Refugees in particular are understood to be 'charity cases', rather than human beings *entitled* to protection" (Lowry, 2002: 31).

There are also problems with subjecting asylum seekers to detention upon arrival or while their claims are being processed. This is a problem in certain 'safe' third countries in Central and Eastern Europe, but also developed countries like the United States (Legomsky, 2003: 586). Detention and other punitive measures may be particularly detrimental to asylum seekers because of the trauma that many of them have suffered given their past experience of being persecuted and possibly tortured or otherwise abused (Welch, 2004: 123). There is evidence of numerous suicides and other acts of self-harm by refugees (Fekete. 2005: 77). Therefore, it is apparent that safe third country policies (in addition to and in combination with other restrictive and punitive practices towards asylum seekers) are actually quite dangerous to the welfare of a vulnerable population.

Implications for the International Refugee Regime

The apparent unwillingness of Western governments to accept asylum seekers into their borders also has consequences for the broader global system under which countries agreed to share the 'burden' of taking care of populations that have been displaced. Developing countries absorb the strong majority of the world's refugee population: over 66% of the world's refugees and asylum seekers and about 75% of the total population of concern to UNHCR[4] are in developing countries (UNHCR, 2004: 34, 38). Ucarer explains that this imbalance is largely due to the reality that developing countries produce most of the refugees and that their territories are more easily accessible and less stringently guarded (2006: 223). However, the policies that

[4] People of concern to UNHCR include refugees, asylum seekers, returned refugees, internally displaced persons, returned internally displaced persons and various/others.

have been examined in this essay only exaggerate this imbalance. Because developing countries are geographically closer to other developing countries, it is likely that the first countries that asylum seekers reached will be developing countries. In such a scenario, even if they want or are able to reach a developed country, asylum seekers will likely be returned to a 'safe' third country. Legomsky states,

> As UNHCR has observed, unilateral measures such as safe third country domestic legislation are contrary to the spirit of international cooperation and responsibility-sharing. Moreover, they inevitably yield disproportionate responsibilities for the states closest to regions of origin – in the case of Europe, the southernmost and easternmost countries (2003: 588).

Clearly, this imbalance has potential to overwhelm the asylum system as well as the social and physical infrastructure of developing countries.

In addition, it has been argued repeatedly in this essay that restrictive asylum and refugee policies and practices are undermining the intent of international refugee law. This is an important development because the 1951 Refugee Convention was designed to protect refugees themselves and, if genuinely observed, it may be more successful in achieving this goal. Even UNHCR, the main international body devoted to refugee issues, appears, for the most part, to be genuinely concerned with refugee protection (Fekete, 2005: 65). The challenge to this international system is twofold. First, national and regional governments place their own interests ahead of those of refugees and asylum seekers. These domestic interests are often correlated with a protectionist view of national security and cultural preservation. Thus, after the US's national security was threatened on September 11, 2001, 15 300 asylum seekers were detained in the US between 2001 and 2003 (Welch, 2004: 113). The second challenge to the maintenance of the international refugee protection system is the lack of enforcement mechanisms. There is no legal way for UNHCR or another international authority to reprimand states that they conclude are in violation of

international law or norms. All UNHCR can do, on behalf of the over 20 million displaced people worldwide, is state its concern in public documents. Thus, it may be the notion of sovereignty itself that fundamentally undermines the international refugee protection system.

Other Worlds

The notion of "other worlds" [5] implies the existence of a dominant world (or worlds) that is positioned in opposition to this other. Asylum seekers are a unique group because it is not automatically clear whose 'other' they are. Indeed, their own governments are unwilling or unable to provide them protection; their destination countries are often (officially or unofficially) unwelcoming; and there is no authoritative international body that could provide them the protection they need and deserve. Thus, they are 'others' at multiple scales.

This essay focused on national policies of destination countries in order to reveal that "other worlds" are in fact placed in dangerous positions because of their marginalization. Consequently, it is concluded that the concept of "other worlds" has practical as well academic significance. There are also many opportunities for further research on this topic. For instance, the practice of detaining asylum seekers was briefly mentioned a couple of times in this presentation. One could examine in more depth how detention of those who have not been proven to have broken the law promotes the conception of asylum seekers as security threats and "illegal" migrants. It would also be interesting and rewarding to deconstruct the discourse around refugees and, in general, migrants because this discourse plays an important role in designating migrants as an 'other' group. The conception of refugees as victims, for

[5] For more information on the concept of "other worlds" and the related notion of incivil societies, see: Sen, Jai (2005) *On Incivility and Transnationality : Towards Alliances of Critical Hope*. Paper for the 2005 IACS Conference 'Emerging Inter-Asian Subjectivities in Cultural Movements.'

example, implies a lack of agency and competency, even though refugees are often quite resilient and resourceful.

Conclusion

The and, in particular, those policies that allow these countries to transfer their responsibilities by transferring asylum seekers to other countries. The European Union and the United States were used as case studies to examine the implementation of safe third country and first country of asylum policies. These policies, in conjunction with other practices that deter and punish asylum seekers, have numerous impacts on asylum seekers and the international system designed to protect these individuals. Essentially, policies that allow countries to transfer their responsibilities to other countries undermine the international principles asserted in the 1951 Geneva Convention relating to the Status of Refugees and threaten to render the international system in this regard obsolete.

Bibliography

Canadian Council for Refugees (2005) *Closing the front door on refugees: Report on the first year of the Safe Third Country Agreement*. Canadian Council for Refugees: Montreal.

CBC News (2002) *'Safe third country' pact puts refugees at risk, say critics*. Available at: http://www.cbc.ca/canada/story/2002/12/07/border_deal021207.html

CBC News (2005) *Refugee claims down 40% in deal's wake*. Available at: http://www.cbc.ca/canada/story/2005/07/27/refugee-claims050727.html

Fekete, Liz (2005) The deportation machine: Europe, asylum and human rights. *Race and Class*, vol. 47 (1), 64-78.

Johnson, Kevin (2004) *The "Huddled Masses" Myth: Immigration and Civil Rights*. Philadelphia: Temple University Press.

Kerwin, Donald (2005) The use and misuse of 'national security' rationale in crafting US refugee and immigration policies. *International Journal of Refugee Law*, vol. 17 (4), 749-763.

Legomsky, Stephen (2003) Secondary refugee movements and the return of asylum seekers to third countries: The meaning of effective protection. *International Journal of Refugee Law*, vol. 15 (4), 567-677.

Lowry, Michelle (2002) Creating human insecurity: The national security focus in Canada's Immigration System. *Refuge: Canada's Periodical on Refugees*, vol. 21 (1), 28-39.

Nicol, Andrew (2004) Between immigration and policing: Cross recognition. *European Law Journal*, vol. 10 (2), 171-181.

Office of the United Nations High Commissioner of Refugees (1951) *Convention relating to the Status of Refugees*. Available at: http://www.ohchr.org/english/law/refugees.htm

Sen, Jai (2005) *On Incivility and Transnationality : Towards Alliances of Critical Hope*. Paper for the 2005 IACS Conference 'Emerging Inter-Asian Subjectivities in Cultural Movements.'

Tazreiter, Claudia (2004) *Asylum Seekers and the State: The Politics of Protection in a Security-Conscious World*. Burlington: Ashgate Publishing Co.

Ucarer, Emek (2006) Burden-shirking, burden-shifting and burden-sharing in the emergent European asylum regime. *International Politics*, vol. 43 (2), 219-240.

UNHCR (2005) *Summary of UNHCR's Provisional Observations on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*. Council Document 14203/04, Asile 64.

UNHCR (2004) *2002 Statistical Yearbook*. UNHCR: Geneva.

Von Sternberg, Mark (2002) *The grounds of refugee protection in the context of international human rights and humanitarian law: Canadian and United States case law compared*. New York: M. Nijhoff Publishers.

Welch, Michael (2004) Quiet constructions on the war on terror: Subjecting asylum seekers to unnecessary detention. *Social Justice*, vol. 31 (1-2), 113-129.