REFUGEE PROTECTION IN EUROPE

Lessons of the Yugoslav Crisis

Joanne Thorburn

Thesis submitted in partial fulfilment

of the requirements of the degree of

Doctor of Philosophy in International Relations

at the University of Kent at Canterbury

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Responsibility for the contents of the thesis remains mine alone.

PREFACE

The origin of my desire to research and write this thesis lies in a number of interests which are brought together in the refined and narrow subject area. The first interest is in the movement of people between states. Such movement takes place for many reasons, both subjective and objective. I decided to concentrate on forced flight, and within that still broad category, on flight caused by a situation of armed conflict in the state of origin. Furthermore, I want to limit the study to an examination of the protection people forced to flee for this reason can claim and receive.

A second interest lies in the field of European integration, and regional cooperation on issues such as migration policies, and how regionalism can affect universal or global attitudes and actions. In addition, in the migration context, Europe and the developed world had long been at the forefront of legal and political developments in the protection of forced migrants. However recent decades have seen the rise of additional refugee related legal instruments in Africa and Latin America, but none in Europe. As the Cold War ended and suppressed ethnic tensions in and around Europe began to develop into displacement producing crises, the ability of Europe to maintain claimed levels of human rights protection and humanitarianism within the confines of Cold War legal instruments came into question.

These then were the personal interests which brought me to this subject area. In the more objective realm, the displacements caused by the conflict in the former Yugoslavia, and particularly by the policy of 'ethnic cleansing' caused UNHCR and some European states to start looking to establish means of affording protection to persons not covered by the current international instruments, and for groups which were too large to be considered for the various levels of humanitarian or de facto statuses available in some states.

The crisis of displacement caused by the conflict in former Yugoslavia, and particularly in the republic of Bosnia Herzegovina, was in some ways simply the latest in a long series of 'refugee' crises in all parts of the world. However, this

crisis, for a number of reasons, brought the need for a re-evaluation of the nature of protection and indeed of refugeehood itself to the attention of the organisations and states called on to deal with such displacements. The major reasons for this realisation can be narrowed down to questions of time, place and numbers.

In summary therefore, from the broader subjects of migration and European integration, I have refined the subject to that of an analysis of temporary protection. This covers a group of migrants who are not covered by current refugee law, who to some extent suffer from the reaction to the relative liberalism towards economic migrants and illegal immigrants during the 1970s and '80s. In addition, the subject takes in an area of migration law and policies which, while it is dealt with on a regional level by African and American states, has no universal or pan-European legal basis, and which is being promoted by UNHCR and the European Commission at a time when other areas of European asylum and immigration policies are being worked on for harmonisation.

ABSTRACT

This thesis addresses the issue of refugee protection in Europe, and draws on the approaches taken to the crisis in former Yugoslavia to find lessons for future policies and strategies.

The protection of refugees in Europe has a long history and during the twentieth century has provided a basis and model both for other regions and for a universal approach. At the end of the twentieth century refugee protection in Europe is being challenged. Part of the test arises from the number of immigrants, with various motivations, arriving in Europe combined with the continent's own moves towards territorial integration and free movement for its own citizens. Another factor is the potential for mass movement arising from various manifestations of the end of the Cold War, exemplified by the displacements in former Yugoslavia.

The progressive development of refugee law and policies shows that while a strong basis to universal protection was established with the 1951 Convention Relating to the Status of Refugees, later developments, including the 1967 Protocol, have been made according to the circumstances of the moment. Given the regional situation at the end of the twentieth century, a further contextualised evolution may be appropriate. This could take the form of a mechanism of temporary protection, supplementary to and supportive of the foundations of the 1951 Convention.

In this thesis the existing basis of protection, and its essential components, are established through an assessment of who may be defined as a refugee and how, and an analysis of the human rights norms in which refugee protection is grounded. The situation in Europe in the 1990s shows that there is the potential for continued evolution, meeting the requirements to which states have internationally agreed and maintaining the humanitarian stance upheld by European states for most of the twentieth century.

The development of European protection strategies must occur in a holistic context, addressing the causes of movement, involving different types of protection (in the country of origin; in the neighbouring states and wider region of origin on a short-term basis and longer-term asylum) and admitting that various solutions are possible. Protection in itself does not solve a refugee's situation. The opportunity to return, remain in the host state or resettle to another state, with in any of the three situations a long-term perspective for employment and family life and involvment in all the political, social and cultural aspects of citizenship, can solve the personal, and wider, crisis, although certain scars may remain.

European states have developed different strategies to cope with the short-term protection needs of those displaced during the conflict in former Yugoslavia. As well as protection in so-called 'safe areas' they have developed 'temporary protection' policies, allowing a short-term, limited status to people who were not accorded Convention refugee status. In spite of efforts to harmonise their asylum and immigration policies, even European Union Member States created very different schemes, policies and legislation. Four of the mechanisms are assessed in this thesis.

Policy options are advanced which favour protection for those in need, take into account the range of political and legal commitments and aims of states, citizens and refugees, and the means for policy determination.

INTRODUCTION

INTRODUCTION

The issue of refugee protection lies at a juncture between domestic politics and international relations. The features of domestic politics, or a lack of political structures brought about by a conflict, can lead to the (forced) migration of civilians. Those who are forced to flee, or feel it is their only choice if they are to live in safety, either reject or lose the protection of their state of origin. The protection which a state accords to its citizens is at the heart of the nature of statehood and the accompanying concept of state sovereignty.[1] That protection both involves the relationship between the state and its citizens and is a factor in the acknowledgement by other states of the authority a government exerts over and on behalf of the people within its territorial jurisdiction. Once a person has lost the protection of his or her own state, he or she has no guarantor of any rights. An alternative protector will usually be sought. People who have lost the protection of their state will seek the protection of another state. They therefore cross international frontiers, making the domestic strife of their country of origin a matter of international concern. Once they have crossed a frontier (or in some cases several frontiers) the crisis of the refugees becomes a matter to be regulated by the internal political reaction of the state in which they seek refuge. If that state cannot or will not guarantee protection itself it either re-creates an international movement or must call for international assistance, from allies or organisations created for the protection of refugees. Sometimes people displaced by a conflict are unable, for numerous reasons, to cross an international boundary. Such people are not considered to be refugees in a legal or political sense, but their need for protection, as internally displaced persons, is

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[1] See, for example, Zolberg, Aristide R., Astri Suhrke and Sergio Aguayo, Escape from Violence: conflict and the refugee crisis in the developing world, (New York: Oxford University Press, 1989) p.264:

> *Because the elemental justification for the modern state, at least since Hobbes, is its ability to provide reasonable security for its citizens, the strongest pressures must be exerted on governments not to lash out at their own people. Otherwise, as the history of refugee flows shows, the international community - in practice other states - will be called upon to provide such protection for people turning up at their borders.*

just as great if not greater.[2]

At the origins of modern refugee protection, the sovereign of a neighbouring state, or the leaders of free cities and republics granted a safe haven, otherwise known as 'asylum' to the unprotected. Over the course of the centuries since this tradition of state protection was initiated there have been many developments.[3] Evolutions have occurred on the levels of thought about individual rights; state duties; the nature of sovereignty; the relations between states and between the state and its citizens and the desirability of taking in migrants, whatever caused their movement. Each period of change in the relations between states and the causes for which people leave their homes, how they travel and how far they can go, has brought about some change in the way the question of migration generally and forced displacements in particular have been handled.

The twentieth century has seen some of the greatest changes in the way forced migrations are viewed and received, in the way states relate with each other on the issue of protection and in the way the protection of individuals and their rights are perceived. Prior to the First World War, migration was seen as very much a natural, and often not unwelcome, phenomenon. It increased the population useful in the economic development and defence of the nation. The forced statelessness of thousands of people in the process of creating the Soviet Union caused massive movements towards European states. The members of the League of Nations saw the protection of these stateless masses as an area for cooperation, and developed the first politically motivated, international legal definitions of refugees.[4]

From the twenties until the Second World War there were several forced displacement crises creating new masses of refugees, each of which was accorded a new definition and the protection of host states.[5] At the end of the forties the

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[2] See Deng, Francis, Protecting the Dispossessed: a Challenge for the International Community, (Washington DC: Brookings, 1993).

[3] See, for example, UNHCR, The State of the World's Refugees: the challenge of Protection, (Middlesex: Penguin, 1993); Zolberg, *et al*, op.cit..

[4] See, Grahl-Madsen, A., The Status of Refugees in International Law, Vol.1 (Leiden: A.W. Sijthoff, 1966) p.12.

[5] See Ibid. for a collection of these definitions, many of which are also examined in Chapter 1 below.

leaders of the United Nations were faced with two large groups of displaced people for whom they created a legal definition intended to deal with the situation as it existed, and be sufficient to cover the limited forced migration envisaged in the short-term. The two situations faced by those formulating a universal refugee definition were the aftermath of the persecution and destruction of the Second World War and the on-going persecution in the Soviet Union and East European states as communism was forcibly spread to the latter. In the political climate of the early 1950s the Convention drafters produced a document whose importance for refugees and their protectors has reigned for forty-four years at the time at which this thesis is being written. Forty-one years after the 1951 Convention Relating to the Status of Refugees was drafted, and acceded to, a European conflict produced a displacement crisis of a magnitude not witnessed in Europe since the Convention was written. The continent had been the focal point of the Cold War for thirty-nine of those years, and for two years had been experiencing the spread of democracy and market economy after communism had collapsed. Among the hopes and fears of the two years following the end of the Cold War had been a west European dread of massive migration from the east. In 1992, as Yugoslavia descended into secessionist and ethnic conflict, Europe was indeed faced with a major refugee crisis, although not from Poland, Hungary and the former Soviet Union as it had most feared, and was still focused on. As both Glenny and Cviic noted in texts written in the early days of the Yugoslav crisis, the refugee flows convinced Europe that this was a conflict with European dimensions, and one challenge to Europe was how to protect the fleeing masses.[6] Its management of that crisis, just as its handling of the whole conflict, needs to be assessed for the lessons to be learnt for future situations of a similar nature.

Politics have always driven the migration and protection issue. At the end of the twentieth century it is also being driven by regional containment, as the

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[6] Glenny, Misha, The Fall of Yugoslavia: the Third Balkan War, (London: Penguin, 1992) p.165: "The refugees finally brought home to other parts of the continent that there were European dimensions to the wars in Yugoslavia." Cviic, Christopher, Remaking the Balkans, (London: Pinter/RIIA, 1991) p.88 describes how sending on refugees is a way of passing on trouble and challenging countries that do not take notice of your problem so they feel the need to get involved. Together with the economic and military challenges presented to Europe by the Yugoslav breakdown, Cviic saw the protection of refugees as a major trial for Europe.

governments of developed countries attempt to restrict medium and long distance flight for a number of reasons, including the view that the further one migrates the less likely one is to return. European migration policies are also being formulated within the context of a contest between regional integration and state sovereignty. Regional politics meant that the Yugoslav displacements had to be contained. The nature of early 1990s European politics provoked a reluctance to include large groups of newcomers, who had the potential not only to impact on the 'national identity' (whatever that may be) of the receiving state, but also to induce tensions between neighbouring states which were in the process of removing their barriers to movement.[7] Regional containment essentially meant containing the refugees in their war-torn country of origin or as close by as possible. More positive regional containment would have taken place if there had been structured financial burden-sharing with those countries, mainly other former Yugoslav republics and central European state, which were taking people in.

The thesis of this study

The thesis of this study is that the evolution of refugee protection in Europe will continue, and that its progress should involve the search for a mechanism of short-term protection for those forced to flee conflict. The mechanism should take into account the cause of flight and the nature of European cooperation and coordination.

Many of the displacement situations of the post-Cold War period may be best dealt with by the granting of temporary protection, in line with the minimum

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[7] Geddes describes the migration pressures on the European Union, emanating from the South and the East, as global forces similar in their persistence to the force of the economic logic of interdependence which pressured the moves towards the creation of a single market. The economic logic which forced the Union towards a single market has also pressured it towards restrictive general immigration policies. The model of European immigration policies has been generated, suggests Geddes, by the 'positive ideology' of 'Europeanness' and the 'negative ideology' of immigration, together with the apparent paradox of the single market and integration, which says that to have free movement inside one needs tight external controls. [Geddes, Andrew, 'Immigrant and Ethnic Minorities and the EU's "Democratic Deficit"', Journal of Common Market Studies, Vol.33 No.2 (June 1995) pp.200-205]. Those tighter controls motivating immigration policies were very much generalised and included asylum-seekers (more often than not painted as bogus claimants) as people to be excluded. The desire to exclude came face to face, in the Yugoslav case, with the undeniability of the genuine humanitarian need of many. Thus a policy of containment, responding to the humanitarian need while excluding, was developed.

protection guaranteed by nonrefoulement[8], and in keeping with the notion of burden sharing[9]. As Loescher notes, the consequences of restrictive refugee and immigration policies and strict interpretation of the 1951 Convention definition of 'refugee', the "erection of barriers to entry and ... containment of forced migration in countries or regions of origin"[10] can be lethal for those up-rooted in places such as, and conflicts such as that in, former Yugoslavia.

The organisation of the study

In assessing the viability of this hypothesis several key elements of the above statement of the thesis of this study need to be addressed. Who is a refugee? What is protection? What role have refugee protection issues had in European cooperation since the Second World War? These questions will be dealt with in **Part One** of this study, which is divided into three chapters taking these issues in turn.

The whole question of the categorisation of refugees occupied much time and space for both academics and practitioners working on this subject during the decade from 1985 to 1995, and may continue to do so.[11] The essence of the definitions debate is who to include and who to exclude, and the giving of some reasoning for the division. Inclusion and exclusion in this case does not simply mean allowing into or keeping out of one's society or even more simply allowing or denying access to a given territory. It can, at its most extreme (although not in extremely limited cases), mean including or excluding from life. The answer to the simple question

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[8] See Chapters 1 and 2 for discussions on the importance and meaning of the norm of nonrefoulement, as put forward in Article 33 of the 1951 Convention. For further discussion of the links between nonrefoulement and temporary protection see eg. Perluss, Deborah and Joan F. Hartman, 'Temporary Refuge: Emergence of a customary norm', Virginia Journal of International Law, (Spring 1986) p.572, and Goodwin-Gill, Guy S., '*Nonrefoulement* and the new asylum seekers' in David A. Martin (ed.) The New Asylum Seekers: Refugee Law in the 1980s - the Ninth Sokol Colloquium on International Law (Dordrecht: Martinus Nijhof, 1988).

[9] Burden-sharing is the concept whereby states should spread the financing and protection in refugee crises across the international community. The next section of this chapter will focus on this element of protection.

[10] Loescher, Gil, Beyond Charity: International Cooperation and the Global Refugee Crisis, (New York: Oxford University Press, 1993) p.164.

[11] See, for example, International Journal of Refugee Law, Vol.3 No.3 *Special Issue: the 1991 Geneva Colloquium - The 1951 Convention relating to the Status of Refugees: Principles, Problems and Potential*, (1991).

'Who is a refugee?' is a matter or life or death for hundreds of thousands of people throughout the world, including those who were 'ethnically cleansed' in Bosnia Herzegovina. As Zolberg *et al* have stated, research which is narrowly based on those who are recognised by states and by UNHCR legitimises the practice of narrow definitions and excludes policy alternatives.[12] For this very reason this study looks also at the position of the excluded and seeks out policy options for their inclusion in the wider scope of protection.

The definitions debate centred on interpreting the Convention definition[13] and what those who formulated the definition meant by the terms they used.[14] This question is included in the assessment of our hypothesis to demonstrate that in both political and legal terms there has been evolution and adaptation in the categorisation of those to be included throughout the twentieth century. The adaptation has been contextual. The circumstances in which the politically and legally accepted notions of refugeehood have evolved encompass the causes of movements, the relationship of the (potential) host states to the states of origin, the relationship between host states and the refugee group and the extent of cooperation between different host states. The case is made for the inclusion, in a regional accompaniment to the universal Convention, of those forced to flee the ethnic strife and conflicts emerging with the end of the relatively clear cut divisions of the Cold War as the logical extrapolation of the positions policy-makers and legislation drafters have taken to date.

In assessing the meaning and content of 'protection' it is necessary to turn to human rights documents. These include the Universal Declaration of Human Rights, formalised shortly before the 1951 Convention, in a similar political environment.

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[12] Zolberg *et al*, op.cit., p.4.

[13] Article 1 A paragraph 2 of the Convention defines a refugee as any person who *as a result of events occurring before 1 January 1951 and 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.*

[14] See, for example, Hathaway, James C., 'A Reconsideration of the Underlying Premise of Refugee Law', Harvard International Law Journal Vol.31, No.1 (1990) and by the same author, The Law of Refugees Status (Butterworths: Toronto, 1991).

While the protection of a refugee would most logically involve the upholding of all acknowledged human rights, the UNHCR suggestion of some nuancing of this position in the case of short-term protection in order for more people to have the most fundamental right, the right to life, assured is investigated and accepted. If there is a basic choice between the guarantee of protection to masses fleeing conflict by initially housing them in collective centres with limited spending money and the safety of a few people who would receive private housing and full-time employment instantly, then the position taken here is that the former is the more humane option.

As an element of its growing political integration, the European Union has started to address the asylum and immigration issue, and its initial debates have indeed focused on harmonising national interpretations of the Convention definition. Other organisations have also been involved in issues associated with forced migration, and may in future have an important role to play, be it in addressing the causes of flows, the return of refugees or indeed their protection in states which are members of the organisations concerned. As of 1995, however, the European Union remained the only organisation with enough apparent strength, and the political will of sufficiently powerful and numerous members, to progress towards new adaptations of protection which involve international cooperation. The desire or need to this is added to by the progress towards a frontier free landmass of these neighbouring states. One of the earliest organisational steps towards a coordinated policy front was the creation in the Treaty on European Union of a 'third pillar' of negotiation on matters of Justice and Home Affairs. This included the establishment of a distinct directorate in the European Commission dealing with these issues, with immigration and asylum policies as one element. In 1994 the European Commission issued a Communication on Immigration and Asylum policies, and that document is analyzed for its contribution to the development of a comprehensive approach and temporary protection in particular in Chapter 3 and the chapters of Part Two of this study.[15]

Having addressed these three key background issues we turn to the wider question of the impact of refugee movements on other issues in international relations and the impact of political cooperation on flight and its management. The Yugoslav crisis saw the further development of what has become known as a

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[15] European Commission, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, (COM(94) 23 final) (Brussels: 23 February 1994).

'comprehensive approach' to the whole displacement issue, and this is the tool which is used to address this matter here. A comprehensive approach must, as its name suggests, be holistic. The notion of comprehensiveness is used here to cover the range of issues, and to allow a thematic exploration of the practical and theoretical issues involved in protection. **Part Two** therefore includes three chapters ranging from the causes of flight, through different modes of protection to potential solutions. Protection in itself is not a solution, but a palliative measure in the period between the onset of a movement and its resolution in the finding of a (semi-)permanent place of settlement for the refugees.

The pivotal feature of the comprehensive approach as advanced here is temporary protection. This type of protection has several potential forms. It could be seen either as a limited measure granted by states geographically close to the country of origin, prior to more long-term solutions through return or permanent re-settlement elsewhere, or as a solution available from any state, with the protected status lasting for the duration of the conflict, or until alternative permanent protection is granted. This formulation poses questions over the sharing of the burden involved, as temporary protection could be granted by more than one state, to the same individual or group during the course of the conflict in the country of origin or habitual residence. In a mass influx situation the grant of temporary protection to large groups of people could have the added benefit of 'unclogging' regular, individualised, asylum application procedures, as a particular feature of temporary protection as advocated by UNHCR is that it should be accorded to entire groups on a *prima facie* basis. A more controversial perception of the meaning of temporary protection is that it could be used as a facility for evacuating all or most civilians from a conflict zone enabling the 'international community' to intervene and 'sort out' the situation without civilian casualties. While apparently permitting an ideal situation, this scenario is just that - idealistic and realistically impractical, particularly in Europe, where protection traditions no longer include camps and settlements. That is not to say that camps in Africa and Asia are used for protection purposes while regional or state intervention seeking to resolve the flight provoking conflict takes place. However, one reason for which western states reject the idea of an OAU style 'refugee' definition is their different tradition of protection and reception in Europe, and these practical issues influence the type of legal and

political basis from which admissions decisions are taken.

It could be argued that the offering of temporary protection assists in lending weight to both the sovereignty and normative based arguments for various forms of intervention. The weighting to the normative side is obvious: the granting of protection and upholding of human rights satisfies the major requirement of protection of life and limb. The sovereignty element of this position comes from the fact that the admission of displaced persons, particularly in massive numbers, puts strains on the normal boundaries of the sovereignty of the refuge state, potentially raises doubts over regional peace and security (particularly in regions where states other than that in turmoil face the real possibility of ethnic tensions and conflicts among the same ethnically rooted peoples). These factors taken together with the implication of return as the 'best' solution for the host state, the displaced population and for the future of the state of origin after the conflict, mean that swift resolution (prior to integration, and to give certainty and security to the displaced) is necessary. It should however be maintained that any intervention be for *humanitarian* purposes, and must not be a hostile act.

The legislative and policy directions taken by a selection of four European states as a result of the former Yugoslav crisis are the subject of the case study which forms **Part Three**. This is an assessment of the practical experience of various temporary protection mechanisms in Europe. The types of temporary protection policies and legislation enacted in Europe from 1992 onwards vary greatly. The findings of this case study offer support to the notions advanced in Chapters 2 and 3. While there is a desire amongst states to cooperate on the subjects of who should be admitted, the terms of their access to other European states and, to a lesser degree, the length of permitted stay, the characteristics of the effective protection are largely based on domestic political, societal and cultural variations. The suggestion advanced is, therefore, that rather than focusing on coordinating all elements of their asylum and immigration policies, European states should examine the alternative of harmonising their entry procedures, terms of residence and movement, and how they can effectively spread the protection in terms of numbers and finance, while allowing domestic or sub-regional variations in the content of protection. The latter nuancing, as well as the notions of burden-sharing, should involve a recognition that the policies of neighbouring states will

influence the level of attractiveness.

The use of juridical documents in this study

In addressing refugee issues, and particularly in dealing with the practical positions taken on the subject by actors in the international field, the use of legal documents and texts becomes unavoidable. Müllerson notes that[16]

> It has always been necessary to study international law in the context of an international system where the law is functioning and developing, and to analyse legal and political problems as inseparably intertwined (as indeed they are).

He goes on to give several examples of scholars in both the international law and international relations field who take the more narrow view of their own discipline. These scholars often focus even more narrowly their own preferred approach to their discipline, which is treated as an untouchable position, standing alone and unaffected by other means of approaching the same issue in the same or different fields or the variables which can alter the situation. The present study forms an assessment of the features of refugee protection which impact upon, and are influenced by, the nature of international relations. I do not think that any one way of looking at this subject can offer many answers to the complex range of issues it raises. For this reason I am approaching it as a practical matter which a whole range of theories can help us to understand. At the same time I am admitting that international politics and international law are inseparably intertwined on this matter. The drawing up of international legal agreements, and the drafting of domestic legislation, are influenced by political factors. International legislation on refugee issues is influenced by reactions to the plight of those forced to flee, levels of domestic nationalism and racism, any perception of taking in too many people and the extent to which cooperation between receiving states, and involvement in the cause of flight is operating or may be desirable. Changes in domestic legislation are also altered by domestic politics. Meanwhile the agreements reached in international fora, be they binding or of a more guiding nature, influence the extent to which domestic political factors will be played up or tamed. All of the legal texts used in this study have a

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[16] Müllerson, Rein, International Law, Rights and politics: Developments in Eastern Europe and the CIS, (London: LSE/ Routledge, The New International Relations Series, 1994) p.2.

judicial weight, but it is their political significance which is central to their inclusion and handling here.

This thesis forms, to an extent, a juridically based discussion, analyzing the laws and policies of states and organisations with regard to those who flee armed conflict. The discussion is informed by relevant theories in the international relations field, in particular by the on-going philosophical debate centring on normative issues, and by theories of cooperation and international organisation. The normative debate is brought out through a discussion of the often opposing claims of the protection of human rights and upholding of state sovereignty, and in particular a discussion of how temporary protection can mediate these claims. Discussions in other academic fields closely related to refugee issues, for example psychology and sociology, will also be taken into account.

Caveats

There are, then, three caveats to be made in concluding this introduction. Firstly, this is a study made from an international relations perspective, and not from an international law standpoint. A political view of all the materials used is adopted, even if those materials include legal texts.

Secondly, as should be clear from the title, although refugee situations in and from other parts of the world are referred to, this is essentially a study of the European management of European refugee crises. A very small percentage of refugees from other continents arrive in Europe to claim asylum. The difficulties the developing world has in shouldering the care and protection of the vast majority of displaced persons cannot be shrugged off. However, the subject of this study is the way in which Europe copes with its own refugees, since after all, no other continent is likely to assist developed western Europe with its regional migrations. As the title should also make clear, this is a study of forced migration, not of economic migration. Economic migration usually involves a high degree of choice in terms of when and how to move. In some cases the distinction between economic migration and the seeking of political asylum is blurred, either because the reason for an inability to find profitable employment is due to discrimination in the country of origin or to the political conditions there, or because people seeking economic

betterment attempt to claim political motives. In this study, however, the concern is the relation of forced migration due to conflict to the long-standing international position of defining refugees by individual persecution for political reasons, and the type of protection attainable by groups fleeing conflict.

Finally, in addressing the refugee protection issue one cannot avoid making normative statements and using normative theories of international relations. However, this is not a study of the use which could be made of normative theories in a study of refugee protection, but by intention rather a study of the practical issues involved in refugee protection supported by a basis of various theoretical standpoints. Just as it is not a study of the use of realist theories in assessing states' approach to the issue, so it is not a study of the normative reasons for any humanitarian approach. The study is, however, interspersed by remarks pointing to positions from the realist and normative perspectives, and with points taken from the whole of the broader field of international relations theory. That the normative issues are not dealt with as a separate topic is not to leave something out. Rather the inclusion of this theoretical standpoint in a practically-based discussion is intended to strengthen that discussion and to avoid a limitation of this very complex human situation to the confines of theoretical standpoints.

The future of refugee protection in Europe

In the light of situations such as the refugee crisis resulting from the conflict in Bosnia Herzegovina, the problem to be faced is that of whether it is possible for the core of developed western European states to exclude people fleeing conflicts and tensions in the wider Europe, by continuing to apply an anachronistic interpretation of a still relevant Convention definition. Who else will protect Europeans in need of international protection? Should a liberal interpretation be applied only to fellow Europeans, while the restrictive interpretation is maintained for non-Europeans? Would such dualism be tenable in a region which prides itself on its democratic and humanitarian traditions? Would it be possible, therefore, to apply a liberal interpretation of the Convention definition to all, potentially opening the flood gates to all with the means and desire, and legitimate reasons based on a fear of persecution, or other reasons which could be interpreted as forcing flight, to

arrive in Europe and request undefined and unlimited protection? None of these options being realistically tenable, a regional protection mandate could be instituted for defined groups of people within defined time frames and with the upholding of defined rights and duties, and encouraging, within the democratic and humanitarian spirit, the institution of similar systems in other regions.

The argument being presented in this thesis is that a mechanism of temporary protection is urgently required in Europe to complete and link the elements of a comprehensive approach and thus permit more success in the handling of future displacement crises than could be perceived in the early 1990s.

PART ONE

EUROPEAN PROTECTION

A Regional History

INTRODUCTION

The first part of this thesis examines the background to the protection of refugees in the European continent. It is divided into three chapters. The first two seek to answer questions which range more broadly than Europe alone. In Chapter 1 the question is 'Who is a refugee?' and in Chapter 2 we ask 'What is protection?'. Although the responses are more universal than regional in scope, the centrality of Europe's role in the development of refugee protection will be discerned throughout. Chapter 3 develops the first two chapters within a strictly regional context by looking at Europe's motives for alterations in its handling of protection issues, the process of these changes in the 1980s and 90s and the potential paths for the turn of the century.

Chapter 1 concentrates on the evolving definitions of refugees in international law and politics. Why do we need to define a 'refugee'? To whom is such a definition of importance? Establishing criteria for the acknowledgement of refugeehood is the business of states. States define 'refugees' in order to announce which people under which circumstances may make a claim for protection, and how the outcome of such a claim will be determined. States maintain this right to define on behalf of the people their own sovereignty protects because protecting others traditionally means admitting them to the society of the protecting state and ultimately offering membership. How a refugee is defined can be a matter of life and death for the person claiming a need for protection.

Defining a refugee involves international relations on two levels. Firstly, the definition of the characteristics of a person who needs protection in the international arena, or at least outside his or her country of origin, automatically makes a statement about that country. The acknowledgement of refugeehood gives international justification to the rejection of the protection of the country of origin by the individual or group, or recognises that the country either can or will no longer protect the individual or group. Secondly, international protection receives wider legitimation by being the subject of agreement between two or more protecting states.

> To know who is a refugee, know first who is asking, and why. Alternatively, ... ask instead whether protection is needed, and by whom; ... Definitions will always be attractive, as long as they seem to impose finite limits on human problems that otherwise seem intractable. Definitions serve useful purposes but become deficient once their rationale and relation to other issues are ignored.[1]

Definitions have proved very attractive to those who have understood the occurrence of a need for protection in the twentieth century. The need for protection does not only encompass the assessment of necessity by the protection seeker. It also entails the protectors' understanding of that assessment and their own conviction that their protection is a necessity. Definitions have set the limits of the protectors' assessment of their own duty to protect and the right of the seeker to receive protection. Over time the definitions have adapted in part because the issues to which protection is related have changed, and in part because the understanding of the need for protection, by states, protection seekers and concerned observers has altered.

The end of the Cold War provides an instance of transformation in the issues to which protection is related, in terms of the causes of flight and the political use of protection. In this period there have been movements towards an adapted form of protection, labelled temporary protection. These movements include developments in responses to the question of who is a refugee and who needs protection.

In order to establish the potential for evolution in the defining of a 'refugee' it is necessary to trace the roots of current refugee law and politics. Chapter 1 therefore examines the progression of refugee definitions from their 1920s origins to establish past developments in the context of the international political situation of the time. An evolutionary aspect to refugee definitions proving to be nothing new, the reasons for and potential directions of further developments of post Cold War categories of displaced persons will be presented.

The chapter is divided into three sections, for simplicity labelled the Past, the Present and the Future. The similarities between the three periods lie in refugee movements caused by wars and social upheaval with political, religious and ethnic motivations. The United Nations High Commissioner for Refugees, Sadako Ogata, noted that "the landscape of displacement in the early part of this century was not

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[1] Goodwin-Gill, G.S., 'Benigno Aquino Lecture in Human Rights', International Journal of Refugee Law, Special Issue (1990) p.33.

dissimilar to the one we are witnessing today",[2] and the similarities include a disinclination towards the admission of the displaced. However, the early part of the century saw arrangements which resulted in a renewing of the protection tradition. The question is whether the 1990s will produce a similar revival.

Chapter 2 focuses on the meaning of protection according to international legal instruments dealing with human rights, and political interpretations of those instruments within differing social and cultural contexts. This chapter includes some conceptual background to the differing forms of protection analyzed in Part Two, and lays the foundations for notions of differentiated mechanics of protection according to societal and cultural conditions which will be developed in Part Three.

The chapter is divided into five sections. The links between human rights and protection policies are established. States often assess their need to provide protection on the basis of violations of internationally accepted standards of human rights. The constituent elements of protection are also characterised by reference to human rights instruments. However, while human rights documents are used to deduce the degeneration of a sovereign state to a situation where others discern a need to take over protection of some of its citizens, limits are set on international insistence for the respect and development of human rights by the sovereign rights of states, and respect for the sovereignty of other states. Refugees often are the political pawns in the practical opposition of human rights and state sovereignty.[3] It is suggested that there are certain essential rights which, whether for natural law reasons or due to the development of protective instruments and stances in the twentieth century, must be upheld. These are the right to seek protection and to receive it outside the country of origin; the right not to be returned to a country

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[2] Ogata, S., 'Refugees: Lessons from the Past', The Oxford International Review, Vol.4 No.3 (1993) p.39. Kjaerum also notes the parallels between 1930s refugee policies and those of the 1990s, comparing the exclusion of Jewish people from Germany and the introduction of visa requirements for people from former Yugoslavia as restrictive measures leading to reduced numbers receiving protection. Kjaerum, Morten, 'Temporary Protection in Europe in the 1990s', International Journal of Refugee Law, Vol.6 No.3 (1994) p.448.

[3] The conceptual opposition between the same issues is not the concern of this thesis which deals with practical protection issues. The conceptual debate is on-going and lengthy. See for example Vincent, R.J., Human Rights and International Relations, (Cambridge: Cambridge University Press/ Royal Institute of International Affairs, 1986); Frost, M., Towards a Normative Theory of International Relations: a critical analysis of the philosophical and methodological assumptions in the discipline with proposals towards a substantive normative theory, (Cambridge; Cambridge University Press, 1986); Brown, C., International Relations Theory: New Normative Approaches, (Hertfordshire: Harvester Wheatsheaf, 1992).

where one's life would be endangered; and the right to family unity. Beyond these essential rights however, it is suggested that in practical terms, for both the protecting state and its society, and for the protected people, the entitlements of the protected become questions of the quality of protected life. This suggestion means that some nuancing of the meaning of social, cultural and economic rights according to the situation in the country of origin and in the host state may be possible and ultimately beneficial. It would, for example, be a nonsense to insist that protected people have rights and benefits beyond those of the indigenous society. However, protection of life requires an upholding of dignity and self worth for it to be viable. Particular attention also needs to be paid to the essential value of non-discrimination, both between groups in need of protection and between the protected and protecting. Within given circumstances, however, the upholding of civil and political rights and providing of meaningful protection prior to greater inclusion and potentially ultimate membership of the host society is a protection path which deserves consideration.

Chapter 3 examines the European handling of protection issues within the context of regional integration and cooperation. The coordination of regional approaches to a whole range of security issues in the European continent has developed during the 1980s and '90s. In general it has had two directions. The first was economic and resultant political integration in western Europe, via the European Communities and Union in particular. On the EU level, cooperation on economic issues, and in particular the desire to remove frontiers for goods and people within the Member States' territory has lead to a need to coordinate policies on the admission and treatment of immigrants. If third country nationals legally enter one Member State and there are no further frontier checks on entry to further Union territory, then they have legally entered all Member States and can travel freely, and ultimately reside in any country. There is therefore a need for equal entry and residency rules for third country nationals, as restrictive states fear the admission of 'undesirables' via more liberal states, and liberal states could hesitate over the exclusion of needy cases due to excessive limitations. In turn, policies towards legal entrants need to be coordinated to a sufficient extent to avoid a funnelling of immigrants into one or a small number of more attractive states. Coordination of migration related policies has been embarked upon in the EU and also in a sub-group of EU Member States, known as the Schengen States, which

have taken the lead on the removal of frontiers and associated policies.

The second direction of political cooperation in Europe focuses on security and human rights issues, and was begun during the Cold War by the Conference for Security and Cooperation in Europe and the Council of Europe. Both of these organisations included non-EU Members States, and have expanded eastward since the fall of communism, as states turn to democratic institutions and a valuing of human and minority rights. The extended interest in coordination in these areas is not only encouraged by emergent democracy in former totalitarian states. The re-emergence of ethnic, religious and nationalist divides which had been subsumed during the communist era is opening further concerns for localised conflicts with regional implications for peace and security, including the outflow of massive groups of displaced people. While nationalisms and desires for self-determination are at the root of many refugee crises in the 1990s (much as they were during the break up of empires in the early twentieth century), nationalism and economic concerns in the potential protecting states are causing a questioning of the humanitarian impulse to protect within one's own state. In addition the possibility of a surrendering of national sovereignty over the control of admission and residence to a supra-national body such as the EU, albeit through the cooperation of sovereign governments, has the potential of raising the call to nationalism within EU states.

Chapter 3 is divided into five sections. The first two sections look at the Organisation for Security and Cooperation in Europe and the Council of Europe, and describe the reasons for which coordination on regional temporary protection policies cannot be expected from these organisations in the near future, but why the former in particular offers potential for an eventual widening of EU agreements in this area. The European Union is suggested as the most likely forum for coordination of policies in this area, or eventually the creation of a regional mechanism. The third section examines work in the Schengen 'laboratory' as a precursor to EU activity. The final two sections examine European Union developments in protection. The period leading to the Treaty on European Union is examined, including the Dublin Convention[4] and the particular focus of the Edinburgh Conclusions, and the initial effects of the TEU and the creation of a Third Pillar of the European Commission are analyzed. Finally, the way ahead, as

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[4] The Convention determining the State responsible for examining an Asylum Request.

seen through the Commission's 1994 Communication on Immigration and Asylum Policies[5] and suggestions for discussion of reception in the region of origin, is discussed. The Communication, like the Council of Ministers' Edinburgh Conclusions before it, looks at a comprehensive approach to migration policies, and the notions of reception in the region of origin point to certain elements of such an approach. As such the latter sections of Part One indicate the form in which Part Two will proceed.

Europe has a century long history of evolving protection legislation and policies upon which it can potentially develop a protective stance appropriate for its circumstances in the 1990s. It also has a recent background in cooperative understanding between the states into which the continent is divided, and of protection not only of lives but of rights of individuals and minority groups. The three chapters of Part One develop this background to European regional refugee protection.

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[5] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies [COM(94) 23 final], (Brussels, 23 February 1994).

Chapter 1
WHO IS A REFUGEE?

In everyday language, including that of the media, anyone fleeing a problem, usually not of their own making, heading towards another country or another place within their country of origin, is labelled a 'refugee'. However, those (states) who need to recognise 'refugees' in order for them to qualify for all the entitlements and protection of that status are not so generous. Nor are they consistent. There is no way to establish a single, valid or strict definition of 'refugee', for as Grahl-Madsen has said, there is no such definition of 'refugee' even in international law, only 'fitting' definitions.[1] What is attainable through a distillation of international legal instruments, policy documents and politico-sociological indications is an idea of who might be accorded refugee status or at least protection and under what circumstances, in both the real and an ideal world. As Zolberg *et al* have noted, this problem of defining a refugee is "no mere academic exercise but has a bearing on matters of life and death."[2]

The current, so-called 'universal', definition of a 'refugee' contained in the 1951 Convention Relating to the status of Refugees[3] [the Convention], and carried over, with the removal of its temporal limitations, in the 1967 New York Protocol influences all legislative and political approaches to the subject of migration. Article 1 A paragraph 2 of the Convention defines a refugee as any person who

> as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion,

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[1] Grahl-Madsen, A., The Status of Refugees in International Law, Vol.1 (Leiden: A.W. Sijthoff, 1966).

[2] Zolberg, A., A. Suhrke and S. Aguayo, Escape from Violence: conflict and the refugee crisis in the developing world, (New York: Oxford University Press, 1989) p.3.

[3] 1951 Convention Relating to the Status of Refugees: 189 *UNTS* 137; text also in UNHCR, Collection of International Instruments relating to Refugees, (1979), p.10. The Convention definition included the possibility for Contracting States to stipulate on signing whether they wished "events occurring before 1 January 1951" to be understood as "events occurring in Europe before 1 January 1951" or "events occurring in Europe or elsewhere before 1 January 1951". The geographical limitation could be broadened after signature (Article 1 B).

> 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.

The Times report on the signing of the Convention tellingly hinted at a need for contextualisation of refugee movements and the progressive need for changes or extensions to laws and definitions on this subject:[4]

> "What is a refugee? From time to time, whenever an international effort is concerted to deal with a refugee problem, the attempt at definition is made; the resultant form of words may serve its immediate purpose, but it is likely to be useless for any other. . . . Today, as the Soviet system hardens its political grip on eastern Europe, refugees of a new type are leaving the countries under Soviet domination and arriving in western Europe in numbers that tend to grow. . . In the discussions the refugee problems of Europe played a large and perhaps dominant part, and the definition adopted reflects clearly the present state of Europe. . . For victims of future upheavals or future persecutions - displaced perhaps by a seizure of power in a country now relatively free - the convention will have to be extended or a new convention made. . . [T]he convention, though it does not go far, will be valuable to the limited extent to which it gives him [the refugee] the freedom to rehabilitate himself."

1. PAST: Refugees Before the 1951 Convention

In comprehending current refugee definitions and Conventions and discussing possible innovative measures for dealing with future refugee flows, it is important to take into account the origins of notions of defining the characteristics of refugees. Beyond those origins one must note the developments which have brought refugee law to its current form, and which may play a part in informing further changes. Many works have been written on the subject of the history of refugee law, including the seminal work of Grahl-Madsen,[5] so a grand excursion into this period will not be made here. Neither will the centuries long background to refuge,

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[4] The Times, (31 July 1951) p.7.

[5] Grahl-Madsen, op.cit..

originating in the asylum offered by kings, republics, free cities and churches be assessed as it is the twentieth century categorisations which are of relevance to this discussion.[6] We will look rather at the essential characteristics of refugee law, in particular protection; persecution; territoriality; ethnicity; regionalism in refugee crisis management; definitions and conventions; war, and in particular, civil conflict.

1.1 Groups for whom arrangements were made

Prior to 1920 there was largely unrestricted migration, and the need or desire to categorise did not really arise. During the period from 1920 to 1950 the definition of refugees applied to particular nationalities or groups who had lost the protection of governments controlling specific territories. With the end of the First World War, the breakdown of the Ottoman and Austro-Hungarian Empires and revolution in Russia and the creation of the Soviet Union, the numbers of displaced people were large. However, the displaced were generally stable groupings emerging from existing populations. Europe rushed to put up the first barriers to immigrants as regional security was perceived to be under renewed threat. In spite of this, the establishment of the League of Nations allowed for the evolution of international rules for the treatment of refugees as specific arrangements could be created, which permitted specified protection but limited international responsibility with narrow group definitions. Faced with 800,000 Russians fleeing the civil conflict, persecution, and totalitarian regime and ideology of the emerging Soviet Union in 1921, the League "found itself almost compelled to take some action."[7] The first League resolution on refugees was passed on 26 February 1921, followed later that same year by a conference on the question of Russian refugees and the appointment of a High Commissioner for Refugees, Dr. Fridtjof Nansen. Further arrangements granting travel documents [the Nansen Passport] to Russian refugees were adopted in July 1922, followed by more arrangements for Armenian refugees in 1924. No general definition of the term 'refugee' had been made in any of these arrangements. However, a further conference in 1926 amended and supplemented the earlier arrangements, and defined the terms 'Russian refugee' and 'Armenian

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[6] For a summary of this longer history see Zolberg *et al*, op.cit., pp.5-11.

[7] Grahl-Madsen, op.cit., p.12.

refugee'. The term 'Russian refugee' was defined as:[8]

> Any person of Russian origin who does not enjoy or no longer enjoys the protection of the Government of the USSR and who has not acquired any other nationality.

The term 'Armenian refugee' was defined as:[9]

> Any person of Armenian origin, formerly a subject of the Ottoman Empire, who does not enjoy or no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired any other nationality.

Further instruments were adopted in 1928 which were extended to include Turkish, Assyrian and Assyro-Chaldean refugees.

The factors which provoked mass movements during that period were almost identical to those which are the predominant causes of flight in the 1990s including civil war and ethnic tensions.[10] In response to the movements in the twenties and thirties specific responsive arrangements were created, allowing for protection. Protective facilities and the whole system of asylum has changed over the decades. Whereas the politically pragmatic response to mass forced movements in the early part of the twentieth century was to make protective arrangements for incoming masses, the political situation has evolved to suggest that restrictive protection for limited numbers away from the country of origin, and ambitious plans for protection *in situ* are the pragmatic responses of the nineties. As such, protection has evolved. The question is whether this evolution is appropriate.

The word 'origin' in the above definitions was held to signify territorial roots, in other words, these original refugee definitions were territorially based. Further definitions were employed, in which ethnic rather than territorial origins were used as defining characteristics, in order that minorities could be distinguished so that no particular group from one territory could be left out. In addition, the notion of loss of protection was not defined in conditional terms. No specific reasons were required to determine the basis for loss of protection, such as flight

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[8] Ibid., p.123.

[9] Ibid., p.125.

[10] Similarities between the beginning and end of the twentieth century are being drawn in other areas of international relations including for example the administration of disputed territories or those relinquished by vanquished states. See for example Lopez-Reyes, R., 'United Nations Zones of Peace Territories: a proposal for transforming the Trusteeship system', Peace Research, Vol.27 No.1 (1995).

from conflict; fear of persecution; or grounds for flight such as race, religion or political opinion, as would later appear in the 1951 Convention.

In 1933, "the time was ripe for a legally binding instrument: a Convention relating to the International Status of Refugees was adopted at Geneva on 28 October".[11] This was followed in 1935 by arrangements for certificates of identification for those fleeing the Saar; in 1936 by provisional arrangements, and in 1938 a Convention, concerning the status of refugees coming from Germany. The definition used in this latter Convention was:[12]

> 1 (a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German Government;
> (b) Stateless persons not covered by previous Conventions or Agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government.
> 2 Persons who leave Germany for reasons of purely personal convenience are not included in this definition.

These instruments were followed in 1939 by arrangements for those fleeing Austria, in which the definition stated that recognised refugees are those[13]

> Persons having possessed Austrian nationality not possessing any other than German nationality who are proved not to enjoy, in law or in fact, the protection of the German Government; and
> (b) Stateless persons not covered by any previous Convention or Arrangement and having left the territory which formerly constituted Austria after being established therein, who are proved not to enjoy, in law or in fact, the protection of the German Government.
> Persons who leave the territory which formerly constituted Austria for reasons of purely personal convenience are not included in this definition.

Grahl-Madsen notes that these definitions for the first time refer indirectly to people leaving due to persecution.[14] At this point the definitional terms shift from refugeehood based on loss of protection for unspecified (but commonly understood) reasons, to refugeehood based on flight from persecution. The concepts of persecution and loss of protection are very closely linked, since as Goodwin-Gill

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[11] Grahl-Madsen, op.cit., p.13.

[12] Ibid., pp.131-132.

[13] Ibid., pp.132-3.

[14] Ibid., pp.131-132.

notes:[15]

> The persecuted clearly do not enjoy the protection of their country of origin, while evidence of the lack of protection on either the internal or external level may create a presumption as to the likelihood of persecution and to the well-foundedness of any fear. The core meaning of persecution readily includes the threat of deprivation of life or physical freedom. In its broader sense, however, it remains very much a question of degree and proportion...

Quite how the link between persecution and loss of protection is interpreted depends very much on the political context at the time of attempted understanding. It is heavily influenced by the relationship between the sending and host states and their governments, and the relationship between the host government and opposition groups in the country of origin of refugees.

The use of the term 'persecution' in refugee definitions leads to a more limited scope of the word 'refugee' in the context of civil war. Arguably the breakdown of state order indicates a general loss of protection for entire groups of people, hence persecution, or the fear thereof, can be seen as a potential consequence of this breakdown, although not always in respect of each individual citizen.

Over time, the effectiveness of the League of Nations was declining, and its competence to deal with the on going refugee situation diminished. There was no international commitment to solving the causes of displacement, and in addition, with high unemployment and the foreign policy benefits of protection not obvious, the perceived need and desire to protect was disappearing. One ultimate manifestation of the ineffectiveness of international protection in the inter-war period is often said to be the large numbers killed in the holocaust.[16]

The first definition to be cited here which does not have the qualification of specific ethnic or territorial origins is that adopted in 1936 by a Brussels session of the Institut de Droit International in resolutions on the 'Statut juridique des apatrides et des réfugiés' (Legal status of stateless persons and refugees) of which Article 2

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[15] Goodwin-Gill, G.S., The Refugee in International Law, (Oxford: Clarendon, 1983). p.38.

[16] Loescher, G., 'The International Refugee Regime: Stretched to the limit?', Journal of International Affairs, Vol.47 No.2 (Winter 1994) pp.354-5.

(2) defined a refugee as:[17]

> "tout individu qui, en raison d'événements politiques survenus sur le territoire de l'Etat dont il était ressortissant, a quitté volontairement ou non ce territoire ou en demeure éloigné, qui n'a acquis aucune nationalité nouvelle et ne jouit de la protection diplomatique d'aucun autre Etat."

This is not a legal definition but rather a statement of the political and sociological opinion of the time. The defining characteristics of this definition, involving political events, without specifying the nature of those political events, and of territoriality acknowledge the political realities of that time as do all the above definitions. A development of understanding was needed to recognise flight from totalitarian regimes, and flight from territorial expansion and conflict as elements of refugeehood. In this way, this definition demonstrates the over-riding theme of this chapter, that definitions of the term 'refugee' in international law and politics tend, quite naturally, to suit the contemporary circumstances of the drafters. The Institut de Droit International definition also acknowledges that loss of protection can stem from removal of protection by the government in question, and/or refusal of protection by the refugee. However, this is the first time in the definitions seen here that the individual had been specified rather than a group.

Perhaps the most comprehensive commentator on refugee law and definitions in the 1930s was John Hope Simpson. He noted the deficiencies of all the definitions current in the late 1930s and himself offered a detailed alternative which emphasised his opinion that the essential quality of a refugee was flight from the territory of habitual residence.[18]

> The essential quality of a refugee...may be said to be that he has left his country of regular residence, of which he may or may not be a national, as a result of political events in that country which render his continued residence impossible or intolerable, and has taken refuge in another country, or, if already absent from his home, is unwilling or unable to return, without danger to life or liberty, as a direct

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[17] Quoted in Grahl-Madsen, op.cit., p.74. The translation of this definition appearing in Jackson, Ivor C., 'The 1951 Convention relating to the status of refugees: A universal basis for protection', International Journal of Refugee Law, (Special Issue: The 1991 Geneva Colloquium), Vol.3 No.3 (1991) p.405:

> any person who, because of political events arising in the State of which he is a national, has left or remains outside the territory of that State, and has not acquired another nationality and does not enjoy the protection of another State.

[18] Cited by Grahl-Madsen, op.cit., p.74. [John Hope SIMPSON, 'Refugees. A Review of the situation since September 1938, The Refugee Problem, (London:OUP, 1939).]

> consequence of the political conditions existing there. In general the refugee cannot return without danger to life or liberty, though it may be, in some cases, but by no means in all, that complete political submission to the authorities would enable him to return and live at peace. The term political in this description is used in a sense wide enough to include religious conditions. Other features of the existence of a refugee, such as the absence of *de jure* national status (ie statelessness) may be incidental but are not essential to his quality as refugee in the non-technical sense. He is distinguished from the ordinary alien or migrant in that he has left his former territory because of political events there, not because of economic conditions or because of the economic attractions of another territory.

This unofficial definition demonstrates key features of refugeehood contained in the official definitions of the time, but excludes any limitations of territorial or ethnic origins. Particularly noteworthy is that this explanation of refugeehood contains notions of flight from conflict, and protection from forcible return, however temporary.

Just as events following the First World War, including regional or internal conflicts and territorial changes, caused flights for which the members of the League of Nations saw a need to formulate arrangements the events of, and migrations resulting from, the Second World War caused the United Nations to establish instruments and institutions to regulate refugee definitions and the handling of refugee crises. These post World War Two developments began in 1946 with the Constitution of the International Refugee Organisation. In this Constitution a separate definition is used for those described as 'displaced persons', a distinction which many, such as Grahl-Madsen, felt became redundant once the IRO constitution became but another component of past laws assumed by the 1951 Convention.[19]

Part I, section B of Annex I to the IRO Constitution [1946] said:[20]

> 'displaced person' applies to a person who has been deported from, or has been obliged to leave his country of nationality or of former habitual residence as a result of the actions of the Nazi or fascist regimes or of regimes which took part on their side in the Second World War, or of the quisling or similar regimes which assisted them

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[19] However, it should be noted that, as will be seen below, the term is still used within the context of the notion of the 'good offices' of UNHCR, although it is not involved in the definition of a Convention refugee.

[20] All citations of IRO Constitution taken from Grahl-Madsen, op.cit., pp.134-135.

against the United Nations; for example persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons.

Part I section A of Annex I to the IRO Constitution stated that a

> 'Refugee' is a person who has left or is outside of his country of nationality or of former habitual residence, and who, whether or not he has retained his nationality, belongs to one of the following categories:
> (a) victims of the Nazi or Fascist regimes or regimes on their side, whether enjoying international status as refugees or not;
> (b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not.
> (c) Persons who were considered 'refugees' before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion. [NB This is not necessarily concerned with any particular instrument.]

Paragraphs II to IV also described as a 'refugee'

> anyone, other than a 'displaced person' as defined in the IRO Constitution, who is outside his country of nationality or former habitual residence, and who as a result of events subsequent to the outbreak of the second world war is unable or unwilling to avail himself of the protection of the government of his country of nationality or former nationality.
> Victims of Nazi persecution returned to Germany or Austria as a result of enemy action, but not yet firmly resettled.
> Unaccompanied children, war orphans outside the country of origin.

These definitions are still restricted in terms of geography, time and specific events, although they do incorporate and build on past definitions and thus become more 'universalised' and comprehensive than previous definitions. One finds in them direct reference to the notion of victim, and thus to the element inherited by the 1951 Convention definition of persecution as the propelling force behind refugeehood. However, unlike the Convention which is aimed at refugees as activists or as targets, these definitions refer also to more general victims.[21] Other important features are that they are based on ideological points of reference, and deal with situations which have already arisen, rather than offering forward planning for possible future crises.

The above definitions mention victims of the Falangist regime and the Spanish Civil War which is an important reference point in a discussion focusing on

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[21] Zolberg *et al*, op.cit., p.30.

mass flight from conflict. Only the French, tardily and somewhat reluctantly, made any alteration to the 1933 Convention and extended it to apply to these Spanish Refugees who were for this purpose defined as "persons possessing or having possessed Spanish nationality and with regard to whom it has been established that in law or in fact they do not enjoy the protection of the Spanish government."[22] This was not an amplification of the treaty based definition as it was not done at the time of France's signature or ratification; it was a unilateral extension which does not affect the definition contained in the Convention. The extension was made in 1945, and protective action during the Civil War, which started in 1936, was slow and minimal.

The origins of refugee law lie, then, in very specific definitions of groups of people from specified territorial or ethnic origins who had for unspecified reasons lost the protection of specified states. The evolution of refugee law during the period from 1920 to 1950 was from these case-by-case developments towards an individualised definition of refugees who have left their unspecified country of origin due to the persecution of particular regimes. Over the years, the definition had taken on an ideologized nature, but continued to be influenced by the political context of the time of drafting. Acknowledgement of the contextual nature of refugee definitions is perhaps the most significant point, as the recognition of the influence of political events on the definition of refugees fleeing the crises of the moment leads us to question the changing context of involuntary migration in the 1990s, and the need for parallel changes in, or extensions of definitional terms.

2. THE PRESENT: the 1951 Convention and 1967 Protocol and the Statute of the office of the United Nations High Commissioner for Refugees

Modern Refugee Law is based on the 1951 Convention Relating to the Status of Refugees and its amendments in the 1967 New York Protocol, as well as elements of the Universal Declaration of Human Rights and Humanitarian Law conventions. The treatment of refugees in the international community is also based

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[22] Grahl-Madsen, op.cit, p.131. By decree No. 45-766 of 15 March 1945.

in the Statute of the Office of the United Nations High Commissioner for Refugees.

Grahl-Madsen refers to the Convention as "the '*Magna Carta* for Refugees' and undoubtedly ... the international instrument of greatest consequence for the status of refugees in the world today."[23]

The axis of the current discussion is the Convention definition of a 'refugee', which forms the basis on which states formulate their domestic definitions and decisions concerning the nature of the characteristics which need to be identified if the protection offered by asylum is to be granted. The Convention definition describes a 'refugee' as any person who:[24]

> as a result of events occurring before 1 January 1951 and 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.

Also included is any person who:[25]

> has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.

Meanwhile, refusal of refugee status by the IRO "shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section."[26]

Importantly, the Convention also points to the rights of those states according refugee status by defining the general obligations of those recognised. "Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order."[27]

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[23] Ibid., p.20.

[24] Convention, Article 1 A paragraph 2.

[25] Convention, Article 1 A paragraph 1.

[26] Convention, Article 1 A paragraph 1.

[27] Convention, Article 2.

2.1 Drafting of the Convention: Limitations, Euro-centricity and the Cold War

The Convention marked the first broadening of refugee law from its previous confines of relation to only specific groups and territories.

The drafting history and evolution of the Convention has been summarised as follows:[28]

> The general tenor of the Convention's drafting history and subsequent evolution in practice may be summarized in three points. First, it maintained a strategically conceived definitional focus in refugee law: the principle of comprehensive humanitarian or human rights based protection for all refugees and similarly situated persons was rejected by a majority of states. Second, a universalist approach to refugee protection was defeated in favour of a Eurocentric legal mandate derived from a highly selective definition of international burden-sharing. Third, and most important, states opted to take direct control of the process of refugee determination and have established an international legal framework that permits the screening of applicants for refugee protection on a variety of national interest grounds.

Given the ideological divisions of East and West at the time of drafting, and the voluntary absence of the Soviet bloc from the conference of plenipotentiaries[29], it is not surprising that the humanitarian and human rights concerns of the participants were strategically aimed at those wishing to flee from communist oppression, as well as those who had fled Nazi persecution during the Second World War: it was concern for the most apparent and immediate roots of refugee flows, along with a desire to assist those ideologically opposed to communism, and therefore of importance in terms of national interest for the Western, democratic, capitalist states, which permeated the limitations to be found in the defining of a 'Convention Refugee'. These limitations are found most significantly in the geographic and temporal restrictions already referred to above, and also in the essential role given to the undefined term of 'persecution' as the root cause of forced

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[28] Hathaway, James C., 'A Reconsideration of the Underlying Premise of Refugee Law', Harvard International Law Journal Vol.31 No.1 (1990) p.144.

[29] See Hathaway, Ibid., p.145. Hathaway describes how while they felt stateless persons should be assisted by UN, the socialist bloc objected to protection for refugees, who they considered as "traitors who are refusing to return home to serve their country with their fellow citizens"[Statement of Mr. Soldatov of the USSR in UN Doc. A/1682 (1950), Ibid., footnote number 102]. [NB Thousands were made stateless in the 1920s by the emergent USSR.]

migration.

In considering the Eurocentric nature of the Convention it is important to note that not only did the Convention concentrate on European events, and those displaced by them, but of the 26 plenipotentiaries at the conference, 17 were European, and 16 of those were from the West of the descending Iron Curtain.[30] It was not surprising that the original 1951 Convention had been Euro-centric given the nature of world politics at that time, including the scarcity of independent states in Africa and Asia. Considering political realities of the moment, this had to be so, and the Protocol formed one exercise in re-dressing this balance.

The dateline of the Convention (Article 1 A (2) events occurring before 1 January 1951) is significant because of the contextual indication it gives of the desires of the Western governments to protect not only those displaced by the events and aftermath of the Second World War, but also those fleeing the Communist regimes of Eastern Europe. That is to say that in an environment of increasing movement towards regional integration in the West and increasingly cool ideological opposition to the regimes of the East, the European refugee situation was composed not only of those uprooted by the events of the Second World War, but also those fleeing the newly installed communist regimes.

An indication of the acknowledgment of the Cold War ideological terms of the definition is to be found in a statement by Mr. Rochefort of France, a participant in the conference of plenipotentiaries:[31]

> [T]he definition of the term 'refugee'...was based on the assumption of a divided world. If, however, it was considered that a single text should cover both refugees from western Europe seeking asylum beyond the 'Iron Curtain' and refugees from the latter countries seeking asylum in western Europe, [it was unclear] what the moral implications of such a text would be. The problem of refugees could not be treated in the abstract, but, on the contrary, must be considered in the light of historical facts. In laying down the definition of the

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[30] Delegates came from: Australia; Austria; Belgium; Brazil; Canada; Colombia; Denmark; Egypt; France; Federal Republic of Germany; Greece; Holy See; Iraq; Israel; Italy; Luxembourg; Monaco; Netherlands; Norway; Sweden; Switzerland (representing also Liechtenstein); Turkey; United Kingdom; United States of America; Venezuela; Yugoslavia. There were also observers from Iran and Cuba, and non-voting participants from UNHCR, ILO, IRO, the Council of Europe. A number of NGO representatives also participated as observers.

[31] Hathaway, op.cit., p.149, footnote number 123. [UN Conference of Plenipotentiaries on the Status of Refugees and Stateless persons. UN doc. A/CONF.2/SR.22 (1951)].

> term 'refugee', account had hitherto always been taken of the fact that the refugees principally involved had originated from a certain part of the world; thus, such a definition was based on historical facts. Any attempt to impart a universal character to the text would be tantamount to making it an 'Open Sesame'.

The Convention and its definition were not universal, in that they were not intended to apply to people from every part of the world, nor to people fleeing all situations which might result in forced migrations. Specifically, the intention was not to develop concern for flight from any armed international or civil conflicts which might occur, particularly because such conflict was, in the political context of the time, not expected. The Convention was to be used by the drafting Western states in dealing with arrivals from the East. Only with the purposeful addition of the New York Protocol in 1967 did those fleeing Africa and Asia, for example, gain the potential for recognition. With the removal of the geographic and time limitations in the Protocol, the universal possibilities of the originally Euro-centric Convention were, to some extent, realised.[32] This evolution was of a corrective nature, with the aim of making the Convention less European in the light of decolonisation and the new political climate, as well as mass movements, that brought about. The problem the Western states are faced with in the 1990s is that those fleeing eastern Europe are fleeing states of fledgling democracy, generally because of economic hardship or civil conflict. Those fleeing for the latter reason are the people who need protection, for similar reasons to those who received protection under the League of Nation's arrangements in the twenties and thirties, and those who did not receive protection at the time of the genocide of the Second World War.

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[32] See Ortiz Miranda, Carlos, 'Toward a Broader Definition of Refugee: 20th Century Development Trends', California Western International Law Journal, Vol.20 (1990) p.325: Also Aleinikoff, T. Alexander, op.cit., p.622. Article 1 of the Protocol states:

> 1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.
>
> 2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and . . ." and the words ". . . as a result of such events", in article 1 A (2) were omitted.
>
> 3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the Protocol.

2.2 Statute

The mandate of the office of the United Nations High Commissioner for Refugees is the one element of refugee protection established in the early 1950s which has evolved in line with the contemporary realities of displacement.

On 3 December 1949, the General Assembly of the United Nations decided to establish a High Commissioner's Office for Refugees, and requested the Economic and Social Council [ECOSOC], amongst others, to put forward proposals for an appropriate definition of those migrants who would fall under the competence of this office. ECOSOC had already, in August 1949, established a committee to consider the possibilities of a Convention relating to the Status of Refugees, the report of which was adopted in August 1950, including a definition. The ECOSOC definition was restricted in temporal and geographic terms, as has been seen above. However, the General Assembly decided this was too limited, and removed the word 'Europe' from the more general definition it adopted for the Statute establishing UNHCR on 14 December 1950.[33] This definition became:

> [Chapter II, 6] The competence of the High Commissioner shall extend to:
>
> A (i) Any person who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation.
>
> (ii) Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.

Over the years, the mandate of UNHCR has evolved from this original statutory position, to cover the broader meaning of refugee. That is to say that besides covering individuals who have left their country due to a fear of persecution on

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[33] See Grahl-Madsen, op.cit., pp.103-4.

specified grounds, the mandate covers larger groups and categories who have crossed a frontier in search of protection. Since 1976 it goes further still to cover displaced persons, including the internally displaced.[34] The mandate of UNHCR has been extended, through the requests by the General Assembly in 1957 for the use of the 'good offices' of the High Commissioner to assist Chinese people who were fleeing to Hong Kong[35] and were considered 'refugees not within the competence of the United Nations'. In addition, ECOSOC Resolution 2011 in 1976 "reaffirming the eminently humanitarian character of the activities of the High Commissioner for the benefit of refugees and displaced persons", explicitly approved assistance for displaced persons.[36] In this way concrete recognition was given to flight caused by armed conflicts and internal disturbances which had to a large extent superseded the temporal context in which the UNHCR Statute and the refugee instruments were drafted.[37] In other words, while not considered to be Convention Refugees and thus generally excluded from the possibilities of protection offered by the granting of asylum, those fleeing civil war are acknowledged as being deserving of the protection of the Office of the United Nations High Commissioner for Refugees. A *prima facie* determination can be made, and UNHCR assists those in need on the basis of an objective evaluation of the situation in the country of origin, a situation not dissimilar from the League of Nations period of de-politicised group determination. The major difficulty here is over the nature of this protection, when it must take place within the battle zone.

2.3 Persecution: Relating the Definition to Civil War

The concept of persecution was left undefined in the Convention as well as in

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[34] ECOSOC Resolution 2011 of 1976 explicitly approved assistance to displaced persons. On this see Muntarbhorn, V., 'Protection and Assistance for Refugees in Armed Conflicts and Internal Disturbances: Reflections on the mandates of the International Red Cross and Red Crescent Movement and the Office of the United Nations High Commissioner for Refugees', International Review of the Red Cross, (July-August 1988) p.361.

[35] Ogata, 'Refugees: Lessons from the Past', The Oxford International Review, Vol.4 No.3 (1993) p.40.

[36] ECOSOC Resolution 2011 (LXI), Report of the United Nations High Commissioner for Refugees, 2028th plenary meeting (2 August 1976).

[37] See Muntarbhorn, op.cit., p.361 and Jackson, op.cit., pp. 410-411.

the Universal Declaration of Human Rights where the right to "seek and enjoy in other countries asylum from persecution" is declared.[38] However, the persecution in question is generally understood to be at the hand of the state of origin or of habitual residence. Restrictive interpretation and application of the Convention definition leads states to claim that flight from conflict does not stem from individualised persecution, and that those attempting to leave their country of origin to enter and seek asylum in other states are not Convention refugees and not in a position to receive the protection and rights which should be accorded to Convention refugees. The lack of definition of persecution (a term which is itself used to define refugeehood) provides scope for politically or ideologically influenced interpretations as each state formulates its own criteria for eligibility. Leaving persecution undefined also has the potential benefit of affording space for the flexibility of liberal interpretation and application, if other political circumstance permit this.

However, as Goodwin-Gill has pointed out, the five grounds for persecution set out in the Convention have been correspondingly developed in the field of non-discrimination. Hathaway, meanwhile, notes that it was to be expected that with the civil and political rights paradigm in its primacy at the time of drafting, the notion of marginalisation (leading to flight) would be described in terms approaching non-discrimination.[39] The parallels between the Convention and non-discrimination are of interest as they demonstrate a further example of the significance of the context within which the definition was formulated. The five stipulated grounds upon which a well-founded fear of persecution leading to refugee status may be based reflect the reasons behind forced migration through history, from the expulsion of the Huguenots on religious grounds in 1685 through the political flight of revolutionaries in the eighteenth and nineteenth centuries to the migration of national minorities in the early twentieth century. However, the essential questions are whether the grounds of persecution, and the concept of persecution itself, incorporate fear engendered by a civil conflict, and whether fear of persecution due to membership of a particular group targeted in the course of war qualifies in terms of the

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[38] Article 14 of the Universal Declaration of Human Rights.

[39] Goodwin-Gill, The Refugee in International Law, op.cit., p.26. Hathaway, James C., 'Re-interpreting the Convention refugee Definition in the post-Cold War era', in Baehr, P., and Tessenyi (eds.), The New Refugee Hosting Countries, (1991) p.42.

Convention definition.

> The conditions which generate a well-founded fear of persecution within an individual are commonly no more compelling than those which cause the flight of thousands from violence and civil unrest. Nonetheless, states are generally reluctant to grant permanent asylum to the latter, while they are more receptive to the former.[40]

States, being able as they are to lay down their own criteria for admission, view the fear instilled through conflict alone as *in*sufficient grounds for the granting of refugee status, and asylum.[41] The Council of Europe countries and USA in particular have held that persons fleeing armed conflict are not refugees in the sense of Article 1 A, Paragraph 2 of the Convention. However, such refugees do come under the extended mandate of the office of the United Nations High Commissioner for Refugees.[42] European states may now need to reconsider this position in the light of events in the early 1990s, particularly in former Yugoslavia. The focal point of discussion on persecution is the individualised nature of claims to refugee status under international instruments, and the distinction between restrictive and liberal interpretations of the Convention wording.

The five defining categories of those fearing persecution who should be protected are all group categories. No one has an individualised race, nationality or religion. The individual's membership of a persecuted group may often be acknowledged as sufficient grounds for the granting of asylum. However, membership of a particular social group, religion or ethnic minority which may be persecuted during a conflict does not, under a restrictive interpretation of the Convention, go beyond being of minor significance to a claim of "well-founded fear of persecution".[43] One reason for this is perhaps the capacity for processing claims. The application of the Convention, that is the analysis of the relation between the subjective and objective elements of fear and persecution, is usually

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[40] Goodwin-Gill, G.S., '*Nonrefoulement* and the new asylum seekers' in David A. Martin (ed.) The New Asylum Seekers: Refugee Law in the 1980s - the Ninth Sokol Colloquium on International Law, (Dordrecht: Martinus Nijhoff, 1988) p.108.

[41] This has been the position of EU Member States with regard to those fleeing the conflict in the former Yugoslavia, as will be discussed below.

[42] See Jackson, op.cit., pp.410-411; Goodwin-Gill, Refugee in International Law, op.cit. pp.17-18; Muntarbhorn, op.cit., p.361.

[43] See for example, Moussali, Michel, 'Réflexions sur l'actualité de la convention de 1951 relative au statut des réfugiés', (Geneva: UNHCR 1988).

held to relate to the individual. If, under a liberal interpretation, membership of a group persecuted during a civil conflict was found to be sufficient grounds for recognition of refugee status, the numbers seeking admission would be far too large for individual analysis. Some contend that this is not how the Convention should be applied in such cases. Arguing that approaching the Convention as a document appropriate only to cases of individual persecution is open to question, Egan points out that the oppression the drafters of the Convention had in mind was generalised and group-defined. She continues by suggesting that a process of establishing that one was singled out for persecution denies the forward looking nature of the definition, which talks of "well-founded fear of persecution", that is a fear an individual may have because of the generalised oppression of a group to which he or she belongs.[44] Such a liberal interpretation of the Convention might allow for the application of its definition to those fleeing civil war, while the restrictive interpretation employed by Western states clearly does not.

As Western governments persist in their restrictive interpretation and application of the Convention are changes to the definition necessary to bring it into line with the changed circumstances of the early 1990s, or is it sufficient as it stands, as a cornerstone, which regional instruments should be brought in to complement?

That the Convention is a cornerstone of refugee law, which retains usefulness as an almost universally accepted and acknowledged, if increasingly restrictively applied instrument is not to be ignored. However, as Goodwin-Gill has noted "[f]rom the onset it was recognised that, given its various limitations, the Convention definition would not cover every refugee."[45] In the 1980s and '90s, the appropriateness of the Convention as the sole instrument of international refugee law, and particularly the definition of a 'refugee' it upholds has been increasingly questioned. This questioning becomes particularly pertinent when one considers that the refugee crises facing Europe in the 1990s are most likely to arise from the aftermath of the collapse of the communist regimes in eastern Europe, the very

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[44] Egan, Susan J., 'Civil War Refugees and the issue of "singling out" in a State of Civil Unrest', Discussion Paper, Centre for Refugee Studies and Centre for research on Public Law and Public Policy (1991) p.3.

[45] Goodwin-Gill, The Refugee in International Law, op.cit., p.13.

regimes which influenced the ideologically charged defining of a refugee in the context of the icy Cold War of 1951. Writing in the 1990s, it is interesting to compare the juxtapositioning of West European unity over refugee issues at the time of drafting of the Convention, and the positioning of the refugee debates of the last decade within the issues involved in the widening and deepening of European integration. Added to the more recent linkage of refugee issues and wider European politics is of course the role the fledgling democracies of eastern Europe might play in the future of the continent, including cross frontier migration.

In concluding it must be noted that the definition of a 'refugee' in the 1951 Convention and 1967 Protocol offers a continuing solid basis for refugee protection. However, just as the mandate of the United Nations High Commissioner for Refugees has evolved to accommodate changing political realities, a similar evolution of state practice, symbolised and controlled by international legal instruments, may be necessary, desirable and possible. This evolution would need to take into account the ideological framework of the international system influencing forced migration; the nature of push factors; and the context within which migration takes place. Some evolution would appear necessary if those fleeing conflict *en masse* are to be protected by the international community in a humanitarian spirit. The concern is to establish where international instruments can develop in order to maintain, or, under the restrictive circumstances in place, even increase, levels of protection for those in flight from the post-Cold War malaise of civil conflict.

3. THE FUTURE: Temporary Protection?

The defining conditions of short term or group refugeehood are not established in the concrete terms of international legal or policy instruments, so it is necessary that the inclusion of temporarily protected 'refugees' in this chapter be speculative in nature. In speculating, however, one can note those elements of existing law and practice which might be relevant to a future definition, and examine both concrete and abstract proposals put forward by those handling crises arising from civil war which could lead to developments in this direction.

> "[T]emporary protection offers a means of affording protection to persons involved in large-scale movements that could otherwise

> overwhelm established procedures for the determination of refugee status while privileging safe return as the most desirable solution to refugee problems."[46]

Many of the mass refugee movements of the 1990s may best be dealt with by the granting of temporary protection, in line with the minimum protection guaranteed by nonrefoulement, and in keeping with the notion of burden sharing.[47] This concept is not new, although its widespread application if achieved might be.[48] An example of historical precedent for the granting of temporary protection prior to a more durable solution realised through resettlement can be found in the protection thousands of Hungarian asylum seekers temporarily found in Austria and Yugoslavia, in 1956, with 170,000 of them being resettled elsewhere within eighteen months, as the situation in Hungary did not alter, and the burden became too great for those two states to handle.[49]

The first conceptualisation of the practice of temporary refuge came with the Vietnamese Boat People Crisis. The first mention of this concept in official documents came with Conclusion 15 of the Executive Committee of UNHCR in 1979, which was concerned with the reception of Boat People in coastal states. The fluidity of the terms used is demonstrated in the progress from use of the words temporary *refuge*, to temporary *asylum* (that is the situation of the 'potential refugee' in the period up until the decision on an asylum application has been made) to temporary *protection*, the term used in recent documents from UNHCR, which have abandoned temporary *refuge*, as not being a solid enough term.[50]

A 1992 statement by the UNHCR has put its position as being that "persons fleeing from the former Yugoslavia who are in need of international protection

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[46] UNHCR, Background Note, 'Comprehensive Response to the Humanitarian Crisis in Former Yugoslavia', Informal Meeting on Temporary Protection (Geneva, 21 January 1993). p.7. Section III Note 21.

[47] Burden-sharing is the concept whereby states should spread the financing and support of refugee crisis across the international community. It is referred to in the preamble of the 1951 Convention.

[48] Goodwin-Gill, Refugee in International Law, op.cit., p.115. "In fact, the practice of temporary refuge, of admission and protection (ie asylum) on a temporary basis has a long history, even if the attempt at conceptualisation is relatively recent."

[49] There is an account of this precedent in Chapters 8 and 9 on Austria and the UK respectively.

[50] Seminar presented by Gilbert Jaeger, at The Refugee Studies Programme, Queen Elizabeth House, Oxford (19 January 1994).

should be able to receive it on a temporary basis."[51] One response to the large flow of displaced persons fleeing the conflict in former Yugoslavia has been the Slovenian government's proposal for the formulation of a new definition of "temporary refugee". This would imply an obligation to provide humanitarian necessities and amenities in accordance with the temporary nature of the stay of the refugees, who, having been displaced by this type of aggression "wish to return to their homes."[52]

Various states have their own domestic mechanisms for dealing with categories of so called *de facto* refugees, that is "those persons who are refugees in a broader sense than that allowed for by the Refugee Convention, but who cannot be returned to their countries of origin for humanitarian reasons."[53] These are essentially political (rather than legal) categorisations of refugees who do not meet the legal requirements for the granting of Convention status. This exceptional form of protection first arose in the 1970s, as a response to the changing character of refugee movements. It comes under various titles, such as B-status; Humanitarian status; in the US it is called 'temporary protection' and in the UK, 'exceptional leave to remain'. Cels states quite clearly that "Governments have argued that *de facto* refugees do not fall within the provisions of the Convention, but are *rather fleeing civil war* or seeking economic betterment."[54] Others see liberal interpretation of the Convention as the solution to the problem of *de facto* refugees. Meanwhile, no international legal instruments to regulate state behaviour towards this category of migrants have been developed, a fact which Cels attributes to "the unwillingness of states to agree to additional obligations, the conflicting interests among states, and the absence of political commitment."[55]

There is a current, solid basis for temporary protection in nonrefoulement.

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[51] UNHCR, International meeting on Humanitarian Aid for victims of the conflict in the former Yugoslavia, (Geneva, 29 July 1992), Section 5 Point 12. Underlined in the original.

[52] The Government of the Republic of Slovenia, 'Temporary Shelter of Refugees from Bosnia and Herzegovina in the Republic of Slovenia', Ljubljana, (March 1993)

[53] Cels, Johan, 'Responses of European States to *de facto* Refugees, in Gil Loescher and Laila Monahan (eds), Refugees and International Relations, (Oxford: Clarendon Press, 1990), p.187.

[54] Ibid., p.192. [Emphasis added].

[55] Ibid., p.202.

This is the element of the Convention which can be invoked to protect even those asylum seekers not covered by a restrictive interpretation of the Convention definition, and which all commentators insist must never be denied.[56] Article 33 of the Convention states that:[57]

> 1. 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.

This sets out the concept of nonrefoulement, that is the non-return of refugees to the country of origin, or any other state, while there may be threat to life or physical integrity. The principle of non-return has become an accepted element of customary international law for *de facto* as well as Convention refugees, and as such applies also to those fleeing civil war, as long as hostilities continue. This practice offers both the potential for and a basis to temporary protection, guaranteeing a "limited but fundamental protection, short of asylum, residence or other durable solution."[58]. Meanwhile, the practice of nonrefoulement itself would be further strengthened if temporary protection were to be defined and codified, and further developed as a concept. If a state does try to return refugees to their state of origin, they must justify this action in the light of prevailing conditions in that state. Furthermore, if a state, by enforcing the safe third country principle,[59] begins a chain of return which ultimately results in the protection seeker being sent back to the country of origin, it is as responsible as the actual *refoul-ing* state for the breaking of this element of legal protection for asylum seekers.[60]

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[56] See, for example, Goodwin-Gill, 'Non-refoulement' op.cit.; Moussali, op.cit. p.2; Joly, Daniele with Clive Netterton, Refugees in Europe, Minority Rights Group Report, (Nottingham: Russell Press, 1990) p.8.

[57] Convention, Article 33.

[58] Goodwin-Gill, 'Nonrefoulement', op.cit., p.105.

[59] The principle by which a state considers it appropriate to return an asylum-seeker to a state through which he or she transited and in which protection could, in the view of the returning state, have been sought and found in safety. See Chapter 5.

[60] Kjaerum, M., 'Article 14', in Eide, A., G. Alfredsson, G. Melander, L.A. Rehof and A. Rosors (eds.), The Universal Declaration of Human Rights: A Commentary, (Oslo: Scandinavian University Press, 1992) p.227. Goodwin-Gill, G.S., 'Editorial: Asylum: The Law and Politics of Change', International Journal of Refugee Law Vol.7 No.1 (1995) p.5 points out, with reference to the case of the Kurds in northern Iraq in 1991 that "[t]he responsibility for ensuring the conditions necessary for observance of the *non-refoulement* principle rested with the international community as a whole." He also

3.1 A need for change?

Walter Kalin presents three arguments concerning the 1951 Convention.[61] The first, which he says is put forward by most Western governments, is that the Convention was adopted to resolve the specific problem of the situation of remaining World War II refugees, and that application to new situations should be restrictive. The second argument is a call for new instruments to "overcome limitations of protection...for humanitarian reasons." The third is an advocation of a liberal interpretation of the Convention, which is seen to still be a valuable instrument.

A restrictive interpretation of the Convention definition does not allow protection to those fleeing civil war. The first argument presented by Kalin assumes no leeway for adaptation or broad application.[62] The latter two arguments are deserving of attention, as a restrictive application has already been seen not to include those fleeing civil war, and it is clear that this argument will not allow for application to such crises. The potential usefulness of new instruments, be they regional or universal, broader application of the Convention and extensions to it, therefore deserve closer examination.

3.1.A Broader Application?

> "...if the Convention is to remain meaningful to meeting the needs of modern refugees, and therefore to continue to play its important role of mitigating immigration control in instances of real and compelling threat to human rights, we must look to the core meaning of the Convention definition, and transpose that core meaning to contemporary reality."[63]

While it seems that the Convention definition can provide a basis for modern refugee law, a need for a contextualised interpretation of the concept of persecution

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indicates that this is practical politics, providing a lesson for lawyers and others who would see international obligations in essentially static or mechanistic terms.

[61] Kalin, Walter, 'Refugees and Civil Wars: Only a Matter of Interpretation?', International Journal of Refugee Law Vol.3 No.3 (1991) p.435.

[62] This argument also denies the historical context of the ideological nature of the definition discussed above.

[63] Hathaway, 'Re-interpreting', op.cit., p.40.

and the grounds on which it is feared might be required if it is to retain its value. Reliance on a strict or historical interpretation will not solve the problems arising from the type of refugee crises emerging in the 1990s. The Convention originated, in part, from a humanitarian desire to assist human beings whose lives or physical integrity were under threat in their country of origin or habitual residence. This same principle could be used today in broadening a contextualised understanding of the Convention definition, and in complementing or completing it through the addition of other regional instruments. As T. Alexander Aleinikoff states, "...the Convention remains the 'cornerstone' in the universal protection of refugees; at the same time, a complete edifice of international protection remains to be constructed."[64]

3.1.B Regional Instruments

Aleinikoff also points to a future in which regional approaches to refugee law and policy may hold the key.[65] In terms of refugee law, western Europe sometimes appears to be among the least committed of the regions to the original humanitarian underpinnings of the Convention.[66] Recommendation E of the Convention state:

> "The Conference,
> Expresses the hope that the Convention relating to the Status of Refugees will have value of an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."

In line with this, it may be useful to expand on the basis provided by the universal Convention in the formulation of regionally appropriate mechanisms for refugee crisis management.

One such regional instrument already exists in the form of the Organisation

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[64] Aleinikoff, op.cit., p.625.

[65] Ibid., p.624.

[66] Ibid., p.623.

of African Unity Refugee Convention of 1969.[67] This includes those displaced by civil unrest in the category of refugee.[68] It gives a definition in keeping with political reality in the region. During the Cold War, the Convention definition may have been sufficient for the types of regional refugee generating situations western European states faced.[69] However, the conflict in former Yugoslavia and movements in the CIS and North Africa indicate that Europe faces, and will face, refugee producing situations which are not covered by a restrictive application of the Convention definition. The question is whether, when existing instruments are not being adapted to fit the new crisis, new instruments become necessary. While the Convention definition may remain a cornerstone to refugee law in the 1990s, it may be that Europe needs either a new (regional or universal) definition to deal with the modern political reality, or to establish new guidelines to allow for a more liberal interpretation of the existing definition.

There are, it must be said, potential problems arising from regional approaches. For example, they could be used as a basis for a reduction of support for refugees, particularly those from other regions, and could also result in derogations from universal norms due to claims of special regional needs or traditions.[70] These apprehensions lead to calls for a firm defence of the Convention as the absolute minimum which states and regions might expand on, but must never reduce.

The establishment of a definition of who should receive temporary protection and a conceptualisation of such protection bring the advantages of ensuring admission and nonrefoulement, saving lives and increasing the pressure on receiving governments to find solutions to civil conflicts. The biggest questions are whether

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[67] There is also the Cartagena Agreement in Latin America, but it is not binding on governments. It offers a similar definition to the OAU Convention, including protection for those fleeing civil war. Cartegena Declaration: La protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios: Memorias del Coloquio, (Cartagena, Colombia: ACNUR/ Centro Regional de Estudios del Tercer Mundo/ Universidad Nacional de Colombia, 1984).

[68] 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa: 1001 *UNTS* 46; text also in UNHCR, Collection of International Instruments relating to Refugees (1979), Article 1, paragraph 2.

[69] The arrival of large numbers of migrants from the East was any way unlikely due to restrictions on emigration.

[70] See eg. Aleinikoff op.cit., p.624.

states have the political desire to extend, apply and adhere to international law in their admissions and asylum policies, and whether, in the context of civil war, the advantages of 'temporary protection' outweigh any limitations, such as a possible counter-balance of reductions in the granting of asylum and potential eventual involuntary repatriation.

CONCLUSION

The debate concerning definitions, while not solving refugee crises in and of itself, is neither redundant nor over. Refugee law evolved between the 1920s and 1951 from *ad hoc* very specific, limited definitional terms, in need of constant revision and new instruments with each crisis as it arose, to a more general definition with universal potential although aimed at the individual. This allowed states to conform to an agreed standard of recognition, although interpretations of the definition vary and the universal focus has come to lie on sovereign restrictions on entry. The evolution of definitional scope of those agencies dealing in international protection has also evolved, not only in the years up to 1950, but also since.

However, the 'universal' definition of a 'refugee' contained in the 1951 Convention, and amended in the 1967 Protocol, while applicable to the crises of the time of drafting, and still useful, indeed essential, has not evolved into an instrument of protection commensurate with all political realities. It is doubtful that any definition satisfactory to all states could cover all possibilities. Citations of reports from the time of drafting, as well as Recommendation E of the Convention itself, show that those involved in the creation of modern refugee law had no desire for it to remain static, or be restrictive, denying protection to those in evident need. People who flee war are not automatically included in the scope of the Convention definition, although some commentators think the means and flexibility for liberal interpretation of this cornerstone of refugee protection are in place. At the same time, *de facto* statuses are not applied broadly enough, nor well enough defined, to allow ample scope for the humanitarianly inspired protection or even admittance of those fleeing armed conflict.

The UN standard of international legal definitions allows for the classification

of two out of three categories of refugees.[71] Those who actively oppose the governing party or system of their country of origin, and are, as a result, persecuted (or likely to be persecuted) by that state and choose to escape are one category. Those who, because of their ethnic, racial or religious origins are targeted for persecution by the state are also included. However, the category of innocent victim is excluded, as is the group victim who is indiscriminately targeted in a war. Some of this latter category may squeeze into the second interpretation of the legal definition, or be politically defined as *de facto* refugees under some circumstances in some states. However, the victim groups, usually minorities or the stateless, do not fit the legal definition, and are often lucky to be categorised in the scope of the political notion of who a refugee is. They form a large constituency of protection seekers in times of social and political upheavals of the type Europe is witnessing in the process of re-establishing itself at the end of the Cold War. Ideas of how to effectuate protection appear ever more sophisticated. However, for all the sophistication of concepts, the practical protection of the victim group is not a provable fact in 1995. Measures under the broad title of temporary protection have firm foundations. The bases of the potential for temporary protection lie in the spirit of humanitarianism, the concepts of international human rights law and the notion of nonrefoulement, as well as in notes issued by UNHCR and speeches made by members of governments of those states most heavily burdened by refugee influxes from former Yugoslavia in particular.

There are valid arguments for why there should be changes in the definition of a 'refugee'. However, since states are restrictive in their application of, and often even reluctant to uphold, the conventions they have already signed on this subject, wide ranging changes might be unlikely. In any case rigid definitions have the potential for exclusion as much as inclusion, as is the case of the very Convention definition of a refugee on which this discussion centres. The most important point is that contextual flexibility and an evolution in refugee law and policy has been a norm of the twentieth century. That this norm should be broken with because a 'universal' standard was largely sufficient for Europe's refugee inflows over four decades, particularly when accompanied by adaptable humanitarian statuses over the latter two decades of this period, would be to deny the whole foundation upon which that standard was built.

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[71] See Zolberg *et al*, op.cit., p.30.

Chapter 2

WHAT IS PROTECTION?

Protection can be interpreted as "the act of upholding fundamental human rights, such as the core rights declared in the covenants on civil and political rights, and on economic and social rights,"[1] and includes also the very specific right of nonrefoulement. The Executive Committee of the High Commissioner's Programme said in 1980 that those granted temporary refuge should enjoy "basic humanitarian standards of treatment".[2] This might appear quite straightforward: protection means respecting human rights while treating a person in a humanitarian way. However, while humanitarianism informs policy making to a degree, domestic and international political and security concerns have even greater effect.[3] When establishing how, as well as to whom, protection is to be afforded, therefore, decisions are affected by questions which go beyond agreements on human rights standards. The dilemma comes when one stops to consider what 'human rights' are, who accords and upholds such rights, where the line between humanitarian protection and humanitarian assistance is to be drawn and the distinction between protecting a life in safety and giving a protected life a certain quality and dignity.

1. Human Rights and Refugees

The relationship between human rights and refugee or protection policies is threefold. Firstly, a person is defined as in need of protection (be they a refugee in the legal or the political sense) on the basis of persecution or the violation of their

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[1] Helton, A.C., 'Displacement and Human Rights: Current Dilemmas in Refugee Protection', Journal of International Affairs Vol.47 No.2 (Winter 1994) p.383.

[2] Executive Committee of the High Commissioner's Programme, Conclusion 19 (XXXI) (1980).

[3] See Loescher, G., Beyond Charity: International Cooperation and the Global Refugee Crisis, (New York: Oxford University Press, 1993) p.30.

human rights, including because of a conflict situation. Secondly, the upholding of human rights of forced migrants in their country of refuge is the expression of their protection. Finally, the re-establishment of human rights standards in the country of origin permits the possibility of return (whereas the non-re-establishment of human rights norms would indicate a need for longer term protection elsewhere).

Although these connections would appear obvious, states and non-governmental organisations have only recently established these links in their overt policy approaches. In the 1980s the United Nations, following initiatives from Canada and West Germany, linked human rights violations and mass exoduses, and began to promote international cooperation to avert new flows of refugees.[4] However, it often remains the case that human rights violations are only tackled once a refugee flow brings the situation in a given country to the attention of the international community. In other words, international or regional security concerns bring the attention of states to the violations by another state of the rights of its citizens. The human rights violations of themselves do not always seem to merit the concern of sovereign states over the actions of one of their brethren.

Meanwhile, the cooperation of non-governmental organisations concerned with on the one hand human rights and on the other refugees has been highlighted as minimal. Human rights groups often "treat the protection of refugees as beyond the scope of their concerns" and refugee groups "ignore the reasons that people flee and [do] not give thought to ways to remedy those conditions".[5] Neither of these positions is really acceptable and they underscore the compartmentalisation of rights issues. The situation prevails, as for example still, in 1995, the mandate of Amnesty International, perhaps the most prominent of human rights groups, concerning refugees focuses exclusively on non-return. However, a further concentration on the first category of human rights and refugee policy links, facilitating the early warning of rights violations prompting refugee flows, would not only allow states to address the conditions in the country of origin, but also to

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[4] See for example Resolution 35/124 International co-operation to avert new flows of refugees, (11 December 1980). Also, Coles, G.J.L., 'Refugees and Human Rights', Bulletin of Human Rights: I. Human Rights and humanitarian law, II. Human rights and refugee law 91/1 (New York: United Nations, 1992) pp.63-74.

[5] Refugee Policy Group, 'Refugees and Human Rights: a research and policy agenda', (May 1989) p.16.

establish appropriate protection mechanisms and facilities in case an exodus did occur.

Although attention to that first rights-refugees linkage has been limited, there has been even less consideration of the second link, that is the rights of those who are being protected. Goldman and Martin noted in 1983:[6]

> ... little or no attention has been paid to the rights accorded these persons under international law, despite the fact that the worldwide refugee crisis and the plight of undocumented aliens are among the most serious human rights problems facing the international community today.

In 1995, this situation remained much the same. There is of course a logical relationship between the rights violated causing a need for protection and the rights to be upheld during that protection. If the violation of rights causes a protection need, those same rights must be upheld for protection to be meaningful, otherwise a completely paradoxical system would evolve. The question is whether protection always must entail the guaranteeing of the full panoply of internationally recognised 'human rights' or whether under certain circumstances some nuancing could be acceptable from both a political and humanitarian point of view.

2. Human Rights and State Sovereignty: Refugees as Political Pawns

Human rights became a recognised international issue area creating a form of regime in the late 1940s.[7] In response to the most horrific experience of the human species, the genocide and extreme nationalism and racism of World War Two, the

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[6] Kogod Goldman, Robert and Scott M. Martin, 'International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law', Human Rights Quarterly, Vol.5 No.3 (Summer 1983) p.302.

[7] See Donnelly, J., 'International human rights: a regime analysis', International Organization, Vol.40 No.3 (Summer 1986). Krasner's definition is, as always, the one referred to here: "International regimes are defined as principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue area." (Krasner, S.D., 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', International Organization, Vol.36 No.2 (Spring 1982) p.185). Donnelly's article offers a convincing argument for the use of this topic of international relations, which is usually reserved for the study of international organisations and political economy, in the field of human rights. Its application to the refugee field should also not be excluded. See for example, Loescher, G., 'The International Refugee Regime: Stretched to the Limit?', Journal of International Affairs, Vol.47 No.2 (Winter 1994).

United Nations drew up a list of the rights of individuals known as the Universal Declaration of Human Rights. In essence this summarised the horror just witnessed in a cry of 'never again'.[8] The notion that humans have rights to be respected by the sovereign states they have created does, of course, go much deeper than that. However the political reality is that after experiences which people never wanted to see repeated the force of humanity overcame the force of sovereign states and international political will was sufficient to recognise that there had to be limitations to the power of governments exercising the sovereignty of and over the people.

Philosophical debate opposes the concept of human rights to the notion of state sovereignty. Practice creates the same opposition. The philosophical debate would take us into the realm of rights as natural law, and the whole area of normative theories of international relations. In the context of this thesis, however, it is the practical conceptualisation of human rights in the late twentieth century and their application and limitation by sovereign states which is of most significance.

Human rights delimit late twentieth century state sovereignty. At the same time, sovereignty, which is largely concerned with the perceived national interest, limits adherence to internationally recognised norms of respect for human rights. Sovereignty not only presents limitations to the guaranteeing of rights within different states, but also to the international enforcement of agreed standards. It also prevents any further substantial advances in this area. Essentially, the relationship between human rights and state sovereignty is something of a balancing act.

> [T]raditional approaches to asylum have been constantly complemented by flexible and innovative measures to balance the humanitarian needs of refugees with the political interests of states.[9]

A lack of respect for human rights can lead to some loss of international legitimacy for the sovereignty of a state. However, the relationship does not often go so deep as to cause the complete alienation of a given political regime and the state it represents only as a result of human rights violations, although they may contribute to the degree of exclusion from international society.

In the whole debate over the evolution of refugee law and policies in the

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[8] See Nobel, P., 'Blurred vision in the rich world and violations of human rights - a critical assessment of the human rights refugee linkage', Bulletin of Human Rights, op.cit., p.75.

[9] Ogata, S., 'Refugees: Lessons from the Past', The Oxford International Review, Vol.4 No.3 (1993) p.41.

1980s and '90s some arguments have been put forward for an entire reformulation of refugee law either in human rights terms, or with a strong inter-state foundation, taking advantage of the rules of sovereignty.[10] Both suggestions contain certain risks, not only because states would never accept them, but because they could in fact damage the protection granted to those in need. Suggestions of a system of compensation as part of the inter-state process of protection entail the risk of refugees becoming even more the pawns of inter-state political games than they have always been. The notion that states of origin might be required to give financial compensation to states of refuge taking in those displaced by rights violations including conflict, raises all manner of security as well as moral questions. Some states might, for example, feel inclined to support opposition groups, not through a legitimate desire to see the overthrow of a repressive government but in order to cause an increased flow of refugees to be paid for by the state of origin, or some international fund set up for such a purpose. Meanwhile, formulating refugee policies entirely in human rights terms risks creating a weak assistance programme as all recognition of the need for protection would become based on policy interpretations of the essence of human rights perceived at the moment of possible violation.

A more nuanced alternative to both suggestions would be found in the re-thinking of protection needs in human rights terms with a respect for the sovereign position of states called on to protect. Such a system would determine the criteria under which policies would aim at levels of protection appropriate to the situation be they: protection and assistance in the country of origin; temporary protection in neighbouring states; short term protection further afield; the need for longer term protection and integration or the opportunity for safe return.

3. The Essential Rights

The list of documents detailing agreed 'rights' of individuals is very lengthy. As well as the Universal Declaration of Human Rights it includes the Genocide

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[10] See for example, Hathaway, J.C., 'Reconceiving Refugee Law as Human Rights Protection', Journal of Refugee Studies, Vol.4 No.2 (1991) and Garvey, J.I., 'Towards a reformulation of International Refugee Law', Harvard International Law Journal, Vol.26 No.2 (Spring 1985).

Convention of 1948; the Convention Relating to the Status of Refugees of 1951; the Convention on the Political Rights of Women of 1952; the Standard Minimum Rules for the Treatment of Prisoners of 1957; The Convention on the Elimination of All Forms of Racial Discrimination of 1965; the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966; the Convention on the Elimination of All Forms of Discrimination against Women of 1979; the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment of 1984; the Convention on the Rights of the Child of 1989 and the (as yet much un-signed) Convention on Migrant Workers of 1990. In addition there are several regional documents such as the 1953 European Convention on Human Rights; the 1975 Helsinki Final Act of the CSCE; the 1978 American Convention on Human Rights and the 1986 African Charter on Human and Peoples' Rights. It would be impossible, and even unnecessary, to consider all of these documents here, as two 'universal' documents (the Universal Declaration of Human Rights and International Covenants and the Convention Relating to the Status of Refugees) and one regional document (the European Convention on Human Rights) give a useful and sufficient basis to this listing and frame this discussion of the protection of displaced people.

The key connection between human rights and refugee laws and policies lies in Article 14 of the Universal Declaration which states quite explicitly that everyone has the right "to seek and to enjoy in other countries asylum from persecution." As is the case in the 1951 Convention the exact meaning of 'persecution' is left open to interpretation, although it could be considered to mean the violation of other fundamental rights contained in the Universal Declaration. In addition, the right to seek and enjoy asylum from persecution is not limited by the Declaration to any grounds for that treatment. As many have noted, the drafting of this 'right' achieved little, as the correlative duty would have to be that of states to provide such asylum, and states had, and still have, no intention to assume such a moral obligation.[11] If we accept the contextual political reality of the formulation of the Universal Declaration of Human Rights then Article 14 would indicate a response to the lack of available protection for Jews and others from the fascist regimes. Such protection was openly denied in the 1930s when European states announced after the

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[11] See, for example, Goodwin-Gill, G.S., The Refugee in International Law, (Oxford: Clarendon Press, 1983) p.104.

Evian conference that many Jewish people trying to leave Nazi Germany were not deserving of protection and were in fact a disturbance to the economies and facilities of potential receiving states.[12] The holocaust is seen as the failure of the refugee protection arrangements of the League of Nations, and thus the cry of 'never again' naturally included a cry that never again would states deny protection to those in need.[13] The fact that fifty years on effective protection in other countries is denied to many thousands of people in similar circumstances in former Yugoslavia is perhaps an indication of the limited recall of political memory. The creation of 'safe areas' and offering of humanitarian assistance with limited protection certainly would not appear to be in keeping with the human rights Declaration. Indeed, attempts to create 'safe areas' could be said to effectively deny Article 14.[14] However it could be considered as a nuancing of the right to the protection of asylum tempered by a regard for the sovereignty of states of the region, and a demonstration of the loss of sovereign integrity by the state of origin. The question remains to what extent this is the playing of the international political game of sovereignty through the (ab)use of human rights, and to what extent it is a sufficient guarantee of the post World War Two political desire to protect humans from a repeat of genocide.

3.1 Nonrefoulement

If migrants claiming a justifiable need for protection arrive at the border of a state, a second important component of the rights involved in protection needs to be dealt with. Article 33 of the 1951 Convention relating to the Status of Refugees sets out the right to nonrefoulement, and in the European context this is supported by Article 3 of the European Convention on Human Rights. This concept applies in its purest interpretation only to those who can be recognised as refugees, not to asylum-seekers or those who might be considered *de facto* refugees (as referred to in Chapter One) but it has developed, as Goodwin-Gill has put it:[15]

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[12] Loescher, Beyond Charity, op.cit., pp.44-5. Many of those attempting to flee were categorised as leaving for personal convenience. See the definitions in Chapter 1 at notes 12 and 13.

[13] See for example Loescher, 'International Refugee Regime', op.cit., pp.354-5.

[14] UNHCR, The State of the World's Refugees: in search of solutions, (New York: Oxford University Press, 1995) p.53.

[15] Goodwin-Gill, op.cit., p.115.

> "... to include non-rejection at the frontier, thus promoting admission, but there has been no corresponding development with regard to the concept of asylum, understood in the sense of a duty upon states to accord a lasting solution."

This concept has, however, had little progressive effect on respect of Article 14 of the Universal Declaration of Human Rights. The development of the concept to include non-rejection of those who may not be admissible as refugees under the Convention definition, but whose return to the country of origin is unacceptable due to an obvious risk to their safety, for example in the case of civil war, is, however, a very important basis to protection, including, or even particularly, the development of notions of temporary protection. However, this right is seriously threatened by the adoption by developed sovereign states of the notion that some countries are safe, either as countries of origin or as countries of initial asylum. Through use of these principles people have, in the 1990s, been returned to countries where their safety cannot be guaranteed. In these cases, it is not only the ultimate returning state which is ethically, morally and legally responsible for the violation of the right to non-return, but also the country in which the application for protection was made, and which started the chain of return.[16]

3.2 Family Reunification

One important civil right, that of the unity of the family, recurs time and again in debates on immigration and asylum policies. On the one hand allowing in even just the immediate family members of a protected person involves a potential quadrupling of the number of refugees. On the other hand restricting the access of the family of a person who has managed to reach a frontier means emotional trauma for all. The person who is in safety lives in uncertainty of ever seeing his or her loved ones again, not knowing the circumstances in which they are living, and indeed whether or not they are alive. The family left behind may also have no information on the safety of the escapee. If the family was part of the same group which reached safety there is little room for discussion. If their position is the same as that of the principal family member then they too are in need of protection. The

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[16] Kjaerum, M., 'Article 14' in Eide, A., G. Alfredsson, G, Melander, L.A. Rehof, and A. Rosors (eds.), The Universal Declaration of Human Rights: A Commentary, (Oslo: Scandinavian University Press, 1992) p.227.

dilemma arises in situations where one family member has gone on ahead, trying to reach safety in order that the others (perhaps weaker family members) may follow in the certainty of reaching their safe destination fairly quickly. The same dilemma arises when governments evacuate injured people for medical treatment with the firm intention of returning them to their war-torn country of origin.[17] Having family around in a time of pain and distress is a humanitarian comfort to the patient and the family; however they might not go back, and four or even two people not returning is statistically far worse in the policy-making eye than one non-returnee. However, if the situation means the evacuee cannot be returned, is it humane to restrict the entry of the family?

The consideration of this issue takes place within the context of a Europe in which the families of guestworkers from the 1960s were becoming permanent settlers just as population growth in northern Europe started a rapid decline, and unemployment increased. This situation of a perceived increase in 'foreigners' at a time of relative socio-economic difficulty has had an impact on attitudes to migration and the whole idea of family re-unification.[18]

Some governments solve this policy dilemma by boosting their intake of humanitarian cases (making them seem caring in the voters eyes) by taking in all family re-unification cases, but excluding additional principals. The European Commission has put forward the view that the success of integration policies can be very much affected by the approach to family re-unification.[19] As one possible outcome of temporary protection would be longer term protection and integration this is a view which must be taken into account. Whether integration be short or long term, in a first country of protection or a country of resettlement or indeed if there were to be re-integration into the country of origin, respecting family unity would facilitate the successful achievement of a satisfactory outcome.

In many ways, this question of the right to family unity typifies the political

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[17] There is the supplementary dilemma here of evacuation versus the import of medical equipment and personnel to deal with more injured or ill people on the ground.

[18] Widgren, J., 'International Migration: New Challenges to Europe', Migration News, No.2 (1987) p.6.

[19] European Commission, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, [COM(94) 23 final] (Brussels, 23 February 1994), paragraph 74.

quandary over admission and the rights of those who are admitted. It raises the questions of human rights and numbers in a situation in which everyone, politician, voter, refugee advocate and refugee can imagine the distress of finding themselves. It also gives a striking example of the way in which government action can have both advantages and disadvantages for the host state and the refugee.

Ultimately both humanitarian principles and political considerations would indicate that the right to family unity should be respected by all states, including in cases of temporary protection. Governments tend to fear that permitting a family to reside for any period of time in a state which offers good educational opportunities and prospects for children means they will never return. However this must be balanced by the notion that if return does become possible families could be just as likely to want their children to rebuild their country of origin free of the prejudices which divided it in the past. The fact that education and life away from the long lasting scars which living through the hatred of a war can inflict could play a role in freeing a region of its tensions should be one balancing element taken into account by policy makers.

4. The Quality of Protected Life

If people have the right to seek and enjoy asylum and the right, together with their family, not to be returned to a situation in which their safety is at question, then they already have the most essential basis to protection: life is protected. It is what protection entails beyond this fundamental feature which could be the most complex issue in evolving mechanisms. It is the issue which could raise the most controversy, because while nuancing the protection of life in the balancing act between humanitarian considerations and state sovereignty can really only go so far, the nuancing of the rights granted in pursuing a protected life raises the whole issue of whether all rights are for all humans or may be limited for non-citizens of the state in which an individual resides.[20]

Many commentators insist that the rights listed in the International Covenants

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[20] We will not enter the discussion over the cultural relativity of rights as the discussion below is concerned solely with Western states - the group of states often accused of imposing their values and rights on others.

are universal, pertaining to each individual through the fact of his or her human nature.[21] State practice is often found to be at odds with this claim. Other commentators see the international human rights movement as being

> based on the concept that every nation has an obligation to respect the human rights of its citizens and that other nations and the international community have a right, and responsibility, to protest if states do not adhere to this obligation.[22]

This view leaves refugees and those seeking protection in a type of 'human rights limbo'. Having lost or refused the protection of their country of origin, they are, according to this latter way of thinking, in a right-less world.

As a response to this type of situation, the 1951 Convention includes twenty-two articles which detail the rights to be accorded by contracting states to refugees in their territory. In the areas of personal status, artistic and industrial property rights, access to courts, elementary education, employment remuneration and social security benefits the Convention stipulates that policy makers should accord refugees the same rights as those of nationals in the host country. In the areas of moveable and immoveable property, self employment and recognition of qualifications, housing, freedom of movement and fiscal charges, refugees are to be treated in the same way as non-refugee aliens. Employment and the right of association are areas in which refugees should, according to the Convention, be treated in the same way as foreign nationals generally, although any restrictions on employment should be removed after three years residence or if the refugee has a spouse or child with the nationality of the host country.

Industrialised countries generally uphold all the rights of refugees in accordance with the Convention. The rights of asylum-seekers and people granted temporary protection are not, however, stipulated in any internationally agreed standard setting document. Those who argue that the rights detailed in the Covenants are for all people in all states would say there is no need to repeat these entitlements in documents aimed specifically at asylum-seekers or those granted temporary protection. However state practice does not acknowledge this

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[21] See eg Kogod Goldman and Martin, op.cit., p.303; Jack Donnelly, Universal Human Rights on Theory and Practice, (Cornell University Press: Ithaca, 1989) p.1.

[22] Bilder, Richard R., 'An Overview of International Human Rights Law' in Hannum Hurst (ed.), Guide to International Human Rights Practice [edited for the Procedural Aspects of International Law Institute in collaboration with the International Human Rights Law Group], (Pennsylvania: University of Pennsylvania Press, 1992) p.3.

universality. For example, as a way of limiting the attractiveness of states to potential migrants who may use the asylum channel as a means of entry, states have, in the 1990s, been restricting the legal employment and social benefits available to asylum-seekers.[23] Meanwhile, UNHCR itself has suggested that the full range of refugee rights need not be open to people receiving temporary protection, although it appreciates the challenge this presents to human rights notions.[24]

One way to assess the question of rights and entitlements which are essential to all protection may lie in determining which are essential and which are, to an extent, supplementary. In the political climate of the time of document drafting it appeared essential for all people to have the full range of civil and political, economic social and cultural rights politically determined by sovereign states upheld internationally by those states. However, it is not clear that the different sets of rights (civil and political: economic, social and cultural) are part of a whole or distinguishable.[25] The fact that humans are humans and undeniably deserve to be treated equally has not changed. However neither has the fact that states are states, and in acting to uphold the sovereignty of their nation over a particular territory, governments sometimes see political advantages, and even what they might call necessities, in restricting the access and membership of outsiders. One could take the view therefore that the essential humanitarian position is to uphold the right to life in a secure situation. The quality of the protected lifestyle, however, while it should ideally be as high as the lifestyle of all other lives, might, for a limited period be restricted to certain minimum standards. Those minimum standards could certainly be exceeded. However, as long as a secure life was guaranteed, a certain amount of cultural and societal input could shape the exact nature of the limited protection.

To ensure a secure life civil and political rights must be guaranteed. People must be protected from torture and slavery; they must be recognised as people before the law and have protection of that law, including access to legal remedies for the violation of their rights. They must have freedom of movement and

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[23] For example the British government announced the removal of all social security benefits for asylum-seekers in September 1995.

[24] UNHCR, State of the World's Refugees 1995, op.cit., p.87.

[25] See, for example, Hunt, P., 'Reclaiming Economic, Social and Cultural Rights', Waikato Law Review, Vol.1 (1993).

residence; protection of their privacy and family; freedom to participate in political life and to assemble and associate freely; their cultures, and religions must be respected. Above all they must be free to seek this protection, and not risk being returned to a situation of inherent un-safety. Such protection is cost free and policy options are limited.[26] The protection of life itself has no major financial cost to states. However, in upholding economic, social and cultural rights there can be high costs, and many policy options. Allowing all people to work, be educated, receive social security benefits when in hard times, guaranteeing food, clothing and housing, ensuring the availability of healthcare all have high costs, in financial and politico-social terms, and involve many policy choices. Obviously some minimum standards are essential, otherwise the protected life would not be guaranteed to remain alive for very long. However, the differences between guaranteeing protected persons private housing, access to the labour markets and full social security benefits, or guaranteeing them a place in a centre for protected persons, where they are clothed and fed and given a little pocket money comes down to a difference in the quality of a life which has been saved. While ideally all people would be in the former situation from the beginning, this cannot be guaranteed in all states, including all European states. The political and economic climate might not allow certain states to give such favourable treatment to new arrivals, whose protected stay is anticipated to be of limited duration. To limit the quality of life for a certain initial period is surely a more humane strategy than to say that since no quality of life can be guaranteed the right to protection will also be denied.

5. Non-discrimination

The civil and political rights outlined above are re-iterated in the European Convention on Human Rights. This regional Convention is supported by both decision-making and enforcement procedures in the form of the European Court of Human Rights and the European Commission of Human Rights.[27] However, as Plender demonstrates, the position of refugees in member states of the Council of

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[26] Ibid..

[27] See Donnelly, 'International human rights: a regime analysis', op.cit., pp.620-4.

Europe is not actually very favourable.[28] Among the civil and political rights of both the Universal and European Human Rights documents is the right to non-discrimination. If the evolution of temporary protection for large groups fleeing conflict is pursued, great care must be taken that particular races, religions and national groups are not discriminated against. To avoid discrimination the tendency towards *ad hoc* policy decision making should be avoided. Establishing a formal mechanism which would be open to any group defined as fitting the criteria of a massive group forcibly displaced by conflict, regardless of provenance within a given region would avoid the possibility of suddenly deciding to protect one group amongst many. Maintaining universal protection for individual refugees alongside regional protection for groups whose flight was induced by conflict would also avoid discriminating by only protecting people in need within the particular region. Spontaneous large group flight does not stretch over continents, it rarely spills over national frontiers, in fact.[29]

CONCLUSION

In balancing the values of state sovereignty and human rights there must be some pragmatic decision-making. Hathaway highlights two opposing views, one taken from Walzer, the other from Coles.[30] Walzer's position is a defence of the state's right to exclude strangers from membership. This position pursues notions of ethnic or ideological 'relatives' being reasonable candidates for admission, and ultimately membership of the 'club'.[31] Coles' position as described by Hathaway is rather that the refugee needs 'meaningful protection' until membership of the state of

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[28] Plender, R., 'Problems raised by certain aspects of the present situation of refugees from the standpoint of the European Convention on Human Rights', Council of Europe - Human Rights Files, No.9, (Strasbourg, 1984).

[29] Organised resettlement of large groups has in the past taken place accross continents, and the focus here on regional temporary protection in no way constitutes a suggestion that in some cases this might not be desirable and necessary in the future. A major example is that of the Vietnamese, when resettlement was organised to assist both the refugees and Asian states.

[30] Hathaway, op.cit., pp.124-5. Walzer, M., Spheres of Justice: A Defence of Pluralism and Equality, (Oxford: Blackwell, 1985). Coles, unpublished document cited by Hathaway as 'Placing the Refugee Issues on the New International Agenda' (1990).

[31] Walzer, Ibid., pp.35-36.

origin can be resumed.[32] Hathaway views temporary refuge in situations in which human rights abuse is not intractable as bringing suspicion on the moral claim of refugees to integration in a new community. He also sees the need to develop a mechanism which would oblige states to protect temporarily, pending return, which he sees as the only outcome to temporary protection.[33]

On the question of meaningful protection or new membership, temporary protection should, in fact offer the possibility of both. Meaningful protection should be pursued, followed by membership if necessary and desirable. For protection to be meaningful it must first assure safety, and subsequently offer a quality and dignity appropriate within the society in which it is being guaranteed. For most European states this might mean initial shelter and nourishment within the limited environment of a reception centre, but it will ultimately, after a maximum of three years,[34] include the entitlement to legal employment and private housing, with both the duties and rights of membership of the society of the state in question. While the moral claim to integration of the refugee may be suspicious in a term of limited protection of short duration, the claim to an ultimate right to integrate as the duration of protection is extended should not be dependent only on the situation in the country of origin being intractable, but also on how long it takes for it to be settled. Refugees may not be able to claim an immediate right to integrate, but states should likewise not impose a duty of integration, just as they should not force return. One cannot enforce exclusion in readiness for return. One can also not enforce inclusion in a determination that return will never be possible.

If we extend Walzer's analogy of the state as a club, the concept of temporary protection could be seen as the loaning of players. Players on loan are usually brought in to benefit the club. Temporary protection's immediate benefit is to the 'player', through the safety achieved. There are, however, benefits to the protecting state. Temporary protection could facilitate opportunities for conflict mediation and resolution. While guaranteeing full social security benefits to new large numbers of people and sheltering them would be costly, protracted monitoring

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[32] Hathaway, op.cit., p.125.

[33] Ibid., pp.125-7.

[34] In line with Convention references to employment restrictions. Although in general civil conflicts continue for longer than three years, such a period affords the opportunity of reflection and judgement of the situation for both refugees and states.

and peace-keeping or peace-enforcement together with genuine *in situ* protection would also be costly in financial and man-power terms, and risk the lives of troops called on to serve in such circumstances. Financial burden-sharing also costs. Ultimately, these loan-players could boost some economies, and boost morale and the 'feel-good factor' accompanying the humanitarianism of saving lives.

The formulation of standards for temporary protection should be flexible. Such protection must protect lives, and guarantee safety, and as such it must uphold all civil and political rights. The flexibility could be shown on the level of economic, social and cultural rights. Over time these must also be guaranteed, to the same extent to which they are assures for citizens, because over time the temporariness of protection gives way to a fullness of membership in society. Initially however, so long as life and security are maintained, states and their societies could be permitted some leeway in the policies detailing how they shelter, feed and employ those they are protecting. Where to pose a time limit, and how to balance a level of integration with the maintenance of a desire to return are positions on which real difficulties lie. Human rights lobbyists may not agree with this lessening of universal standards of certain rights. However the essential is surely to protect the right to life, within the political context in which the world finds itself.

Chapter 3

EUROPEAN HANDLING OF PROTECTION ISSUES

There are three European organisations in which progress in regional asylum matters could be anticipated. These are the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE) and the European Union (EU).[1] Between the late 1980s and mid-1990s, migration and, particularly, asylum questions were broached in all of these forums. All the emerging groups concentrated on the situation of the moment, a fact reflected in their labels as '*ad hoc* working groups' and 'processes'.[2] However, any concrete changes can only be acknowledged within the European Union, which is also the organisation with the strongest foundations of commitment to and machinery for joint actions.[3]

The handling of migration policies in a supra-national context is a particularly sensitive issue. Admission and inclusion are viewed as strong symbols of sovereignty. That such policies might become part of supra-national decision-making is an anomaly to some. However, in creating supra-national structures which remove many inter-state barriers, as well as if one simply acknowledges the reality that people move and their movement across frontiers logically has international implications, keeping migration policies in the domestic arena

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[1] Other international fora have also been the scene of discussions of European policy coordination particularly from 1989 to 1993. These include the Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia. For a thorough overview of the various organisations and their overlapping, as well as distinctive, features in this period see Stanton Russell, Sharon and Charles B. Keely, 'Multilateral Diplomacy to Harmonize Asylum Policy Among Industrial Countries: 198-1994' in Rogers, Rosemarie and Sharon Stanton Russell (eds.), Toward a New Global Refugee Regime, (Forthcoming 1995) [mimeo, cited with permission of authors].

[2] Ibid., p.12.

[3] In 1989, the European Communities' 'Coordinators' Group' saw the Communities' own *ad hoc* group, the Council of Europe or UNHCR as the only possible fora for harmonisation. See Ibid., p.19. In an article entitled 'Defining a European Immigration Policy', the Director General with responsibility for Justice and Home Affairs in the Secretariat General of the European Commission, Adrian Fortescue, also defines 'European' in this case as limited to the Member States of the European Community, "since no other major grouping has really made a collective attempt jointly to define something which might deserve the name of an 'immigration policy' as such." Fortescue, A., 'Defining a European Immigration Policy', (Philip Morris Institute for Public Policy Research, October 1993) p.33.

ultimately becomes both illogical and counter-productive.[4] The European Union is the group of states which is bringing down most political, military and economic barriers in Europe. Collectively, the Member States form a powerful body in global relations and negotiations. All of these factors point to the will and strength for an evolution in migration and protection policies in Europe originating in the EU, although it may go further either through the exercise of the Member States' pressure in other organisations, or through a geographical widening of the Union.[5]

As creating and implementing policies aimed at refugees and migrants requires political choices and ethical judgements associated with sovereignty and the national identity even interpretations of long-standing international agreements can vary widely from one state to another. These variations occur according to political systems, culture and perceived national interest. As EU Member States try to integrate in these latter areas, they are also working to harmonise their asylum and migration policies, including interpretation of the Convention definition. However, perhaps because they are not yet quite integrated, differing policies are continuing to emerge, exemplified by temporary protection strategies in response to displacements from former Yugoslavia.

1. The OSCE

The OSCE provides a forum where European human rights and cooperation on security issues are fundamentally linked, not only in Europe but on a trans-Atlantic scale. Its membership also covers those areas in Europe where transborder and ethnic conflicts are more likely to erupt - including the Balkans and the Caucasus. A Swedish paper presented at the 1993 Office for Democratic Institutions

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[4] In response to the desire for a removal of customs barriers for trucks travelling between their territories, initially five but later more of the EU states formed a sub-group, Schengen, which has also had to address the migration question in removing these barriers.

[5] Paragraph 37 of the Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, [COM(94) 23 final], (Brussels, 23 February 1994) states that:

> Achieving and implementing a common policy will not be possible without greater reliance on legally binding instruments, procedures to ensure uniform interpretation of those common rules and the development of common policies in relation to areas of both substantive and procedural law that have not yet been addressed (some of which will probably prove to be the most sensitive).

and Human Rights (ODHIR) Seminar in Warsaw raised the issue of temporary protection as a potential component of a necessary European regional solution - having noted the other existing regional solutions.[6] This paper suggested that the then CSCE offered the advantage of being a forum with an international framework within which security aspects of the problem could be dealt with.[7] Officials at ODHIR confirm, however, that "nothing new has been done within the CSCE framework", and indicate an opinion that, due to the heavy burden of other concerns related to security and the human dimension, as well as to internal structural difficulties and problems of co-operation with other international institutions, the organisation would be reluctant to undertake any 'paper' obligations.[8]

Undoubtedly the OSCE could offer several positive advantages in the broadening of a regional 'refugee solution' including a mechanism, or even Convention, of temporary protection. However it is currently seriously hampered by its novice status on these matters (having only broadened its scope to include them in 1992), an apparent shortage of expert staff on this subject, and also, potentially, by the very breadth of its membership.

Institutions within the OSCE framework focus on security issues, democracy and human rights and ethnic minorities. All of these issues are related to notions of temporary protection, in terms of the causes of flight and solutions, including both return and integration. However, work goes on around the subject, rather than focusing on the central ground of short term protection. As such, the OSCE's primary role could be one of broader facilitation and implementation of measures surrounding protection when necessary, rather than that of focusing on the actual protection issue.

While non-European states may still be necessarily included on questions of security, it is doubtful that a truly regional refugee policy could be established with the inclusion of non-regional players, involving as it does the question of close

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[6] Address by Mr Erik Lempert, Permanent Under-Secretary, Ministry of Culture and Immigration, Sweden.

[7] Just as overall migration policies, and particularly those addressing root causes) need to be integrated with development policies, foreign policies, demographic policies etc, temporary protection and broader asylum policies need to be integrated with peace plans, and security and human rights policies, especially with regard to return as well as to humanitarian assistance and the establishment of safe areas during crises such that in the former Yugoslavia. See Part Two below.

[8] Mr Jacek Paliszewski (24 August 1994).

collaboration within a limited area. In addition, the US has been vehement in its reluctance to broaden its own regional refugee policy in line with other participants in the Organisation of American States, and refused to countenance signing the Cartagena agreement. It would thus be highly hypocritical for it to join in the push for innovations in European refugee policy, particularly as a more liberal European policy would have the potential complementary effect of limiting the number of Europeans finding themselves in need of international protection who might even attempt to arrive in the North American states. It is also unlikely that states which face ethnic tensions in the post-Cold War era would sign up to any agreement by which they would be in the frontline of offering protection for those fleeing neighbouring states, with which they may themselves have border or ethnically inspired quarrels.

2. The Council of Europe

Action on the subject of temporary protection within the Council of Europe, beyond support for recommendations by UNHCR and EXCOM (the Executive Committee of the High Commissioner's Programme) is difficult to discern. According to the Secretary of CAHAR (Comité ad hoc d'experts sur les aspects juridiques de l'asile territorial, des réfugiés et de apatrides)[9] UNHCR is, in fact, the forum in which things not only are happening but should happen in this area. The internal, CAHAR, opinion is that no document on this subject can be drafted in the context of the Council of Europe, that governments should apply EXCOM resolutions and that they should refer to UNHCR and its inter-governmental consultations on temporary protection.[10] In 1993, particular reference was made by the Council of Europe advisors to EXCOM Resolution 15 of 1981 concerning the situation of asylum seekers in situations of large scale influxes. The essential inference is of an internal Council of Europe view that no regional solution can or

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[9] *Ad hoc* Committee of experts on legal aspects of territorial asylum, refugees and statelessness. Although within the framework of the Council of Europe, CAHAR consists of international law experts who meet in their own capacities, not representing their countries of origin.

[10] Interview with Mr Geza Tessenyi, Administrator in the Direction of Legal Affairs, Secretary of CAHAR, and Council of Europe Secretariat Representative at UNHCR meetings on temporary protection (8 September 1994).

should be developed concerning mass influxes and that support for the resolutions of the 'universal' body, no matter how old those resolutions may be, is the best way forward. The other obvious inference is that not much has changed with regard to temporary protection over the last decade and a half, and that we need to ask whether developments are necessary now. The Council of Europe paper at the CSCE/ODHIR Seminar in Warsaw made reference to the need for an improved definition of temporary protection and harmonisation of schemes, but its action seems to be that of stepping back from this debate and supporting other major players. The Council of Europe suffers or benefits from a breadth of membership incorporating a number of east European states, which gives it similar difficulties to the OSCE.[11] It seems likely that the political will of the major players in all the European organisations lies in pressing forward within the narrower, and it must be said more secretive, circles of the EU rather than in pushing for action in the bigger (in terms of membership) organisations.

3. Schengen

In June 1985 an agreement was reached between Belgium, France, Germany, Luxembourg and the Netherlands to remove controls at common frontiers. Signed in the Luxembourg town of Schengen, this became known as the Schengen Agreement, and the states (a sub-group of the EU) as the Schengen Group. The Agreement was not prompted by migration concerns but by commercial traffic queues at customs posts, seen as wasteful to any level of economic integration. However, if free movement of goods is allowed between states, then people will pass with the goods, and so controls on the people need also to be lifted. Removing checks on the movement of people between states raises questions of security. These questions include concerns over the movement of illegal immigrants, who having passed the outer-most frontier would face no more controls within a broad, multi-state area.

The group was joined in 1990 by Italy, 1991 by Spain and Portugal and 1992 by Greece. In June 1990 a Convention on the Application of the Schengen

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[11] Since 1990, the membership of the Council of Europe has increased to 38 states. The latest 'recruits' were Ukraine and the Former Yugoslav Republic of Macedonia on 9 November 1995.

Agreement was signed, which this time included provisions for handling asylum applications by the states concerned, and, similar to the Dublin Convention, determines which state has responsibility.

In many ways, the Schengen process is an experimental laboratory for further cooperation on freedom of movement among the whole membership of the EU. Austria has sought to join the group, although the UK, Ireland, and (for a more limited future) Denmark remain outside the group. The issues dealt with by the Schengen documents also mirror those discussed in the same context in the Union. Beyond the concerns of the Dublin Convention these include visa restrictions, carrier sanctions and an Information System.

Visa restrictions are a very difficult subject where refugee movement and protection are concerned. Refugees and others in need of protection are often fleeing a government or a conflict. In the former case they cannot always apply for the correct travel documents as this would mean informing the persecutors of their desire and plans for flight. In a conflict situation, foreign embassies often close down, so any application for a visa must be made after crossing at least one international frontier. Frontline states often will not allow passage to people without proof of onward movement.

There is an increasing tendency for governments to fine airlines on which immigrants without the correct travel and entry documents have arrived. This means that airline staff have to do the work of immigration officials, checking the passports and visas of all passengers to avoid heavy fines on the company for which they work. Even immigration service staff are often not sufficiently trained to make correct judgements on the protection needs of individuals. Airline staff are certainly not trained to spot genuine cases, and are left with the impossible choice of believing a story and risking a fine as the price of saving a life, or making the morally difficult choice of refusing travel to a person claiming they will be killed if they remain in the country of origin. Anecdotal evidence suggests that all of these measures are backfiring as some travel operators and airlines charge elevated ticket prices which include the cost of the fine so that illegal immigrants (most often economic migrants rather than refugees) manage to arrive at their chosen destination and plead their case.

> The Schengen Information System is designed to:[12]
>
> maintain public order and security, including state security, and to apply the provisions of this Convention relating to the movement of persons, in the territories of the Contracting Parties, using information transmitted by the system.

It allows states to enter and read reports on individuals, including the issuance of visas, residence permits and any criminal record they may have according to the domestic legislation of the state making the report. Differing levels of data protection exist in each of the states, so entry of an individual's data into the system will depend very much on the regulations of the state in question, although entry into the system will affect the person's ability to move within the whole Schengen area. The concern is that those most likely to suffer from this system are third country nationals residing in the Schengen territory and asylum applicants.[13]

A further similarity between Schengen and the future of the EU on immigration matters is the establishment of readmission agreements with east European states. An agreement signed with Poland means that as of May 1991, Poland will readmit its own nationals or people who having transited its territory arrive in the Schengen area but do not have a visa for any Schengen state. In other words, Poland has become a virtual border guard between the eastern limits of the EU and further eastern European and Asian states.

Implementation of the agreements was due to take place in April 1995, and did so, although the first six months did not give a particularly smooth demonstration of how progress can be made. Italy was unable to implement the agreement at the same time as the others due to a need to upgrade the domestic computer system used by the police authorities. There were technical difficulties with the equipment used at Schiphol Airport in the Netherlands to allow people travelling between Schengen states to gain access to the normally controlled area without needing to show their passports.[14] There were political difficulties for some countries. For example, France decided at the last minute that it would delay

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[12] Schengen Convention, Article 93.

[13] Mahmood, S., 'The Schengen Information System: An Inequitable Data Protection Regime', International Journal of Refugee Law, Vol.7 No.2 (1995).

[14] A card must be inserted in a revolving gate type machine, and the distribution of cards and information on use for passengers was not always clear.

implementation for six months, expressing last minute concerns about the trafficking of drugs within the territory and illegal immigration.[15] However, the first experiments of a mini-Europe without frontiers were set in operation, and the true implications for protection seekers, within the wider framework of concerns and limitations, will be discovered as time goes on.

4. The European Union

From the adoption of the Single European Act, in December 1985,[16] it was clear that some form of cooperation on the subject of entry to the territory of the Member States of the [then] European Community by citizens of non-Member States had to be entered into, as the abolition of internal frontiers and free movement of persons became defined goals.[17]

The first piece of relevant administrative machinery put into place on a joint basis was the establishment, by the Ministers responsible for Immigration, of an 'Ad Hoc Immigration Group' of senior officials in October 1986.[18] As the senior officials representing Member States in meetings of this group usually came from Justice and Home Affairs or Foreign Ministries, it was natural that many of their meetings followed on from other meetings they participated in as the 'TREVI Group'. However, contrary to the mistaken belief of many journalists and academics, questions of Immigration and Asylum were never part of the mandate of the TREVI Group.[19] This Ad Hoc Group, like the TREVI Group met behind

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[15] Barber, Tony, 'EU's border-free zone hobbles into place', The Independent, (1 July 1995), p.9.

[16] The Single European Act came into effect in September 1987.

[17] Article 7a of the SEA (ex-8a EEC) commits the Community to the creation of an area without internal frontiers, with an internal market which shall comprise "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured". (Article 7a of the Treaty Establishing the European Community).

[18] At that point, the European Commission's role in discussions was minimal, and only a very small department in the Secretariat General dealt with the whole area of Justice and Home Affairs. The timing of the creation of the *ad hoc* group was midway between the signing and entry into force of the SEA.

[19] The TREVI Group was concerned with matters of judicial and police co-operation on questions of terrorism, drugs etc. The title of the group was not an anachronym as commonly believed (it was thought by many to stand for Terrorism, Radicalism, Extremism, Violence International [or according to some accounts Immigration rather than International]). See among others for the error made on this subject, Loescher, G. 'The European Community and Refugees' International Affairs, 65 (1989). For

closed doors, and indeed much of the EU work on immigration and asylum is still carried out in this secretive manner, in spite of the spirit of greater openness which is hoped for by many outsides and, to an extent, encouraged by some within.[20] It assisted in the drafting of the first two results of cooperation on immigration and asylum issues: the Dublin Convention and the Convention on External Frontiers. The latter Convention, which comes within First Pillar matters and on which the Commission can make directives, ran into difficulties between Spain and the UK on the question of Gibraltar, but was resuscitated by the Commission with a 1993 Communication.[21] The activity of the Commission on this issue indicates a potential for forward movement and sensitively diplomatic role on migration matters. Beyond being the first situation in which a central non-governmental body (the Commission) will put forward a list concerning which nationals require a visa to entire the entire territory of the EU, this Convention also includes many of the details of the Schengen Agreement on a wider scale, such as carrier sanctions.

4.1 The Dublin Convention

The Convention determining the State responsible for examining an asylum request or Dublin Convention, signed in June 1990[22] aims for a harmonisation of member states' asylum policies, in order that asylum-seekers make their applications in only one state. The state in which an application should be considered is

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clarification on the distinct nature of the Ad Hoc Group on Immigration see Benyon et al, Police Cooperation in Europe: an Investigation, (University of Leicester: Centre for the Study of Public Order, November 1993). Additional confirmation of the non-TREVI status of the Ad Hoc Group on Immigration was ascertained in interviews with a number of representatives of the European Commission.

[20] One example of somewhat greater openness was the June 1994 International Conference hosted by the Hellenic Institute of European Studies, and sponsored by the European Commission in Vouliagmeni, Greece, entitled Immigration and the European Union: building on a comprehensive approach, and attended by (selected) academics, as well as representatives of International Organisations, NGOs, Member States and the Commission.

[21] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament: (1) Proposal for a decision, based on Article K3 of the Treaty on European Union establishing the Convention on the crossing of the external frontiers of the Member States; (2) Proposal for a regulation, based on Article 100c of the Treaty establishing the European Community, determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States COM(93) 684 final (Brussels, 10 December 1993).

[22] Except by Denmark which signed and ratified in June 1991.

determined by the criteria laid out in Articles 4 - 8 of the Dublin Convention.[23] The efficiency of the proposals is doubted:[24]

> an effective common body of relevant rights, duties and privileges in the area of immigration control cannot be properly achieved while there remain significant differences in the procedures for realising and applying any common body of rules.

Amnesty International called for no implementation of this Convention until it could be ensured that effective measures and safeguards were in place, so that all procedures and international protection standards would be equal.[25]

The Convention is not (in November 1995) in force, as some states have not yet ratified it.[26] The new Member States (Austria, Finland and Sweden) ratified the Dublin Convention as part of their accession agreements. In addition, its actual effect on what might eventually be a Union-wide asylum policy is somewhat unknown. It is an inter-governmental Convention, drafted before the coming into being of the European *Union*, and the creation of the so-called Third Pillar. It is possible that the Dublin Convention, if implemented, could have great import for temporary protection, and vice versa. The Dublin Convention is intended only for application to *asylum* claims, so if temporary protection were to become a status with distinct procedures for which protection-seekers could make a request separate from regular asylum processes it would not be applicable unless altered. The major concern of human rights groups and other observers of this political process is that procedures differ so markedly that allotting an applicant to one particular state has an element of a lottery and could be unfair. The grounds on which this objection to the Dublin Convention in relation to asylum claims is made remain valid for

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[23] In order these criteria are: Family re-unification; possession of a valid residence permit or visa; irregular entry from a non-Member State, unless application was made to another Member State within the previous six months; legal entry to a Member State where no visa is required; initial lodging of an asylum application.

[24] Jim Gillespie, Report on Immigration and Asylum Procedure and Appeal Rights in the 12 Member States of the European Community, (London: Immigration Law Practitioners' Association, March 1993) p.7.

[25] Amnesty International European Communities Project, EUROPE: Harmonisation of Asylum Policy, (November 1992).

[26] Germany's decision and procedures for ratification came with the beginning of its Presidency of the European Council in July 1994. It had previously been expected to be the last state to ratify. Both the Netherlands and Spain may face substantial difficulties in ratifying the Convention. Dennis de Jong, Advisor to the President - Immigration and Asylum, Secretariat General Directorate F (18 October 1994).

temporary protection. As a bare minimum, the possibility of and procedure for admission and recognition as a person in need of protection must be coordinated if protection in a frontier-free European Union is to be a viable act. Other European states have expressed interest in a parallel convention, allowing them to join in this process of distribution of claims, and discussions are under way with central and eastern European States. If the determination of which state must process protection claims broadens, so must the coordination of policies to guarantee the standards of admission criteria and the protection received.

4.2 Maastricht and the Third Pillar

The framework for intergovernmental cooperation in the fields of justice and home affairs is set out Under Title VI of the Treaty on European Union. This same Title establishes a 'third pillar' of the European Commission to work on the relevant fields and to operate with a shared right of initiative alongside Member States with the possibility of adopting joint actions, joint positions and conventions[27], but not (yet) the exclusive right of initiative or the right to adopt directives and regulations as is the case of the First Pillar.[28] The fields included within this broad area are immigration and asylum, drugs and judicial cooperation. This collection of policy areas once again links migration to the secrets of the defunct TREVI group.

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[27] See Articles K.3 and K.4 of the Treaty on European Union.

[28] According to Article K.9 of the Treaty on European Union, "[t]he Council, acting unanimously on the initiative of the Commission or a Member State, may decide to apply Article 100c of the Treaty establishing the European Community to action in areas referred to in Article K.1(1)to (6)..." These areas include Asylum policy; rules governing the crossing of external borders and controls thereon; immigration policy and policy regarding nationals of third countries. Article 100c of the Treaty establishing the European Community (inserted by Article G(23) TEU) states that the Council will determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, voting unanimously on a proposal from the Commission, or in the case of sudden and imminent mass influxes on a qualified majority vote on a recommendation from the Commission, when a visa requirement may be introduced for a period not exceeding six months. That is to say that the Commission would have powers exceeding an equal right of initiative in the drawing up of and proposals for visa lists, and if Article K.9 were to be implemented, would have similarly extended power in other areas too. In Declaration (No. 31) on asylum attached to the Final Act of the TEU, it is declared that "the Council will also consider, by the end of 1993, on the basis of a report, the possibility of applying Article K.9 to such matters [ie asylum policies]". Such a report was written [SEC(93) 1687 final] (Brussels, 4 November 1993), which, not surprisingly as the TEU had only been in effect since 1 November rather than 1 January 1993, considers that the time is not yet right to propose the application of Article K.9, but that the question should be re-examined in the light of experience. Some within the Commission see advantages in transferring only certain elements of asylum and immigration policies - particularly the development elements of the root causes approach.

All of the work done within the framework of the European Communities and European Union so far points in one essential direction: **Harmonisation.**[29] According to the *REPORT from the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy*, harmonisation is seen as "not ... an end in itself but as a means of re-orienting policies where such action makes for efficiency and speed of intervention".[30] The 1994 Communication describes harmonisation as usually being understood to mean the development of common rules and practices,[31] and goes on to say that this process is still at a preliminary stage, although according to the 1991 work programme significant results should have been achieved in this area by the end of 1993. "The present stage of the process could therefore best be described as approximation rather than harmonisation of immigration and asylum policies."[32]

The means to and substance of migration policy coordination need to be understood within the context of the political and economic climate. This climate is fuelled by the impact of European integration, economic recession, high unemployment and the perceived high cost of refugee care, plus misplaced anxiety over potential East-West migration and actual large influxes from former Yugoslavia and substantial attempted outflows from Albania and other eastern European states.

From 1993, the work programme included discussions within the sub-group on asylum, K.4 Committee and Steering Group 1, on the harmonisation of the interpretation of the definition of a refugee to be found in the 1951 Geneva

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[29] Work within other fora also points towards harmonisation, as is detailed by Stanton Russell and Keely, op.cit.. Two years after the coming into force of the Treaty on European Union, the Council has adopted some 50 recommendations, resolutions or conclusions, although it has adopted only two joint actions and the text of one convention and taken up no single common position. Among the recommendations, resolutions and conclusions (which instruments were all available before the Treaty) are a Resolution on Minimum Guarantees for Asylum Procedures [5354/95 ASIMM 70, 9 March 1995], a Conclusion of the Form of *laissez-passer* for the transfer of an asylum applicant from one Member State to another, a Conclusion on the Standard form for determining the state responsible for examining an application for asylum and a Conclusion on the Commission Communication on Immigration and Asylum (all 20 June 1994). Some of the others are related to movement of people although not protection as such. For a full list of actions by the Council in this area see Appendix 15 of European Commission, 'Intergovernmental Conference, 1996: Commission Report for the Reflection Group' (Luxembourg, May 1995), and p.51.

[30] Ad Hoc Group Immigration, REPORT from the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy, (Brussels 3 December 1991) SN 4038/91 (WG 930) annex - detailed note, p.11.

[31] 1994 Communication, op.cit., paragraph 33.

[32] Ibid., paragraph 34.

Convention. One difficulty of such harmonising of interpretations is that a foreseeable outcome would be the conclusion of a document which finds a form of words indicating a harmonised interpretation of Article 1A of the 1951 Convention, but which in turn has 15 interpretations arising from it as time goes on. In the meantime, the Member States would still have as many un-harmonised policies as there are members, and be in a position of implementing an eventually ratified Dublin Convention, where asylum seekers qualifying for application to more liberal states gain access to the entire EU territory, while those who are forced to apply to states with more restrictive policies are turned away. In the event, the process on reaching some sort of agreement took until November 1995, indicating the difficulties states have in finding common understandings of the meanings of the Convention's terms. The eventual outcome was a non-binding document suggesting a basic understanding, but which is of no weight whatsoever in altering the processing of applications. In addition, absolutely no attention has been paid in this process to the "Possible Measure" put forward under Paragraph 9 of the 1991 Communication from the Commission of the right of asylum which suggests that:[33]

> there should be harmonisation of the rules on *de facto* refugees, who are not covered by the Geneva Convention; the question whether they can be allowed to stay in the Community - temporarily - on humanitarian grounds other than those set out in the Geneva Convention should not depend crucially on the place where their application is examined

and yet, one major European humanitarian crisis later, it largely does. In the meantime, in the period from 1991 to 1993, spurred on by the growing body of conventions and agreements calling for policy harmonisation, states began legislative and regulatory programme to re-shape their asylum procedures. Although some informal assessment of each others' policies may have occurred on the sidelines, these programmes were all enacted by individual states within their own sovereign capacities. All states have made some legislature and/or policy changes in the early 1990s, including on temporary protection. All of them have made their changes independently of each other.

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[33] European Commission, Communication from the Commission to the Council and the European Parliament on the right of asylum, (Brussels, 11 October 1991) [SEC(91)1857 final], pp.6-7. In 1991, the Commission issued two separate communications, one on asylum the other on immigration. By 1994 it had been decided that if a comprehensive approach was to be taken to migration the two categories could no longer be divided, in spite of the large differences between people in need of protection and those in search of economic betterment.

In the meantime, the spontaneous groupings of the early 1990s had, by 1994 given way to more firmly established groups and committees, or been abandoned in the face of failure over former Yugoslavia.[34]

4.3 The Edinburgh Conclusions

In December 1992, The Conclusions of the British Presidency in Edinburgh noted that preparations enabling freedom of movement as set out in the Single European Act had not gone according to schedule. Further work, especially on the Dublin and External Frontiers Conventions, and a European Information System similar to the Schengen System, would be necessary to achieve such freedom without endangering public security or compromising the fight against illegal immigration. Welcoming the Resolutions agreed to in London in November 1992 on Manifestly Unfounded Claims and Host Third Countries, and stressing the need to fight racism and xenophobia in a unifying continent, including protection for and the integration of legal immigrants, the Conclusions contained a declaration of principles. In this *Declaration on the Principles of Governing External Aspects of Migration Policy* the European Council noted the importance of analyzing the causes of flight and removing them. Migratory movements towards the Member States should, it was said, be reduced by the preservation of peace, resolution of conflicts, respect for human rights, creation of democratic societies and spread of liberal trade policies. These measures were considered necessary to prevent the potential de-stabilising effect of uncontrolled migration, and to prevent the integration of legal immigrants being made even more difficult. The measures could, it was suggested be enacted through a coordination of foreign policy, economic cooperation and immigration and asylum policies, for which a framework was made available via the Treaty on European Union, in particular Titles V and VI. While supporting UNHCR's calls for allowing people, by the use of aid and assistance, to remain close to their homes, the Council of Ministers noted that such assistance should not prejudice the availability of temporary protection in Member States for particularly needy cases. These points were set out in a list of principles for the guidance of the Community as a whole and the Member States in their respective spheres of

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[34] Stanton Russell and Keely, op.cit., p.36.

competence. Included as a guiding principle was the aim of increased cooperation in response to the "challenge of persons fleeing from armed conflict and persecution in former Yugoslavia." The intention of relieving this situation by supplying accommodation and subsistence including:[35]

> in principle the temporary admission of persons in particular need in accordance with national possibilities and in the context of a coordinated action by all the Member States. They reaffirm their belief that the burden of financing relief activities should be shared more equitably by the international community.

These Conclusions laid out a path of good intentions, pointing towards a holistic approach to the broad spectrum of migration related issues and indicating an acknowledgement of the need to strengthen protection while being self-congratulatory on restrictions enacted in the cause of closing asylum channels to all but the most needy. However, the on-going conflict in the south of the 'unifying continent' either proved too much for the resolve of those creating these aims, or the aims were never set in a high enough position of strength to be accomplished in the face of political realities beyond EU borders. The idealism of some elements of a holistic approach, and the pragmatic need to reinforce others has been demonstrated by the turn of events. The Edinburgh Conclusions offered some starting points in the creation of a wider and stronger approach to migration and protection. The 1994 Communication from the Commission on Immigration and Asylum Policies sees a non-governmental institution of the Union pushing to continue the process initiated by inter-governmental cooperation.

5. THE WAY AHEAD?

The February 1994 Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies outlines the need for a comprehensive approach which addresses the key components of an effective immigration policy as: action on migration pressure, particularly through cooperation with the main would be sending countries, control or management of immigration and integration of legal immigrants. It emphasises the need for the integration of

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[35] *Conclusions of the Presidency - Edinburgh, (12 December 1992):* [SN 45/92] Annex 5, Part A xvi, 8.

immigration and asylum policies with external policies, a re-newed focus on root causes approaches[36], a desire for greater availability of accurate information, and repeats the call for harmonisation.

In addition the necessity for the development of schemes for temporary protection and the need for solidarity in support of Member States in the front line (that is burden sharing) is highlighted. The crisis in former Yugoslavia which "has produced large-scale movements of people forced from their homes by developments which do not fit patterns with which Western Europe is familiar or equipped and which require new and tailored responses"[37] is acknowledged as the inspiration behind this need. The Communication also outlines the Commission's concern that the contents of the provisions for temporary protection vary from state to state and that secondary rights also differ considerably. It calls for the addressing of the issues of temporary protection and temporary absorption problems[38], saying that:[39]

> it would be possible to build on this experience [of the former Yugoslav crisis] and harmonise these schemes with a view to elaborating a uniform European scheme for temporary protection. Such a harmonisation would avoid the redirection of this type of migratory flows on the basis of differences in national legislation. It would also guarantee a minimum level of protection to the persons concerned, irrespective of the Member State offering this protection

and includes "harmonisation of the schemes for temporary protection" as Point 9 in its 32 point framework for action.[40] The Communication picks out the common features of Member States' temporary protection schemes (that they are set up for mass influx situations only; that asylum applications for those receiving such protection, while they may be submitted, are not being dealt with; that programmes for return and re-habilitation are being sought)[41] and outlines the questions the Commission sees a need to address when considering a harmonised approach (how to identify situations requiring such a scheme; the rights to be accorded those who

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[36] See Part 2 below.

[37] 1994 Communication, op.cit., paragraph 22.

[38] Ibid., paragraph 92.

[39] Ibid., paragraph 93.

[40] Ibid., pp.41-44. (Summary: A New Framework for action by the Union).

[41] Ibid., paragraph 24.

have been granted such protection; the period of time after which longer term permission to stay needs to be granted).[42]

The view in the Commission appears to be that immigration policies, and asylum policies in particular, need to turn away from their **reactive** style, and become **pro-active**: in the manner of all good boy scouts and girl guides, the time has come to 'be prepared'. This realisation was long overdue, and a significant advance in attitude on this policy would be demonstrated if the responses to crises such as that in former Yugoslavia would be drawn on in formulating policies *in advance* of further crises, which it must be hoped, though can hardly be expected, may never happen. The responses to this crisis, however they be analyzed, harmonised and approximated should provide the basis for responses to possible future mass influxes of a similar or indeed quite different kind.

5.1 Reception in the region of origin

Beyond the work of the European Commission on the future of European protection, some Member States have been active in other fora in promoting discussions of future options. One example of this is a tentative Dutch proposal, first raised by the then Dutch Secretary of State for Justice, Aad Kosto, in November 1993 at the fifth Conference of European Ministers Responsible for Migration Affairs in Athens. The proposal is that reception and protection in the region of origin be considered as a future means of combining the wishes to permit people to remain as close to their homes as possible, to protect, and to try not to attract large numbers of immigrants, including protection seekers, to west European countries. The proposal received its first consideration in an Inter-governmental Consultations working paper in 1994, and discussions and reflections are on-going.[43]

There are two components to the suggestion. The first is that all processing of asylum claims would be carried out in the region of origin, at facilities

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[42] Ibid., paragraph 94.

[43] Secretariat of the Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC), 'Working Paper on Reception in the Region of Origin' (Geneva, September 1994).

established in states neighbouring the refugee-producing state. The second is that 'Internationally Protected Areas' would be established, again in neighbouring states, with land leased from the host state and protected and assisted by the EU, or possibly the UN.

There are manifold concerns about protection scenarios such as those envisaged in the 'Reception in the Region of Origin' concept, as well as many perceived advantages. The idea is far from being adopted. In many ways the suggestions reflect US experience.[44] In 1994 the US used interception and initially ship-board processing for Haitians, although after being overwhelmed, and criticised by UNHCR, the processing was later moved to Guantanamo, a US base in Cuba. In Guantanamo, a form of 'safe haven' was also established to temporarily protect Haitians in flight. When, two months after the major outflow of Haitians, Cubans also began what looked likely to become a massive outflow towards the US, the Americans were ready to use the haven established in Guantanamo to shelter them until a solution was found. There are several points to be made on the American experience which would reflect on Europe's ability to proceed with similar plans.

Firstly, the US did not return or expel Haitians or Cubans who reached US land, but picked them up at sea. They were not technically, therefore, responsible for a violation of Article 33 of the 1951 Convention concerning nonrefoulement. Secondly, when the US asked other Central American states to assist by leasing land for safe havens under US protection, they were met with a wall of sovereign rejection, in spite of the large financial gains and good will to be earned from permitting such tenancy. Thirdly, the US idea was to "create a mechanism in which the boat people themselves are encouraged to decide whether the need for protection or the desire to immigrate is the primary motivation".[45] The policy for Haitians caused the numbers to drop, and in the American opinion, allowed sufficient protection to those who really needed it. The majority of the 22,000 Haitians who were protected in Guantanamo returned to Haiti after the restoration of the elected government of Jean-Bertrand Aristide. The solution permitting return was also in

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[44] Referred to in IGC, Ibid.. Also see McKinley, Brunson, 'Safe Haven: Lessons Learned', Remarks made to the Churches Commission for Migrants in Europe Dialogue Meeting on Safe Haven in Brussels (23 June 1995). [Brunson McKinley is Senior Deputy Assistant Secretary in the Department of State Bureau of Population, Refugees and Migration].

[45] McKinley, Ibid., p.5.

American hands, and is a fourth feature of the US policy. In the two cases of safe haven use by the US in 1994 there was an 'end strategy'. The US offered temporary protection, within its powers, outside its territory, in situations in which it had a clear vision of the operation it could undertake to solve the cause of movement, and with a strong rating of its potential for success. The migrations may have driven the desire to effect a solution which permitted return. However the protection, and the type of protection, were only undertaken with the near certainty that a rapid and satisfactory outcome could be achieved by the protectors in the field of the cause, which would involve the repatriation of the majority of the protected.

In Europe's and the EU's search for a model of temporary protection and a regional strategy to cope with forced migrations there must be an assessment of Europe's potential of enacting effective protection, while upholding its Convention commitments. There must also be consideration of whether the migrations and need to protect, along with other contributory factors, such as disgust at human rights violations and desire to see democratic equality for all including minority groups, would enable the EU and other Europeans to bring about an end to the causes of migration. In considering such possibilities all manner of particular characteristics such as geography, the breadth of political systems and cultures, military capabilities and future tranquillity for nations in close proximity must be taken into account.

CONCLUSION

The OAU Convention and Cartagena Declaration offer regional additions to the essence of the universal Convention. It would appear that the time is right for Europe to follow these other regions and formulate regional methods of dealing with its regional crises. If adding to the basis provided in the Convention includes the addressing of mass influx situations by avoiding individualised procedures, but maintaining these for those individuals who require a permanent status then it should be seen as a positive step to establish regionalised approaches to regional problems within the regional tradition. For example, African states talk of a tradition of 'solidarity' between the peoples, regardless of artificial boundaries, and the OAU has developed a Convention which allows protection for those fleeing the type of situation it tragically finds itself faced with on a frequent basis, and a way of

offering protection without challenging the position of the state or government of origin. Europe prides itself on its humanitarian tradition, and is facing increasing ethnic and territorial tensions. There is scope in the current situation for the development of a European regional approach in the manner of its traditions, dealing with its current tragedies. In other words there are different ways in different regions for different (or similar) problems to be dealt with in an appropriate manner with the eventual aim of achieving the same result - protection for those people who cannot find it in their state of origin but need to turn to, or are turned out to, the wider regional or international community.

The model a European mechanism of protection might take is as yet unclear, and a number of imaginative possibilities are emerging. The outcome may be an amalgamation of various forms of short term protection, to suit the situation at hand. What is quite clear is that a non-governmental supra-national body is unlikely to be used as a central system for assessing European asylum and protection claims. Some form of national control is most likely to persist for the foreseeable future. However, through agreements, be they multi-lateral conventions or bi-lateral coordination or simply uni-lateral responses or complements to the policies of neighbours, cooperation on procedures for admission and ultimately the measures of protection are probable given the integrationist climate. Discussions and collective thinking on the issue has already achieved a move towards a comprehensive strategy to migration issues.

There is undoubtedly still a need for an overarching universal system providing a complement and background to the types of regional systems which might develop. This universal system would logically be necessary not least for those situations where individuals and even large groups need, because of fear of persecution, or as their only hope of receiving protection, to migrate between regions. However, it is perhaps essential for an evolving mechanism of temporary protection to be grounded in a regional system in part due to its limited duration (whatever the outcome may be) and anticipated limited geographical scope, and in part due to the accompanying necessity for regional understanding, cooperation and burden-sharing.

CONCLUSION

The history of refugee protection in Europe, and indeed globally, shows both a potential and necessity for contextual reformulation and evolution. The 1951 Convention provides a solid foundation to international protection with universal understanding for individual refugees under circumstances of a well-founded fear of persecution on particular grounds. However, the interpretation and use of the Convention by the majority of states does not make room for the protection of large groups or the understanding of conflict as a form of persecution. Throughout the twentieth century mass movements originating in and around the European continent have initially met with restrictions. Often these barriers have been excused by the economic situation of western Europe or accusations of flight motivated by self-betterment because recent experience had involved large influxes of economic migrants. The forced displacements of the 1920s and 1930s and '40s were first met with such barriers. However, either through the establishment of new organisations offering some semblance of control over the movements, or through a horror at the results of non-protection, the responses on those occasions were developments in the protection regime, including expansion or refining of contemporary notions of those in recognisable need of protection and the development of new mechanisms of protection.

The first half of the 1990s has included one major crisis within Europe, and several 'minor scares'. The possibilities of more migration crises are constantly visible on Europe's eastern and southern fringes. The initial reaction to the new major crisis was restriction. Limitations were already being developed due to rising numbers attempting to flee to Europe from other regions, as well as internal integrationist concerns. However, in the face of the Yugoslav crisis some imaginative developments have indeed been forthcoming, from various states with some similarities.

Part Three of this thesis is a case study of the temporary protection mechanisms in four European states, and Part Two expands on the 'new' models of protection emerging in the 1990s. It has been demonstrated in Part One that there is

a strong historical background to contextual developments in refugee definitions and protective practices. In the ideal world all those suffering in their home country would be protected by stronger, democratic, willing states, while the oppressive regimes were ousted allowing for safe return. In the real world only a limited number of people achieve protection away from their homeland, and few displacement provoking situations can be instantly eradicated. However in the real world, both legal and political definitions of those in need of protection could, in contemporary circumstances, be expanded to include those displaced by conflicts and the internally displaced. Such developments have taken place in Africa and Latin America. Released from the ideological opposition of the Cold War into the fever of ethnically and religiously inspired re-organisation, contemporary Europe is reconsidering its protective stance.

The Times of 31 July 1951[1] talked of a concerted international effort resulting in a form of words to serve the immediate purpose. In an integrating European Union, with the desire to uphold basic human rights, the immediate crises forcing movements towards its frontiers must be met with a concerted international effort if they are to be handled within the tradition Europe has created for itself. When it was beginning its integrationist path confronted by communism to the east, western Europe created the Convention definition which still stands as a solid foundation to all refugee protection. When Europe was releasing its colonies it acquiesced to the reality that a broadening of that foundation was required to cope with the emergent crises in a decolonised world, with African and Asian states searching for their independent directions. Africa accepted the political reality of its conflicts and expanded its definitional criteria and basis for solidarity and the non-politicised nature of protection. Europe has changing political realities, and in the context of its own regional and wider international relations, the seeking of new directions for protection to manage the contemporary struggles within its reality is the historically contiguous path. Within the context of the EU and the wider cooperation on this subject under the umbrella of UNHCR progress and imaginative suggestions for comprehensive action have been put forward.

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[1] The Times, (31 July 1951) p.7. Text cited in Chapter 1 at Note 4.

PART TWO

SITUATING TEMPORARY PROTECTION WITHIN A COMPREHENSIVE APPROACH

INTRODUCTION

In Part One the background to discussion of temporary protection was developed. In Part Two, temporary protection will be situated within the new conceptual and practical approach to displacement situations being formulated by the United Nations High Commissioner for Refugees, the International Organisation for Migration and the European Commission. An analysis of temporary protection from this perspective is used to demonstrate that, as a regional response to crises arising from displacements of populations due to armed conflict, this type of protection can play a mediating role on both the practical and conceptual levels of a comprehensive approach.

Until the late 1980s, major mass-displacement crises which caused flight towards the states of Western Europe, or called for resettlement programmes from the developing to the industrialised world, such as Vietnam, were handled as they arose, as isolated incidents, or dealt with by application of the Convention definition under domestic law and practice, or by the according of lesser, humanitarian or *de facto* statuses.[1] With the end of the Cold War, and re-emergence of long-suppressed ethnic tensions and nationalist tendencies in and around Europe, the handling of mass-displacement crises effecting this region is in the process of a re-evaluation.[2] Since the late 1980s the contemporary validity and relevance of the 1951 Convention definition has also been much questioned.[3] The search for 'new' solutions to the 'new' crises, or perhaps the re-adaptation of 'old' solutions to the re-emerging 'old' style crises, has led many to the conclusion that the logical way to handle displacement situations is to take what has become known as a 'comprehensive approach'. Such an approach, spanning all types of migration,

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1 See UNHCR, The State of the World's Refugees: the challenge of protection, (Penguin: Middlesex, 1993) pp.1-14 for a description of such programmes as were established, such as CAP for Vietnam.

2 See eg Suhrke, Astri, 'Towards a comprehensive refugee policy: Conflict and refugees in the post-Cold War world' in Bohning, W.R., and M.-L. Schloeter-Paredes (eds.) Aid in place of migration?, (International Labour Office: Geneva, 1994) and UNHCR, Ibid..

3 See Chapter 1.

involving intra- and inter- organisational and government cooperation, and stretching from the origins of migration through intermediate and long term solutions, going from the causes to the consequences of migration, is more holistic in nature and sounds very straightforward and 'common sensical'. However, because it takes into account a whole range of practical policy applications and conceptual and philosophical questions it is both highly complex and highly controversial at every level of discussion.

One aspect of comprehensiveness is the notion of beginning from the concept of the prevention of flight. In part this can be explained as finding its roots in a desire for people not to be forced to migrate. It could, however, also be said to stem from the notion that states have a right no to have migrants (or refugees) thrust upon them. States have duties towards their citizens, that is one basis upon which the modern system of governance is premised. They also, through the creation of alliances and agreements, have duties towards other states. Those states or governments which cause flight, through persecution or conflict, are violating the rights of their citizens by forcing flight. They are also encroaching upon the rights of other states to which victims will flee - whether individual flight is intended by the state or simply a bi-product of other policies and actions. However, the states towards which refugees turn have also established certain standards with regard to the acceptance of immigrants and human rights. Calls to close borders, and uphold the sovereign right of the state, are often associated with right-wing, xenophobic attitudes, and shouted down by those with a more liberal or humanitarian standpoint. However, the maintenance of protection within a comprehensive approach must admit that in order to realise a responsibility to protect, the right of states to protect their sovereignty, including the final decision on membership of society, has to be acknowledged. Therefore, a comprehensive approach including protection will involve elements of protection in the country of origin and neighbouring states, as well as protection in more distant, and perhaps less involved and/or wealthier states.

Visions of a 'comprehensive approach' have come from many sources. Both James N. Purcell, the Director-General of the International Organisation for Migration and Sadako Ogata, the United Nations High Commissioner for Refugees referred in the early 1990s to the need for more holistic strategies in dealing with the general "problem" of migration, calling respectively for a "dynamic,

multifaceted development oriented approach" and an "outward-looking comprehensive and concerted refugee strategy for Europe".[4] Mrs Ogata in two 1992 speeches[5] identified five key elements in such a strategy: protection; distinction between refugees and migrants; greater assistance to refugee programmes; prevention of refugee flows; public information, and referred to a three pronged strategy of prevention, preparedness and solutions. The view of the High Commissioner was echoed by EXCOM[6] in its forty-fourth session in October 1993. An internal EXCOM document presents a lucid description of what a comprehensive approach to migration should involve:[7]

> In the broadest sense, a comprehensive approach is one in which a variety of different but concerted measures are brought to bear in an effort to break the cycle of exile, return, internal displacement and exile. The ultimate goal of such an approach is to promote the overall stability of the society and respect for the rights of its citizens, including refugees and returnees, and thus to remedy the factors causing displacement. The maintenance of peace and security, the promotion of economic and social development, and respect for human rights must be considered essential elements of any fully comprehensive approach. More narrowly, the concept can be understood in terms of both the actors (governmental, inter-governmental and non-governmental, as well as affected communities and individuals) and components (political, peacekeeping, humanitarian, human rights, developmental).

The High Commissioner was encouraged by EXCOM to consult with states, international organisations and regional bodies on the possibilities for additional measures in specific areas with complex problems of coerced population movements.

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[4] Purcell, James N., Jr., Director-General, International Organisation for Migration, Opening Remarks, *Ninth IOM Seminar on Migration: South-North Migration, 29 Int. Mig.* 157 (1990) - cited by Goodwin-Gill, Guy S., (for UNHCR and IOM), 'Towards a Comprehensive Regional Policy Approach: the case for closer inter-agency cooperation', Paper presented to the Human Dimension Seminar on Migration, including Refugees and Displaced Persons, Warsaw, (20-23 April 1993) p.8.

[5] The speeches referred to were made in The Hague and at Graz. They are cited by Goodwin-Gill, Ibid., p.9, and also available on the UNHCR Documentation Centre's World Wide Web site at http://www.unicc.org/unhcrcdr/.

[6] The Executive Committee of the High Commissioner's Programme.

[7] Executive Committee of the High Commissioner's Programme, Internal document, (May 1994).

All these points were re-iterated in General Assembly resolution 48/116.[8]

Further notions of, and variations on the theme of, what a 'comprehensive approach' should involve were given by (for example) Goodwin-Gill on behalf of IOM and UNHCR.[9] The theme was also very strongly brought out in the European Commission's 1994 Communication to the Council and European Parliament on Immigration and Asylum Policies.[10] In that document the comprehensive approach was divided into three thematic areas: action on migration pressure; action on controlling immigration in order to keep it within manageable structures; action to strengthen policies for legal immigrants.

It appears from these various descriptions that there are three essential levels within a comprehensive and cooperative approach. These are firstly, that it covers all the different categories of migrants (illegal or irregular immigrants; economic migrants; rural - urban migrants; internally displaced; *de facto* or humanitarian refugees; the temporarily protected; refugees and even potential migrants). Secondly, that it includes cooperation on the subject of all categories and at all levels of response between national governments, regional organisations and international organisations (inter-governmental and non-governmental), as well as between various departments in complex, multi-faceted organisational and governmental structures. Thirdly, a comprehensive approach involves all kinds of response - preventive, protective and palliative - to each category of migration, and is to be implemented in cooperation by each type of organisation.

However, while a comprehensive approach must cover all categories of migrants, there must, in order for comprehensiveness to be achieved, be a holistic approach suitable for each category and each flight provoking situation, since the

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[8] Ibid..

[9] Goodwin-Gill lists an eight point 'activities approach'. This involves:
1) Effective protection of refugees
2) Effective management of migration
3) Contributing to democratic and economic development
4) Effective action against clandestine migration and exploitation
5) Effective implementation of international standards
6) Effective response to humanitarian emergencies
7) Effective prevention
8) Information

[10] European Commission, Communication to the Council and the European Parliament on Immigration and Asylum Policies, [COM(94) 23 final], (Brussels, 23 February 1994).

ultimate cause of flight will largely determine the action to be taken at each level, and affect some of the political and legal variants concerned.[11] In the case under study here, the category of migrant is those in need of protection due to armed conflict. Of course, the cause of the conflict, and the true reason for flight can be varied - but the outward manifestation of final push factor which we are concerned with here is an armed conflict situation. So, our first task is to analyze the approach to be taken when flight is ultimately provoked by a situation of armed conflict in the state of origin. Secondly, our concern here is to investigate response mechanisms and to locate temporary protection within the range, and along the scale of responses to an armed conflict type flight provoking situation. Finally, we are interested in the type of response generated by, and cooperation between different levels of organisation (including national governments) a discussion which should assist in furthering the discussion in Chapter Three over regional approaches to refugee crises.

The approach taken here will be one of thematically examining the response mechanisms at the various stages in a conflict provoked flight situation, considering the practical and conceptual implications of each level and step in the response process, assessing the links between the various possible responses, and analyzing the benefits of a comprehensive coordinated response over a fragmented organisation by organisation, situation by situation approach. This thematic approach will include the following elements of a comprehensive preventive and protective approach:

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[11] It must of course be recalled that the causes of flight are very rarely easy to pinpoint, and it may be a result of a number of overlap push and pull factors. However, in the case here, as in others, one over-riding factor may be isolated as 'the final (and crucial) straw'.

1) Root causes	Prevention
2) Safe areas/ humanitarian intervention 3) Temporary protection/ burden-sharing 4) Asylum	Protection
5) Return/ repatriation 6) Resettlement 7) Integration	Durable solutions

Part Two is divided into three chapters along these thematic lines. **Chapter 4** looks at root cause approaches to migration. **Chapter 5**, the axiomatic chapter, turns to protective measures. **Chapter 6** examines the notions of 'desirable, durable' solutions as the end points of a period of protection.[12]

[12] See Thorburn, Joanne, 'Transcending Boundaries: Temporary Protection and Burden-sharing in Europe', International Journal of Refugee Law, Vol.7 No.3 (1995).

Chapter 4
ROOT CAUSE APPROACHES[1]

For all their variations, all the lists put forward about the elements of a holistic cooperative strategy involve the idea of preventing flows, otherwise known as taking a 'root causes approach'. Indeed, taking the thematic approach to the handling of migration flows, it is logical to start at the root of the flow. Tackling the causes of flight could not only prevent forced movements but also permit safe return following a period of temporary protection, thereby upholding the human right to protection and also the interests of host states. The major concern is how to tackle the causes of a displacement, whilst upholding current legal and normative values.[2]

Any explicit movement towards tackling the root causes of either voluntary or involuntary migration would also put migration policies generally into a new phase of development. While inevitably handled within a foreign, as well as domestic, policy context, and while often the pawns in political 'games' (particularly those of the 'sending' state), migration and asylum policies have always been part of other policies. Zolberg *et al* demonstrate the mystification and politicisation of both refugee policies and their humanitarian motives with reference to various cases throughout the latter half of the twentieth century. A shift to a focus on the use of other policies to tackle the root causes of migration would be a significant admission that migration and refugee issues had moved into the realm of so-called 'high politics'. The fact that this shift has not become obvious perhaps signifies that the on-going use of the movement and displacement of people in conflicts such as that in

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[1] This chapter is based on the author's article 'Root Cause Approaches to Forced Migration: Part of a Comprehensive Strategy? A European Perspective', Journal of Refugee Studies, Vol.9 (forthcoming 1996).

[2] This chapter takes account of the current normative debate in international relations and politics literature (See for example Brown, C., International Relations Theory: New Normative Approaches, (Hertfordshire: Harvester Wheatsheaf, 1992); Frost, M., Towards a normative theory of international relations: a critical analysis of the philosophical and methodological assumptions in the discipline with proposals towards a substantive normative theory (Cambridge: Cambridge University Press, 1986) and Walzer, M., Spheres of Justice: A Defence of Pluralism and Equality, (Oxford: Blackwell, 1985).

former Yugoslavia has not moved migration to the higher agenda. However, as displacements such as those in and around Bosnia Herzegovina become threats to regional security, and above all threats to the politicised humanitarianism which has become the emphasised motivation behind major elements of crisis and conflict management (for example, the establishment of so-called 'safe areas'), it is perhaps time to explore the nature of this approach. The arrival of root cause approaches on the political agenda is being heralded by bodies such as the European Commission[3], even if its lack of tangible political interest (perhaps due to its nature of having long term aims and effects rather then immediately obvious ones) is as yet preserving its discussion for academic debate.

1. PREVENTION

The word 'prevention' as used by UNHCR and EXCOM usually refers to what might be seen as the next step of a comprehensive approach, humanitarian intervention, 'safe areas' or, *'preventive protection'*.[4] The addressing of the root causes of 'refugee problems' is seen by EXCOM to lie clearly with governments, with UNHCR able to play only a very limited role. The very attempt to distinguish between forms of 'prevention' indicates, however, that a root causes approach to forced migration is very nuanced, and easily shades into early protective measures.

During the eighties and early nineties there has been a growing realisation that:[5]

> assistance and political efforts must extend far beyond charitable and humanitarian concern, and that strategies and anticipatory foreign policies that deal with the root causes of the refugee problem have

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[3] See Commission of the European Communities, Communication to the Council and the European Parliament on Immigration and Asylum Policies, [COM(94) 23 final], (Brussels, 23 February 1994); Perrakis, S. (ed.), Immigration and European Union: building on a comprehensive approach (Athens: EKEM and Ant. N. Sakkoulas, 1995) [Proceedings of the international conference with the same title, held under the auspices of the Greek Presidency and with the support of the European Commission in Vouliagmeni, Greece, June 1995].

[4] See for example, Frelick, B., '"Preventive Protection" and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia', International Journal of Refugee Law, Vol.4 No.4 (1992) and Adelman, H., 'Humanitarian Intervention: the case of the Kurds', International Journal of Refugee law, Vol.4 No.1 (1992).

[5] Loescher, G., Beyond Charity: International Cooperation and the Global Refugee Crisis, (New York: Oxford University Press, 1993) p.184.

> become a necessary part of the search for long term stability in the world today.

In other words, in the search for long term stability, it has been realised that prevention is a key - and that the only way to attempt to prevent flows of refugees is to attempt to cure the causes of their flight.

Rogers and Copeland refer to prevention as "the elimination of the causes - such as human rights violations or civil wars - that force persons to flee".[6] They rightly say that prevention should occur before forced migrations occur, but, as has been noted, a root causes approach shades into other prevention methods, namely those to stem the flows once they have started. There are, therefore, two levels at which the root causes of forced migration might be addressed. Firstly, in anticipation of potential migratory flows, and secondly, once such a flow has commenced. The boundaries between these two levels are not clear, and similar practical and conceptual difficulties arise at both stages.

2. ELEMENTS OF ROOT CAUSE APPROACHES, AND THEIR HISTORY

Zolberg *et al* trace the origins of the root cause debate in the UN system to a "heated discussion in the General Assembly's Special Political Committee in 1980."[7] The discussion was sparked by Western initiatives within the UN to censor Cuba and Vietnam for their encouragement of mass exoduses. This discussion was followed by a report on mass exoduses for ECOSOC, under the auspices of the former High Commissioner for Refugees, Sadruddin Aga Khan, in 1981, and five years later by a report on "International Cooperation to Avert new Flows of Refugees" issued by a Group of Experts, established by a resolution of the General Assembly. At the same time, outside the framework of the UN, an Independent Commission on International Humanitarian Issues was formed (in 1983), and a report by that Commission was issued in 1986. The Commission was co-chaired by Sadruddin Aga Khan and the Crown Prince of Jordan Hassan Bin Talal. The

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[6] Rogers, R. and E. Copeland, Forced Migration: Policy Issues in the Post-Cold War World, (Tufts University, 1993) p.121.

[7] Zolberg, A., A. Suhrke and S. Aguayo, Escape from Violence: conflict and the refugee crisis in the developing world, (New York: Oxford University Press, 1989) p.258.

outcome of both reports was that human rights abuses, poverty and inequity needed to be tackled. However, both concluded by emphasising the need for "better management of asylum policies, relief assistance and [the] search for 'durable solutions' in the form of permanent settlements in a host country, or repatriation" as refugees would continue to arrive in large numbers.[8] That is to say that a comprehensive approach would be necessary, and that tackling the causes of migration, where they are visible, will not always be sufficient, even if the means available to tackle them ever proved strong and broad enough to overcome the causes of flight, or to stop the human urge to migrate.

As for the elements of a root causes approach, they are varied, and cover many aspects of international relations and foreign policy. As well as measures to avoid forced displacement, these include ways of preventing unregulated or illegal economic migration. When considering the root causes approach, we cannot consider only measures such as preventive diplomacy, which are directly related to the cause of migration (armed conflict) being dealt with in this thesis. Here an overlap of policies must take place on two levels. Firstly, in attempts to prevent the degeneration of a situation into conflict, as well as active diplomacy and negotiation, other measures such as aid and development assistance may be necessary. This will involve addressing the causes of voluntary migration, and ultimately may also result in the prevention of forced migration. A second overlap of policies occurs once conflict has broken out, or is perceived to be imminent, as preventive diplomacy comes to the fore, followed in recent cases such as Bosnia and Iraq by some level of humanitarian and/or military intervention. It is then that the overlap between the root causes approach and 'preventive protection' becomes apparent.

The measures usually classed as constitutive elements of a root causes approach, then, include (to prevent forced migration) the promotion and monitoring of human rights; preventive diplomacy; conflict resolution; (to prevent both forced and voluntary migration) efforts to strengthen national laws and institutions; (to limit voluntary migration and perhaps, indirectly, eventual forced migration) the promotion of sustainable development; international aid; and the dissemination of

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[8] Ibid., p.259.

information and public education.[9] However, tackling the true root causes of a conflict, which could be centuries old often cannot be even (realistically) envisioned. In the meantime, attempts to offset ethnic or nationalist divisions with efforts to encourage economic development, by trying to open up markets or enrich less developed and emerging states, are unlikely to be immediately, and in a practical sense, effective. This is due in the first instance to lack of funds, and secondly to the mismanagement of available resources. Indeed attempts to enrich could simply become measures of funding conflict, or of funding flight.

The practical tackling of migration causing factors poses particular difficulties in terms of the formulation of policies, their implementation and the 'coercing' of states from which migratory flows originate into following the 'rules'. One major effort in this direction has been undertaken in the CSCE Charter of Paris of November 1990, which recognises that participating states should not pursue policies which lead their citizens to seek safety, refuge and livelihood elsewhere in an unregulated manner, and that countries which have difficulties in meeting the needs of their people should receive assistance from the international community. Such assistance would be both to the benefit of the people in the states of origin, and in the interests of other states wishing to avoid migration towards their borders. However, the effective achievement of these goals is, as Goodwin-Gill points out, threatened by ever increasing gaps in living standards, and imbalances between development and population growth.[10] It is equally threatened by the maintenance of ethnic hostilities, expansionist tendencies and the reluctance to let go of, or enter into peaceful negotiations over, the secessionist regions of some signatories (for example Russia and the conflict in Chechnya).

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[9] See Goodwin-Gill, G.S., (for UNHCR and IOM), 'Towards a Comprehensive Regional Policy Approach: the case for closer inter-agency cooperation', Paper presented to the Human Dimension Seminar on Migration, including Refugees and Displaced Persons, (Warsaw 20-23 April, 1993) p.33: Rogers and Copeland, op.cit., p.121. Rogers and Copeland note the [to date] ineffectiveness of early warning, and the example of the PHARE Democracy Programme of the European Union as an example of effective public education. Gilbert offers a more precise example of possible measures to tackle root causes in his advocation of a restraining of the arms trade, Gilbert, G., 'Root Causes and International Law: Refugee Flows in the 1990s', Netherlands Human Rights Quarterly, 4.

[10] Goodwin-Gill, Ibid., p.29.

3. A EUROPEAN PERSPECTIVE

The European Commission in its 1994 Communication puts forward a coordinated plan of action for its Member States' governments. This provides an interesting case of the inter-related elements of both the root causes and wider comprehensive approaches within organisations. The Commission sees 'action on migration pressure' as requiring the integration of immigration and asylum policies into the Union's external policies, and as potentially including action at various levels in areas such as trade, development and cooperation policies, humanitarian assistance and human rights policies. This leads to certain institutional questions.

The Communication classes as main migration inducing pressures: the human rights situation; the political situation; economic disparities; demographic factors; and environmental factors. In order to tackle these push factors the Commission sees a need for coordinated action in the fields of: foreign policy; trade policy; development cooperation; and immigration and asylum policy. In support of this approach it cites the 1992 Edinburgh Conclusions, in which the European Council adopted a Declaration on Principles Governing External Aspects of Migration Policy.[11] An important additional element of a root cause approach, currently the topic of much debate both in the Commission and elsewhere, is the need for systems of early warning, followed by preventive diplomacy. In this context the European Commission, supported by the European Parliament is looking into the potential of a 'European Immigration Observatory', and other institutions, such as UNHCR are setting up their own systems.[12]

However, involving other policy areas so directly in one component of a so called comprehensive approach at European Union level provokes institutional questions for the Union, and queries over the position of Member States.

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[11] See Chapter 3.

[12] It has yet to be proved that early warning of 'refugee crises' can be very effective, beyond of course the fact that whenever one hears of conflict in any region through the media it is natural, and usually correct, to assume that a mass flow of civilians is on the move, either within the state of origin, or towards and across borders. Projects are being carried out in and with the support of various fora including UNHCR's Documentation Centre and the European Commission. A Pre-feasibility Study on a Possible Future European Immigration Observatory (Luxembourg: Official Publications Office of the European Union, 1994) was presented to the International Conference 'Immigration and the European Union: building on a comprehensive approach', June 25-28, 1994.

3.1 Institutional difficulties ...

Since the ratification of the Treaty on European Union in November 1993, the European Commission operates under a three pillar system. The first pillar, including areas such as external economic relations, trade and development assistance has an exclusive right of initiative and the right to adopt directives and regulations. The second pillar, involving the search for "a common foreign and security policy" , sees the Commission "fully associated" , but without any implementational or directing role, as the positions to be taken by the Member States are to be coordinated and defined by them at Council level.[13] Meanwhile, the third pillar, which involves cooperation in the fields of Justice and Home Affairs, including immigration and asylum policies has a shared right of initiative alongside Member States and the possibility of adopting joint actions, joint positions and conventions.[14]

Separating issues related to the asylum and immigration question would perhaps result in the first pillar Directorates-General of the Commission acting specifically in order to reduce migration pressures. This could give rise to a situation in which a component of immigration and asylum policy, a matter in which the Commission has only a shared right of initiative, was being handled for the Union via Commission directives and regulations. Such a system of managements would be outside the perceived borders of state sovereignty, of which an essential feature is held to be the right to control admission to state territory and membership of the state citizenry.

3.2 ... and normative questions

If, on the other hand, the aim were to have development, assistance and trade programmes which were not aimed specifically at reducing migration, but rather were covertly influenced by distinct immigration and asylum policy departments, myriad ethical questions would arise. The major ethical question to be posed, regardless of the means of (to put it simply) dividing the labour, would be how one

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[13] Treaty on European Union, Title V.

[14] TEU, K3 and K4.

could justify the use of policies to prevent migration, that is to prevent exit from the country of origin. If policies were aimed 'only' at upholding human rights, for example, then most people would label them 'good'.[15] Once the aim rather than the (perhaps fortunate in some people's view) by-product becomes the prevention of migration, the percentage of 'bad' votes would rise dramatically, because the aim would involve the violation of the right to leave, even though it upheld the norm of the state's right to control entry and membership.

This raises the question of humanitarianism as the emphasised motive for refugee policies. The normative justification for the use of a root cause approach to any type of migration would have to be that the aim was to allow people greater ability to choose whether to stay or move, by enhancing their potential to stay. In the case of forced migration in particular, there would also need to be a demonstrated motive of general prevention of death, destruction and the other horrors of conflict, and not just a desire to stem immigration numbers. Indeed, in this case, the further steps of the comprehensive approach outlined above would need to be accepted, admitted to, and kept open.

3.3 Organisational problems

Finally, if a way around these institutional and normative difficulties were to become evident, then any sharing out of duties would involve a level of intra-organisational coordination and cooperation far greater than that which has yet been perceived in the European Commission.[16] In addition, taking the issue of tackling root causes of forced migration onto the higher political agenda *because of* the migration element, would require deep political will on behalf of the governments of the Member States. There would need to be strong commitment and desire to link foreign policies to migration issues, rather than states finding themselves facing migration 'problems' as a direct or indirect result of their foreign policy approaches.

If the elements of other policies which would be involved in an effective root

[15] See, for example, Gilbert, op.cit., p.4.

[16] See, for example, Ludlow, P., 'The European Commission' in Keohane, R., and S. Hoffman (eds.), The New European Community: Decision-making and institutional change, (Boulder: Westview, 1991) pp. 86 and 92.

causes approach to immigration and asylum issues were to be kept within the third pillar, the Member States would have to agree unanimously on every use of foreign policy, development assistance or other policy for this purpose. Under Title V of the Treaty of European Union joint actions may currently be agreed to by a qualified majority, although the conditions surrounding a decision to vote in this way rather than to unanimity apparently make it unlikely that the qualified majority rule would be used anyway.[17] Furthermore, the Commission would be required to coordinate its actions both within and between Directorates General and the Secretariat General to ensure that there would be no overlap, and that operating procedures would be efficient.

However, as both asylum and immigration issues and foreign and security policies remain matters for intergovernmental cooperation, the combination of these policy issues, or perhaps more accurately, the acknowledgement of their linkage and the decision to coordinate usage of policy making tools, with a view to the overall effect of policy determination, would not be impossible. To make it possible would require political will of all Member States, not only to make this policy linkage in dealing with the causes of forced migration, but also in further recognising the need for a Union wide approach to protection and population issues generally. A particularly pertinent question when thinking about this linkage is to address situations where mass influxes of displaced persons in need of international protection, either into the European Union itself, or into its immediate neighbours, might constitute a challenge to regional peace, security and stability.

In Council discussions following the publication of the Commission's February 1994 Communication some guarded interest is reported to have been expressed in addressing root causes. The Barcelona 'Mediterranean' Conference of November 1995 was perhaps a first step in this direction. However, no full-scale action plan for the addressing of the root causes of migratory flows, and in particular forced displacement, has (as of 1996) been adopted by the European Union Member States. Meanwhile, papers presented to the European Commission sponsored conference 'Europe and Immigration: building on a comprehensive approach', and discussions which took place in that meeting, including on the

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[17] Edwards, G. and S. Nuttall, 'Common Foreign and Security Policy', in Duff, A., J. Pinder and R. Price (eds.), Maastricht and beyond: building the European Union, (London: Routledge, 1994) p.96.

subject of the possible establishment of a European Immigration Observatory, where accurate information would be collected and potential policy directions formulated, demonstrated that the path forward on the subject of a root cause approach is neither straight nor smooth. However, from the holding of such a conference, and from presentations by Commission officials, it seems that the Commission has a strong desire to forge ahead in its thinking on this issue, either isolated or within the framework of a 'comprehensive approach'.

4. THE PROBLEMS OF APPROACHING ROOT CAUSES

The prevention of forced, and indeed unforced, migration, is hardly problem-free. Collinson perceives five major problems with the root causes approach within European Immigration and Asylum Policies, and these deserve some attention.[18] She sees it as an approach which is founded in defensive thinking, and, since it is treated as another 'solution', reactive in nature. Its use to prevent migration is, she says, impossible, due to the complexity of the problem, the competing interests which lie at the heart of these matters and the unpredictability of migratory pressures and situations causing displacement. Finally, she finds a normative problem in the notion that this approach encourages - ie that migration can and should be prevented.

Collinson is quite right to be sceptical about the effectiveness of a root causes approach as a solution to migration 'problems', and in her difficulties with its implication that all migration can and should be prevented. As has been shown in a work edited by Sarah Spencer, immigration can, and should, be seen in a positive as well as (or instead of) negative light, as without migration our societies would no longer be involved in a cultural-evolutionary process, and would become static.[19]

However, Collinson is mistaken in assuming that all elements of a root causes approach are reactive and defensive. This criticism could possibly be made of using this approach on the second of the two levels on which it could operate - after flight has begun. However, prior to displacements occurring it can be seen as

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[18] Collinson, Sarah, Beyond Borders: West European Migration Policy Towards the 21st Century, (London: RIIA/ Wyndham Place Trust, 1993).

[19] Spencer, S., (ed.), Strangers and Citizens: a positive approach to migrants and refugees, (London: Institute of Public Policy Research/ Rivers Oram Press, 1994).

an active stance, particularly if the country of origin were, as is suggested by the European Commission's Communication, to be involved in the process from the beginning of its operation.

As well as the institutional difficulties for the European Union, an effectively implemented root causes approach poses broader practical and conceptual difficulties, including those raised by Collinson, but which, it is suggested here, in fact centre on one of the key elements of the approach - intervention.

4.1 Intervention

While the international community would have several tools at its disposal in attempts to address the causes of migration generally before it occurs, intervention in a situation which is causing or perceived to be about to force flight has to be a central feature of any discussion on the ways to tackle *forced* displacements. 'Intervention' is often taken as a broad term, and, for example, prior to a situation's degeneration to the point of flight producing conflict could be said to encompass economic sanctions, a control on the import of arms to the state(s) in question, conditionality (economic and political assistance and understanding in return for protection of human and minority rights) or, in a more positive sense, the provision of development assistance. These forms of intervention, hand in hand with diplomatic negotiations to resolve a flight provoking situation should be exercised before stronger intervention could ever be contemplated. If these means of conflict or crisis resolution fail, the attention of international debate inevitably turns to stronger forms of intervention. Indeed, the generic term *intervention* has become more strongly associated with either military intervention (participation in a conflict aimed at its resolution) or humanitarian intervention (the provision of aid and defensive protection to vulnerable populations within a given territory). The type of intervention which would be necessary to tackle the causes of forced migration, and prevent such movements or permit return, would be military intervention, with a humanitarian aim and component.

During the Cold War period, intervention was generally opposed, and seen in a negative light. However, a new movement towards an emerging norm of positive intervention can be said to have been occurring during the early 1990s. From this

perspective, intervention would be seen "as a positive means to resolve conflict and protect human rights of vulnerable citizens".[20] One group of such vulnerable citizens are those who, if intervention were not to occur, would become refugees. In a 1994 article, Astri Suhrke sees the likelihood of greater efforts being made in the post-Cold War world to 'avert' flows. She sees intervention as an on-going phenomenon, continuing on both the regional and collective (UN) level. However, as she points out, it is, and will be, easier to obtain international agreement to aid refugees than to address the causes of the outflow.[21]

Suhrke uses three cases to demonstrate this point, those of the Kurdish situation, the situation in Myanmar and the situation in Haiti (in 1991). In the first instance, which she describes as being met with "incomplete activism" by the international community she demonstrates that a highly interventionist refugee policy, departing from the principle of providing asylum outside the state, was left in uncertainty by the failure to tackle the root causes of the long standing Kurdish struggle.[22] In the second case, she demonstrates the near paralysis of the UN, many states, particularly in the Asian region, holding back because of shared problems of ethnic minorities, and a fear of intrusive external pressures in their own affairs. Finally, the Haitian case shows a situation where a regional (OAS) root causes strategy was developed, without accompanying protection mechanisms including "the option of temporary asylum".[23]

As Suhrke rightly points out, "the principle of non-interference remains the obstacle - and may in fact have been strengthened in the post-Cold War world as many countries, particularly in the developing world, fear a more assertive UN or regional bodies."[24] An additional problem with this approach is that of jurisdiction, and whether one can intervene early enough to prevent migrations - even if justification for intervention due to such a motive can be found. It is often

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[20] Sharp, Jane M.O., 'Appeasement, Intervention and the future of Europe', in Freedman, Lawrence (ed.), Military Intervention in European Conflicts, (Oxford: Blackwell, 1994) p.37.

[21] Suhrke, A., 'Towards a comprehensive refugee policy: Conflict and refugees in the post-cold war world' in Böhning, W.R. and M.-L. Schloeter-Paredes (eds.), Aid in place of migration?, (Geneva: International Labour Office, 1994) pp.26-8.

[22] Ibid., p.27.

[23] Ibid., p.28.

[24] Ibid., p.28.

the case that intervention, if it is to take place, comes after the crisis has started.

Sharp uses a set of five preconditions associated with just war doctrine to establish the justification of intervention, defined as ending a war on behalf of others.[25] These preconditions dictate that an operation, which must be aimed at a just cause, and conducted under a competent authority, should be undertaken only after attempts at resolution through peaceful means have been exhausted, with a sense of proportion and discrimination, and only if success seems likely. Michael Walzer, meanwhile, offers a (revised) 'legalist paradigm' summarising the theory of aggression with six propositions.[26] This holds that there is an international society of independent states which has a law establishing the rights of its members, and which places the rights of territorial integrity and political sovereignty above all other rights. Within this established system, any use of force or imminent threat of force by one state against those supreme rights constitutes aggression and is a criminal act, which justifies two kinds of violent response: either a war of self-defence by the victim, or a war of enforcement of international standards by (an)other state(s) together with the victim. According to Walzer's original paradigm only aggression can justify war, although he revises this to allow that violations of human rights within a state, promotion of overwhelmingly supported secessionist and self-determination movements, and the countering of prior intervention can justify war.

Neither of these classifications of criteria for just war or intervention includes direct reference to forced population movements as a justification for such action. Looking beyond these sets of preconditions, however, and into the debates surrounding intervention in the 1990s, we find, as Sharp indicates, a set of at least three dichotomies which need to be addressed involving the intrusive and improper nature of intervention as opposed to its more recently acknowledged positive and affirmative aspects, and the question of unilateral or collective intervention.[27] A further dichotomy, and the one which is of interest here, is that between the protection of state values and the upholding of human values - understood as recognised norms of human and minority rights. On this level determinations must

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[25] Sharp, op.cit., pp.34-5.

[26] Walzer, M., Just and Unjust Wars: a moral argument with historical illustrations, (New York: BasicBooks, 1977) [Second Edition 1992] pp.61-3; 85; 90; 108; 121.

[27] Sharp, op.cit., p.34.

still be made, as the examples used by Suhrke referred to above indicate. All three examples show state integrity over-riding human values in the outcome if not the initial desires of the interventionist strategies.

The most recent case of justified (and justifiable) intervention in the Gulf War clearly was a demonstration of the international community's willingness to intervene to protect the territorial integrity of a state (Kuwait), particularly when other interests were also benefited.[28] The initial lack of intervention in Bosnia Herzegovina also shows that in spite of humanitarian level justifications, the absence of demonstrable state level justifications for intervention (as well as political divisions and indecision) holds back the international community from real responsive action of this type. Sharp points to the genocide occurring in Bosnia Herzegovina as a wrong, and as a circumstance which cannot justify passivity. She offers strategic and deterrent arguments for intervention in this case, not least of which is the upholding of the European ideal of pluralistic and multi-ethnic states and regions within the continent.[29] Relating intervention to the addressing of the root causes of forced migration, the question has to be whether such arguments can also lead one to use the human rights and minority rights abuses demonstrated in the forced displacement (as distinct from genocidal) aspects of 'ethnic cleansing' as justification for military intervention. Furthermore, it is necessary to ask whether forced displacements and the destruction of multi-ethnic statehood as potential causes of regional instability and insecurity are reason enough, motivation enough or justification enough for intervention.

If the answer to this is yes, then the next question is whether a distinction can or should be made between forced movements which can be contained and absorbed by other pluralistic and multi-ethnic states of the region, and those which might tip the balance of already delicately equilibrated ethnically mixed states, and where the line is drawn. If containment of the situation within this fine balance is not possible, the question becomes that of whether states should use this humanitarian justification for intervention if they could in fact spread the protection 'burden' further afield. The problem comes down to whether using forced migration to justify intervention would be for the human right of people to remain in their homes and country of

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[28] Walzer, Just and Unjust Wars, op.cit., Preface to the 1992 edition.

[29] Sharp, op.cit., pp42-3.

origin or for the states where protection would be sought to use their sovereign will to deny protection within their boundaries, by involving themselves in the displacement-provoking conflict. This difficulty is not easily resolved, for while state use of intervention to uphold the sovereign right to territorial integrity of aggressed states might be quite readily justifiable, its use to uphold human and minority rights within a state or states at war cannot be seen as absolute or 'pure', without resolving the following dilemmas. Would the motive of military intervention justified in humanitarian terms, with the aim of addressing the root cause of flight, be that of permitting people to remain in their homes in safety or preventing people from arriving to seek protection in other states? Can it be considered that there is a primacy in human rights terms of being able to remain over being able to seek protection elsewhere? Finally could military intervention, which inevitably would threaten the lives of the civilians in whose name it was being carried out, actually be given humanitarian justification?

In the light of action by the UN and NATO in Bosnia Herzegovina in September 1995 one perhaps also needs to consider the multiplicity of motives bringing about the delayed use of long-threatened intervention to uphold rights and halt massive movements of populations, caused by the shelling of besieged cities and the overthrowing of nominal 'safe areas'. While protection may be claimed as the ultimate objective, the hesitation to carry out threats until the point where 'face' may be lost, and the very legitimacy and existence of such organisations themselves might be called into question, points to a need for stronger advance policy making on situations where interventionist strategies might be appropriate. This hesitancy also demonstrates the need to take into account the fact that the timing and type of intervention is crucial if the aim is to limit forced displacement, rather than to provoke further movements through international action.

While humanitarian concerns about forced displacements could eventually be used in conjunction with other security and sovereignty arguments to justify intervention in a conflict, the dilemmas surrounding this issue are likely to mean that it could never be the sole justification for such action, and that displacement issues will not advance so far on the political agenda to give any likelihood to the possibility of intervention to prevent migration. Any direct tackling of the root causes of migration would therefore have to remain within the weaker interventionist

realm (sanctions and development assistance) where the moral dilemma exists, but is perhaps not such a forceful issue. At the same time, such measures cannot be expected ever to fully deter forced migrations (or voluntary migrations) and so other elements of a comprehensive approach, including effective protection, asylum and immigration policies, must still be enhanced and developed.

5. AIMS AND HURDLES

To summarise, root cause approaches to migration issues have a twofold aim, and a double practical and conceptual hurdle to overcome. The morally justifiable aim of such approaches is that of resolving the causes of the necessity of flight: human rights abuses; ethnic and civil tensions or conflicts; wars and development problems, before they begin, or very soon afterwards. However, not only is there a need for both the ability and the political will to intervene in this way, but the motivation of so acting needs to be questioned. If it is wholly for the sake of those people whose lives would be put at risk were these causes of flight not addressed then many would say this approach was laudable. If the motivation is rather as a part of restrictive asylum and protection policies within the potential receiving states then, from a human rights perspective, it cannot be so easily justified.

In this context one should note the comments made by the High Commissioner in Bonn in June 1994,[30] to the effect that the challenge is not how to keep people away, but rather how to control refugee and migratory flows in a way which upholds basic human rights and humanitarian principles, and how to meet the needs of victims world-wide as well as the concerns of the states and communities which receive them. Tackling root causes is, she said, in this context, essential. The obvious inference is that if the tackling of root causes is in the context of preventing the flight of those in need of protection in order to uphold state sovereignty through restrictive asylum policies, it is far from a desirable action. As Gilbert points out "[p]reventive action should not be aimed at keeping refugees out of Europe, but should be undertaken for humanitarian considerations, even if the

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[30] Available on the Internet at http://www.unicc.org/unhcrcdr/.

former may be an incidental result."[31] The motivating force of restricted asylum is, however, understandable and justifiable from a primacy of state sovereignty perspective, and (perhaps worryingly) it seems that the prevailing view is becoming one in which the migration aspect of potential crises is seen as a useful contribution to overcome political obstacles with regard to measures in the context of preventive diplomacy.

Simultaneously, there is a difficulty from the state sovereignty perspective in that intervention and interference in internal state affairs, by the international or regional community, would become necessary. The current norm is one of non-intervention, so for a root causes approach to work effectively this solid basis of the international law of states, and UN Charter, finds itself in a questionable position, open to re-negotiation, particularly on the issue of the contribution which the prevention of forced displacements might make to the creation of a migration oriented humanitarian justification for intervention in conflict. Suhrke's statement of the re-affirmation of the principle of non-interference is probably correct, however, Loescher is surely equally correct in his assertion that "it is time for a major debate about how the UN, regional bodies, and states can effectively intervene in internal conflicts."[32] Such a debate is necessary if the root causes approach is to become an effective element, at both levels described, within the comprehensive approach.

CONCLUSION

In an effective comprehensive strategy towards migration flows, including forced migrations, attempts at prevention have to be a key first step in at least the thought processes of policy making. Addressing the question of prevention on its two levels, before migration occurs and after it has begun (in order to stem further flows and allow return) requires both active (or pro-active) and reactive policies. However, on either level, a careful distinction has to be made in what is motive and what is by-product. A moral stance on asylum and immigration policies would not find justification for the violation of the right to freedom of movement, or the right

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[31] Gilbert, op.cit., p.414. Gilbert goes on to cite the situation seen following the Gulf crisis, and activated for the Kurds and later in the Bosnian crisis: "In the wake of the Gulf Conflict, the British government spoke of setting up safe zones throughout the world where refugees might flee, but the unstated aim was to deny those refugees the chance of applying for asylum in Europe."

[32] Loescher, op.cit., p.196.

to seek and enjoy asylum. A position which permitted the maintenance of the ability to choose whether or not to move, by attempting to ensure that conditions in the country of origin made the option to remain (in safety) possible, and upholding the right to seek and enjoy asylum of those who, for legitimate reasons, could not stay in the country of origin would, however, find both legal and moral justification. In particular, using a root cause approach to migration to justify an interventionist policy would create a very precarious position.

Within a comprehensive approach, which is by its very nature multifaceted, a root causes approach offers a layered series of policies of which the aim should be to improve conditions in states of origin, a by-product being that emigration from those states towards the developed world may be reduced, or indeed potentially that immigration and emigration would become complementary. Whatever happens, though, the other components of a holistic plan of action, especially protective policies, must not be ignored, and should continue to be developed to address the contemporary situation.

The case of the European Union's approach to immigration and asylum policies, and particularly the role of the European Commission in inter-governmental and inter- and intra-organisational cooperation, demonstrates that the practical implementation of a root causes approach, even if conceptual hurdles can be overcome, is not exactly plain sailing, particularly where political will might be lacking, or hesitant, due to the very complexity of the issues to be addressed and the overlapping of motivating forces.

Although it is practically and conceptually very difficult to imagine the root causes of all migration flows, and especially forced migration flows resulting from long-term ethnic tensions, being successfully and effectively tackled, as one component in a comprehensive approach it is to be applauded particularly for the potential it offers of broadening government understanding of the phenomenon of migration, and in the long term for the creation of more effective policies.[33] However, even if part of creating a comprehensive approach to forced displacement involves the tackling of the causes of the flows once debate on the overcoming of the barriers highlighted above can begin (and shows results), protection is always going to be absolutely essential.

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[33] See Collinson, op.cit., p.55.

Chapter 5

THE PROTECTIVE APPROACHES[1]

To be effective refugee policy must encompass adherence to existing legal obligations, have a strong moral basis and set out from the assumption that all forced migration scenarios are manageable in one way or another. If policies aimed at resolving flight provoking situations fail, or displacements occur anyway, refugee policies must involve the ability to protect. The moral basis to the entire refugee issue involves the upholding of human rights and dignity, and is standardised by international legal obligations established in a number of documents. Those documents do not, however, express any obligations with the regard to how protection should be enacted. In order to manage evolving crises, protective mechanisms have spread from the basis of protection aimed at integration to involve a search for protection aimed at permitting a resumption or an evolution of the situation prior to flight, highlighting return as the solution of priority. Forms of protection which might be categorised as 'more limited' than established asylum and integration have therefore been formulated within the 'comprehensive approach'. The assessment of limitations rests on the level they achieve in offering asylum in terms of protection rather than in terms of integration. In fact as forms of protection, in view of the wider picture of the developments of societies and international relations, mechanisms other than the regular asylum-integration practice of the twentieth century may prove to be broader and stronger mechanisms than the integrationist bias to asylum which is being challenged.

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[1] Elements of Chapters 5 and 6 and the Conclusion to Part Two are taken from the author's article 'Transcending Boundaries: Temporary Protection and Burden-sharing in Europe', International Journal of Refugee Law, Vol.7 No.3 (1995).

Chapter 5

1. Preventive Protection: 'safe areas' and humanitarian intervention[2]

While UNHCR does not actively take part in 'root cause approaches', it does claim a role in prevention activities, as it considers that:[3]

> Humanitarian assistance itself can play an important role in prevention. The negotiations involved in delivering assistance may create an opening for dialogue, drawing antagonists into discourse with external observers in a way that allows the international community to exercise some restraint on refugee-producing behaviour.

The enactment of 'preventive protection' in terms of permitting people, through assistance measures, to remain close to their homes and ultimately return, has not been successfully conceptualised or achieved. Such protection policies are very much a reaction to restrictions on entry and asylum. The practical manifestation of this preventive idea which has emerged in the 1990s is the creation of 'safe areas'. This policy attempt has not succeeded in preventing displacements even if it has to some extent prevented movements beyond the country or immediate region of origin. Meanwhile, aid, the key element in this approach, has become increasingly politicised.[4] In addition, while attempts to keep people close to their homes may have resulted in a reduction in the number of potential refugees (those who have left their country of origin) who actually become refugees, this has been matched or exceeded by rising numbers of internally displaced people. There is no international agency with a mandate to enact protection of the internally displaced. Their protection by the international community, in cases where the protection of the home government is as lacking as if they had left the country, also raises significant

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[2] In order to limit this study to the essential element of protection, the focus will be on the security and intervention components, not on questions concerning the types of aid (food, shelter, medicines) or their actual delivery and distribution. Although the provision of effective assistance is the ultimate aim of many forms of humanitarian intervention, it cannot be achieved without protection of overall safety.

[3] UNHCR, The State of the World's Refugees: the challenge of protection, (Penguin: Middlesex, 1993) p.129.

[4] See for example Loescher, Gil, Beyond Charity: International Cooperation and the Global Refugee Crisis, (Oxford University Press: New York, 1993) p.28.

questions of sovereignty and territorial integrity.[5]

1.1 Practical attempts to create 'safe areas': Iraq and Bosnia Herzegovina[6]

Adelman points to three 'traditional' refugee solutions, and the reason for which they could no longer stand the test of the practical situation in early post-Cold War displacement situations such as that in northern Iraq.[7] The three traditional solutions are: resettlement abroad; settlement in countries of first asylum; repatriation. A similar rationalisation could be made in the Bosnian case.[8]

In the crisis of the Kurds in northern Iraq, resettlement was not considered a viable option because of the large numbers involved, the lack of political will to face an evacuation and the fact that resettlement would play into Saddam Hussein's hands. Turkey, which would have been the first country of asylum, was adamantly opposed to playing such a role unless the protection would be temporary, with resettlement in third countries guaranteed. Such a guarantee was not forthcoming. Meanwhile, 'repatriation' assumes that the displaced are refugees, of either a Convention or *de facto* nature, and have crossed an international boundary to seek protection. The Kurds did not fall into this category, as Turkey had closed the border to them, and they were still in their country of origin. In this case, "[t]he legal fiction that the internally displaced were not 'refugees' within the responsibility of the international community could no longer be sustained."[9] Adelman's use of the term 'refugee' is somewhat dubious, since even those who seek a redefinition of

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[5] See Deng, Francis M., Protecting the Dispossessed: a challenge for the international community, (Washington DC: Brookings, 1993) and UNHCR, The State of the World's Refugees: in search of solutions, (New York: Oxford University Press, 1995) especially pp40-41.

[6] The same terminology was used to describe US protection of both Haitians and Cubans at the Guantanamo base in Cuba. However, there are substantial differences between the protection by the US in those cases and that referred to in and around Europe. In particular the US case involved US protection, not an international effort and the protection was in a place already under US jurisdiction.

[7] Adelman, Howard, 'Humanitarian Intervention: the case of the Kurds', International Journal of Refugee Law, Vol.4 No.1 (January 1992) p.9.

[8] Although the three traditional solutions could, in fact, have been applied in Bosnia Herzegovina, had the political will been there and had the mediating proposal of temporary protection for those displaced by this conflict actually been pursued as was suggested by UNHCR and the Slovenian and Croatian governments.

[9] Adelman, op.cit., p.10.

the term 'refugee' maintain the essential notion of a frontier having been crossed in the course of flight.[10]

Resettlement faced similar problems in the Yugoslav situation, particularly due to the practice of 'ethnic cleansing'. In addition, west European governments did not want the political problems of mass evacuation and the resulting Bosnian diaspora that could create.[11] The first countries of asylum, Slovenia and Croatia, were giving a temporary refugee status to the displaced, and requesting burden sharing after receiving a certain number. The refusal to share the onus resulted in these states beginning to deny entry to others. Repatriation of those who did leave was not possible as ethnic tensions persisted, there were commitments not to return displaced persons to a war zone (which the whole of Bosnia Herzegovina was categorised as[12]) and anyway there was no recognised or defined *patria* to which people could be *re*patriated.

In spite of the long history of international cooperation on the subject of refugees, the claimed right of sovereignty had long prevented the international community from intervening in what were considered the domestic affairs of other states, and thus from protecting those displaced people who had not crossed a border.[13] Humphrey, citing a history of politically motivated humanitarian interventions in the nineteenth century, points to a twentieth century desire for non-intervention in similar cases where "the conscience of mankind" was shocked by the

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[10] See, for example, Hathaway, James, The Law of Refugees Status (Butterworths: Toronto, 1991); Ortiz Miranda, Carlos, 'Toward a Broader Definition of Refugee: 20th Century development trends', California Western International Law Journal Vol. 20 (1989-1990). Adelman himself refers to this fact, using it to point out that the ultimate point of reference in the international refugee regime is still the sovereign state. Ibid. p.10.

[11] Interview with Andrew Cunningham, British Home Office, 18 November 1994.

[12] Cunningham, Ibid..

[13] See, for example, Loescher, op.cit., p.30. In spite of the use of this cloak of sovereign rights, the roots of intervention by the United Nations for certain humanitarian reasons - notably self-determination - are traced back to 1960, and the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the 1970 Declaration on Principles of International Law Concerned with Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations by Adelman. However, he suggests that these two documents still clung to the superiority of territorial integrity over People's right to self-determination, but that the principle of non-intervention is supported by the qualifying of it as but subject to states "conducting themselves in compliance with the principle of equal rights and self-determination of peoples".

treatment of certain groups within their own states.[14] He also doubts that the United Nations Charter authorises the use of force for the purposes of humanitarian intervention by the UN or any of its organs. The exception clause in Article 2(7) of the United Nations Charter is that the principle of non-intervention by the UN in "matters which are essentially within the jurisdiction of any state ... shall not prejudice the application of enforcement measures under Chapter VII."[15] Chapter VII refers to "Action with respect to threats to the peace, breaches of the peace and acts of aggression", the existence of which is to be determined by the Security Council, as are the recommendations and measures to be taken for the restoration of international peace and security.[16]

The fact that a mass exodus may take place is increasingly seen as a threat to regional and international peace and security. The defensive measure of humanitarian intervention is, therefore, coming to be seen as the most appropriate first response.[17] Although sovereignty is still recognised as a cardinal feature of the contemporary and international political legal system "the legal and political arguments against UN intervention are no longer unassailable".[18]

The debate over the meaning of state sovereignty is most keenly highlighted when one considers that in the space of just six months in 1991

> The same countries that had fought a war to protect the principle of the sovereignty and territorial integrity of states, now challenged the sovereignty of Iraq by intervening in a matter of ostensible domestic jurisdiction, and in a way that could potentially lead to the

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[14] Humphrey points particularly to Nazi Germany in the 1930s. Humphrey, John P., 'Foreword' in Lillich, Richard B., (ed.) Humanitarian Intervention and the United Nations, (University Press of Virginia: Charlottesville, 1973) p. vii.

[15] Charter of the United Nations, Chapter I, Article 2, paragraph 7.

[16] Ibid., Chapter VII, Article 39.

[17] Cunningham, op.cit..

[18] Loescher, op.cit., p.182. See Suhrke, Astri, 'Towards a comprehensive refugee policy: Conflict and refugees in the post-Cold War world' in Böhning, W.R., and M.-L. Schloeter-Paredes (eds.) Aid in place of migration? (International Labour Office: Geneva, 1994) p.28, for contemporary reservations to interference. (Also Chapter 4). Somalia broke new ground because the intervention did not require the prior consent of an established government or national authority in the country of destination for the (US) troops.

> "While it is still unlikely that the international community would be prepared to intervene in all cases with humanitarian aid the civilians against the express wishes of a government, the previously held notion of inviolable state sovereignty is increasingly called into question." (Loescher, p.183)

disintegration of the territorial integrity of Iraq.[19]

The Kurdish nationalist movement is one of the oldest in the world, dating back to the 1880s. The major cause of flight for Kurds in the twentieth century is their widespread persecution by the four states throughout which they are spread while they strive for a Kurdish state.[20] In April 1991, repeated repression by the Hussein regime in Iraq, following the 1988 gassing of thousands of Kurds in the same area, forced thousands to flee towards the Turkish and Iranian borders. Turkey saw this as a deliberate attempt by Iraq to create a mass exodus, with the aim of ridding its northern territory of an unwanted minority. Turkey, itself in conflict with its own Kurdish minority, closed the borders and refused to allow access to protection, both in terms of asylum procedures and physical assistance within Turkey.[21]

Two attempts to respond took place in Iraq, both of which are comprehensively described by Adelman.[22] In summary, one was a UN effort, brokered by Sadruddin Aga Khan, which Adelman describes as not really intervention.[23] This agreement was for the whole of the Iraqi people, and to take place with Iraqi support and assistance in implementation, and for this reason is

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[19] Adelman, op.cit., p.4.

[20] See Adelman, Ibid., p.6. This root to the 'refugee problem' has in no way been tackled. See Chapter 4 and Suhrke's position that the approach to the plight of the Kurds in northern Iraq was one of and active and innovative regime providing relief and protection, which, however, was not followed by a comprehensive refugee policy, as the aid function lacked a political counterpart to address the root causes. Suhrke, op.cit..

[21] See Adelman, op.cit.. Also, Kirsci, Kemal, 'Provide Comfort and Turkey: Decision Making for Humanitarian Intervention', Kent Papers in Politics and International Relations, Series 3, No. 3 (University of Kent: Canterbury, 1993) which describes the creation of the zones and international (though particularly Turkish) decision making on this process, although the use of the meaning of refugeehood and refugee law is somewhat debatable in this paper.
It should be noted that on signature of the Convention Turkey restricted application of the Convention definition to those coming from Europe under Article 1 B and expressly maintained its geographical limitation upon acceding to the 1967 Protocol. (Annex IV, UNHCR, Handbook on procedures for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva, 1979) p.87.

[22] Adelman, op.cit..

[23] Ibid., p.19. Adelman uses the term 'humanitarian intervention' to mean "the *use of physical force* within the sovereign territory of another state by other states *or the United Nations* for the purpose of either *protection* or *the provision of emergency aid* to the population within that territory." ie the purpose must be overtly humanitarian, what ever other self-interests are involved, and the purposes must be protection or relief - or both those. He sees the agents of the intervention as either the UN or other states. The tool will always include the use of military force, otherwise it is not intervention. (p.18).

assessed as unlikely to be impartial, or to lead to any substantial measure of protection. The second effort was initiated by the UK and France, and eventually led by the US. It was multilateral, and its major problem lay in the search for justification within international law. Resolution 688 went some way towards providing this. Its support could, however, only be implicitly relied on, as it did not call for intervention or the use of force to protect the Kurds, but rather condemned Iraq for its repression of the Kurds, and the consequent mass exodus, as a threat to the peace and security of the region. It called for the provision of humanitarian aid and the urgent addressing of "the critical needs of the refugees and displaced Iraqi population" through all resources at the disposal of the Secretary General.[24]

Both plans were flawed. The UN plan could not be impartial, nor could it protect, and the US led plan could not find legal justification. However, the end result of initial intervention by the allies and their replacement by a UN guard was a first attempt at collective action under Chapter VII to protect regional peace and security when it is threatened by an outpouring of persons in need of international protection.

The next occasion on which the international community felt it necessary to intervene for humanitarian reasons was in Bosnia Herzegovina.

According to UNHCR estimates there were, by 12 November 1992, 740,000 displaced Bosnians and 70,000 people displaced by the earlier conflict in Croatia on the territory of Bosnia Herzegovina, and 725,000 Bosnians elsewhere in former Yugoslavia.[25] By far the largest number of displaced and refugees were in the country where fighting, indiscriminate bombing and shelling were going on daily. Living conditions in Bosnia Herzegovina at the end of 1992 were described as deplorable, with inadequate housing, no heating, a shortage of basic necessities, and insufficient humanitarian aid for those in need.[26]

UNHCR had emphasised the idea of 'preventive protection', meaning the attenuation of the causes of displacement so that people may remain in their homes

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[24] Resolution 688 (1991), adopted by the Security Council at its 2982nd meeting on 5 April 1991. See also Loescher, op.cit., p.183.

[25] Please note that the use of statistical data here is for comparative purposes only. *Bosnians* here indicates persons normally resident in the Republic of Bosnia Herzegovina, regardless of ethnicity.

[26] Council of Europe, Parliamentary Assembly, Rapporteur; Mr. Fluckiger, Report on the situation of the refugees and displaced persons in former Yugoslavia, Doc. 6740 (19 January 1993).

in safety and dignity. It was stated that:[27]

> the [UNHCR] Working Group [on International Protection] considered prevention to be an umbrella term covering activities both to attenuate causes of departure and to reduce or contain cross-border movements or internal displacements. Prevention is not, however, a substitute for asylum; the right to asylum, therefore, must continue to be upheld.

Slovenia pressed for the creation of 'safe areas' within Bosnia Herzegovina, similar to those created in northern Iraq a year earlier.[28] Mrs Ogata, the UN High Commissioner for Refugees herself said that the safe haven idea would be "difficult to implement" in Bosnia Herzegovina.[29]

Direct arrival at the borders of and admission to western European States was almost impossible for the average Bosnian civilian, and many who did make it, outside government quota schemes, were reportedly returned to the country of first asylum, usually Slovenia, Croatia or Hungary.[30] In calling for the return of these displaced persons to so called 'safe areas' in Bosnia Herzegovina, the Slovenian government stated that:[31]

> the implementation of [this] principle [of safe areas] shall be without prejudice to the sovereignty, territorial integrity, political independence, security and non-interference in the internal affairs of the Republic of Bosnia-Herzegovina.

The Slovenes, backed by the Croatians, proposed the establishment of 'safe areas' largely as a means of shifting the political and economic burden of the large numbers of displaced Bosnians, which they were sustaining with little or no financial or practical support from the international community. They were supported in this effort by the British and French, who at that time had taken in fewer than 3,000 displaced persons between them. Arguments for resettling people away from Bosnia

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[27] Ogata, Sadako, United Nations High Commissioner for Refugees, 'Note on International Protection', submitted by the High Commissioner, Executive Committee of the High Commissioner's Programme, Forty-third session: UN doc. A/AC. 96/799, (25 August 1992).

[28] Frelick, Bill, '"Preventive Protection" and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia', International Journal of Refugee Law, Vol.4 No.4 (1992) pp.441-442.

[29] The Economist, 'The search for a safe haven in the Kingdom of Death', (21-27 November 1992) p.47.

[30] Amnesty International, Report on the Former Yugoslavia, (29 July 1992). [EUR 48/WU 05/92 EXTERNAL].

[31] Government of the Republic of Slovenia, Ministry of Foreign Affairs, 'Proposals concerning measures for the voluntary return home of the displaced persons and refugees from Bosnia and Herzegovina', (Geneva, 29 July 1992).

resolutions 781 (9 October 1992), 786 (10 November 1992) and 816 (31 March 1993).[36] Resolution 836 also extended the United Nations Protection Force (UNPROFOR)'s mandate[37]

> to deter attacks against the safe areas, to monitor the cease-fire, to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina and to occupy some key points on the ground.

Paragraph 9 authorised the use of force in self-defence

> "in reply to bombardments against the safe areas by any of the parties or to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys."

Furthermore, Member States were permitted to take action, including airstrikes, in support of UNPROFOR's defence either unilaterally or through regional organisations (ie NATO) under the authority of the Security Council and "subject to close coordination with the Secretary-General and UNPROFOR.[38]

In Resolution 836 the Security Council therefore provided a mandate, based on the self-defence of UNPROFOR, for the protection of the 'safe areas'. It also reaffirmed the temporary nature of the safe areas, and called for further contributions of forces from Member States. However, its preamble hinted at the differences in perception of what safe areas where intended to mean as it noted that the decisions taken were in line with the fact that the Security Council was "convinced that *treating* the towns and surrounding areas [Sarajevo, Bihać, Srebrenica, Gorazde, Tuzla and Žepa] as safe areas will contribute to the early implementation of [the objective of a just and lasting political solution]."[39]

In April 1994, while the above mentioned towns and their surroundings were being treated as 'safe areas' they were in fact not *safe*. The conflict in and around those areas, including the practice of ethnic cleansing was continuing. Indeed, with assaults on the town of Gorazde, the policy of 'safe areas', and its failure in this situation, was calling into question the very credibility of the United Nations. By

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[36] Resolution 836 (1993), adopted by the Security Council at its 3228th meeting, on 4 June 1993.

[37] Ibid., paragraph 5.

[38] Resolution 836, paragraph 10.

[39] Emphasis added.

November 1994 the real need to actively protect 'safe areas' within Bosnia had become more than apparent with Serb shelling of the town of Bihać from airfields in Krajina, then a Serbian majority area within Croatia. One of the major needs to protect the area was, however, in the (reported) words of UN Special Representative Yasushi Akashi, that "the UN could be considered incompetent and spineless" if it did not act.[40] This position again shows the statist perspective as superior to normative considerations, and demonstrates the difficulties organisations face when trying to cooperate on these sensitive issues, even if the major players in each of the organisations involved are the same. It also exemplifies the difficulties of governments in alliance working together when they have differing interests at stake.[41] In the meantime, UNHCR's own position was compromised at every turn as it had to make deals with the belligerents in order to deliver just a fraction of the aid which was left after bartering.[42]

In July 1995 the eastern enclaves of Srebrenica and Žepa, two of the UN declared 'safe areas', were captured by the Bosnian Serbs. In security terms the enclaves had apparently been secretly written off for months, and the possibilities for removing them from the UN strategic perspective and re-grouping to defend the mainly unified Muslim held territory had been considered.[43] In the event the UN did not need to face the anguish of openly giving up the areas without provocation. It did, however, suffer badly in the international public relations stakes by seeming to pull out so readily in the face of Bosnian Serb fighters surrounding first Srebrenica and later Žepa. The actual sequence of events and motives which led to the fall of the two towns, and the non-use of airstrikes or other effective self-defence measures by UNPROFOR may never be known. In June 1996 serious political questions were still being asked in the European Press, and the finger of blame was being pointed in new directions. The fact that the areas fell, and proved to be

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[40] Bellamy, Christopher and Emma Daly, 'Nato jets blast Serb air base in Croatia', The Independent, (22 November 1994), p.1.

[41] See, for example, Marshall, Andrew, 'Big Powers riven by splits over crisis in Bosnia', The Independent, (25 November 1994) p.12. and The Economist, 'Time to get tough?' (26 November 1994) p.22.

[42] Loescher, op.cit., p.30.

[43] Sheridan, Michael, 'UN peace-keepers "set to regroup around Sarajevo"', The Independent, (13 July 1995), p.3: Eager, Charlotte. 'UN plan for retreat from 'safe areas' raises fears of Bosnian bloodbath', The Observer, (21 May 1995), p.16.

unsafe is central to discussion of whether protection *in situ*, as an alternative to (short-term) exile, is a manageable policy option for any state or organisation to adopt.

The repeat of humanitarian disaster for civilians who had been led to believe that they were secure through international protection demonstrated the humanitarian failings of the 'safe areas' concept. 30,000 displaced people made their second or third journey into the unknown, from the 'safe area' of Srebrenica, assisted on their way by the Bosnian Serbs and the UN. They arrived at unprepared camps in the Tuzla area, one of which was pointedly described as a "temporary camp which looks more like Africa than Europe."[44] Between ten and twenty thousand more, mainly men and young boys but also young women, had left in what was described as a "fighting withdrawal". These were people who did not trust to their safety in the organised withdrawal because they were men of military age or women with partners still involved in the fighting. Some of these people made it to Tuzla, but many thousands remained unaccounted for.[45]

Besides demonstrating the lack of protection in the original enclaves, this episode showed gaps in the procedures and capacity to cope with a loss of the nominal protection provided. There were no aid agencies at the Tuzla camps to assist the displaced on their immediate arrival. There was confusion between the Bosnian 'Muslim' government and UNHCR over who was to take charge of relief.[46] As a result of this initial confusion there was more preparation for those forced to flee Žepa later that same month.[47]

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[44] Bellamy, Christopher, 'Refugee women "see menfolk shot"', The Independent, (16 July 1995), p.17. See also Bellamy Christopher, Tony Barber and Donald MacIntyre, 'Serb attacks pile on the misery', The Independent, (15 July 1995), p.1.

[45] Bellamy, Christopher, 'He's coming, he just hasn't arrived yet', The Independent: Section Two, (21 July 1995), pp.2-4. See also Bellamy, Christopher, '20,000 still missing in "zone of death"', The Independent, (17 July 1995), p.8. Satellite photographs and eyewitness accounts suggested a massacre of at least three thousand people buried in mass graves in Srebrenica.

[46] Radosavljevic, Zoran, 'Muslims' flight brings no escape from despair', The Independent, (15 July 1995), p.8.

[47] Borger, Julian, 'Aid workers plan for new refugee flood', The Guardian, (19 July 1995), p.11. The fall of these 'safe areas' was rapidly followed by Croat victory in the Krajina, forcing 120,000 Serbs to flee the area, mostly heading either for Serbia or for Bosnian Serb strongholds. See for example, Helm, Sarah and Emma Daly, 'Croat forces "just hours" from victory', The Independent, (7 August 1995), p.1.

1.2 Practical and conceptual difficulties: realism and the moral dilemma

Undoubtedly, the policies and practice of 'ethnic cleansing' made assistance in the flight of civilians from their homes more questionable than might otherwise have been the case. In assisting movement from areas being 'cleansed' humanitarian organisations and Western governments might be seen as taking part in the 'cleansing process', thus violating the rights of the civilians involved. On the other hand, the rights of those same civilians were hardly being upheld when the belligerents could and would forcibly remove them, destroying homes and torturing or killing the occupants.[48] As the Bosnian President himself said, "There are worse things than ethnic cleansing and that is ethnic killing."[49] While 'safe areas' could perhaps work in some situations, their ineffectiveness in the case of Bosnia Herzegovina gives rise to a whole host of difficulties. Not least of these is the moral conflict over appearing to comply with 'ethnic cleansing', or encouraging or even forcing people (through the lack of available and practical options) to remain in the conflict area and face the possibility of death. In addition, the failure of the policy of 'safe areas' highlighted the apparent European desire not to take in refugees, matched by a Bosnian and Croat desire to keep people in place to carry on the fight.[50] Besides undermining the 'safe areas' concept, the ruthless practice of 'ethnic cleansing' frustrated any notions of allowing people to remain close to their homes in safety, as suggested by the UNHCR notion of 'preventive protection'.[51]

Conceived in military terms, but used to infer a humanitarian protection, 'safe areas' themselves become strategic targets for one side in a conflict. When

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[48] UN High Commissioner for Refugees, Sadako Ogata, said in a 1992 article in "Die C" that the flight of refugees "seems not to be just the result but the goal of the fighting" (cited in Helsinki Watch, War Crimes in Bosnia, (Washington: Human Rights Watch, 1992) p.141. Helsinki Watch points out that sending humanitarian aid stops neither indiscriminate artillery attacks or "ethnic cleansing" (p.183). To quote a New York Times article, 'The Well-Fed Dead in Bosnia': "What good will it do for [Bosnians] to have food in their stomachs when their throats are slit".

[49] Bosnian state television interview with President Alija Izetbegovic, in which he put forward proposals to evacuate the wounded, elderly and ill from Zepa, in order to avoid a repeat of Srebrenica. Cited in 'Bosnian president defends plan to negotiate with Serbs for evacuation of Zepa enclave', The Guardian, (19 July 1995), p.11.

[50] In fact, if it really wished to prevent ethnic cleansing, the international community would have had to intervene political and militarily in the internal affairs of Bosnia Herzegovina; this would run contrary to positions on state sovereignty that still carry considerable weight.

[51] UNHCR, State of the World's Refugees (1995), op.cit., p.50.

surrounded enclaves become such targets, the protectors may find it to their own strategic advantage to surrender the area. In the Bosnian case, two months prior to the fall of Srebrenica and Žepa, the UN was said to be considering withdrawal from the enclaves which had come to be seen as "a legacy of a different period of the war": once the Bosnians had an army and a few military successes, the need to protect the territory of the mainly Muslim government was no longer seen as essential.[52] This is to view the area as territory to be strategically protected, not as a haven in which people can find safety, and clearly demonstrates the problem of 'safe areas' as a concept for refugee protection. If protecting the civilians was paramount the areas could not be discussed in terms of a legacy with no further strategic value until the strategy of finding peace and permitting return had been accomplished. This was clearly not the framework within which withdrawal from the eastern enclaves was being discussed in May or even July 1995.

The practical problems involved in this type of protection are evident and manifold. Staff of agencies are beaten, arrested, kidnapped and killed and the agencies themselves are perceived to be working for governments or rebel groups, and thought to have hidden religious and political agendas.[53] Also, there is the obvious question of what constitutes 'safe' and how safety is to be assured or maintained. 'Safe areas' have been difficult to establish in Bosnia Herzegovina due to the extreme volatility of the situation accompanied by a lack of political will to become involved in the conflict itself. In Iraq, while the creation of the areas was operationally easier, it is not clear for how long or on what basis they can continue to be protected. Such factors as developments in the country of origin and the capacity and will of the international community to act are to a great extent unpredictable, and vary from situation to situation, thus making a consistent policy of humanitarian intervention, and the establishment of protective zones or safe areas,

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[52] Un official in Sarajevo cited by Eager, Charlotte, The Observer, (21 May 1995), op.cit..

[53] Loescher, op.cit., p.29: "In fact, governments have been tightening their controls on aid agencies, attempting to incorporate them into officially managed programs that benefit only their own supporters. Throughout the Third World and most recently in parts of ex-Yugoslavia, agencies have been excluded from war zones - in part to deny supposed civilian supporters of rebel groups or ethnic minorities food or medical aid, and in great measure to prevent independent observers from becoming witnesses to the brutal human rights violations perpetrated on non-combatants."

difficult to uphold.[54]

Meanwhile there are conceptual difficulties centring on the oppositions of sovereignty and human rights or statist and normative arguments. UNHCR sees some recent developments such as aid corridors and humanitarian cease-fires, as respecting sovereignty, and it sees practical and legal reasons for continuing, "when possible, to honour sovereignty".[55] It sees protection and assistance as more likely to succeed if affected governments have consented to humanitarian intervention. But, in times of civil war, while it sees a need to cooperate with all those who control access to the people in need of aid and protection, such cooperation should not, it says, be seen as legitimation.[56] Loescher takes the position that sovereignty carries with it certain responsibilities of states towards their own citizens, and sees this notion as bolstering the grounds for humanitarian intervention to provide relief and protection.[57]

> Sovereignty does not mean that a state can behave in any way it wants toward its own citizens without consequence; in fact, the most elementary justification for the modern state is its ability to provide reasonable security for its citizens.

This stance echoes the UNHCR claim that states which have joined the UN, signed the Universal Declaration of Human Rights and ratified Humanitarian Law instruments "have in the process accepted certain legal obligations to permit and facilitate humanitarian aid. This is not an infringement of their sovereignty but an exercise of the responsibilities that go with it."[58] This position encompasses a

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[54] Collinson S., Beyond Borders: West European Migration Policy Towards the 21st Century (London: RIIA / Wyndham Place Trust, 1993) makes the interesting point that "without any basic framework for action, there is a danger that preventive and protective activities will depend increasingly on differential political and economic interest, as was the case in Europe during the first half of this century." pp.77-78 and in a footnote adds that "a Resolution on ' Certain Common Guidelines as Regards the Admission of Particularly Vulnerable Groups of Persons form the Former Yugoslavia' issued by the EC Ministers responsible for Immigration at Copenhagen in June 1993 is reminiscent of the group specific (and thus variable) responses of the League of Nations during the interwar period.' This position should be compared to the position taken at the end of Chapter 1 of this study, where it was seen that the evolution towards mechanisms of temporary protection may entail just such a reversion to nationally specific definitions of those who qualify for temporarily protected status, and the position in Chapter 2, where the nature of such specificity with regard to the right of non-discrimination on the grounds of nationality was questioned.

[55] UNHCR, State of the World's Refugees (1993), op.cit., p.74.

[56] UNHCR, Ibid., pp.74-75.

[57] Loescher, op.cit., p.183.

[58] UNHCR, State of the World's Refugees (1993), op.cit., p.75.

notion of the inseparability of the rights and responsibilities of sovereign states. However, UNHCR acknowledges that international consensus on humanitarian intervention is unlikely to emerge soon:[59]

> Whatever the eventual outcome of this debate, recurring humanitarian emergencies have undoubtedly focused attention on the question of how far the relief of human suffering can and should be subject to national boundaries and the consent of governments.

Adelman develops a theory justifying restricted humanitarian intervention in restricted circumstances, which does not challenge the sovereign rights of the state with regard to the rights and entitlements of its citizens, or its territorial integrity.[60] He maintains the state as the actor in the international system, but limits its jurisdiction. One of his major justifications for this position where refugee law is concerned is that, due to the concept of non-refoulement, a state has restrictions on its sovereign right to control membership and admission, and "to maintain its own ethical position and ensure its sovereignty, the asylum state is entitled to intervene and/ or call on others to assist it to intervene to prevent a mass exodus."[61]

This position takes as its basis the one upon which the modern theory of the state was constructed - the obligation to provide protection - a position which permits a restricted right to intervention "to be recognised only in cases where the state *both* fails to protect its own citizens *and* that failure jeopardises the peace and security of other states."[62] It is a justification of intervention built on current ideas of inter-state relations, not radically new concepts or distinctly moral influences as Human Rights advocates propose.

Adelman sees the statist or realist position as still being the base of international relations with regard to displacement. Falk presents a different

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[59] UNHCR, Ibid., p.74.

[60] The limitations Adelman puts on intervention are:
1) It is only to provide relief and protection
2) It is only to be used when coercive force is used to provoke mass flight of a minority population
3) It is only to be used when such mass flight threatens peace and stability of region.
4) It must be authorised by the state whose security is threatened or by Security Council.
5) Intervention must be followed by the installation of an 'international police force'.
He does concede that there are risks even to this restricted position in that is could be open to abuse, and its use could in some cases contribute to the causes of mass flight. op.cit., pp.29-31.

[61] Ibid., p.38.

[62] Ibid..

position. He sees a confusion in so-called 'World Order thinking' between five intersecting dimensions of concern: the geopolitical; the statist; the normative; the logistical and the psychological. His overall position is that "sovereign rights are definitely giving way to human rights .. but not if geopolitical calculations favour deference to sovereignty."[63] He sees the normative challenge to the statist position in these matters as not yet authoritatively resolved[64], and that the "political atmosphere is favourable, as never before, to weighting the balance of international law in favour of humanitarian intervention as authorised by the UN and other international institutions."[65] The geopolitical factors in the Middle East could be said to have put sovereignty considerations above the human rights elements in the motivation of western states to intervene and create 'safe areas'. The passive or laissez-faire geopolitics in former Yugoslavia can also be seen to have subordinated the normative position in Bosnia Herzegovina.[66] The creation of 'safe areas', and the intervention needed to enact such a policy lowers levels of respect for the sovereignty and territorial integrity of states which are violating human rights and causing mass exoduses.

However, Falk's position could be 'turned on its head', and if we consider that sovereignty is being challenged, through intervention, only where self-interest is involved (eg in terms of oil; the economy; regional peace and security or the risk of mass exodus). Realism and sovereignty may appear to be giving way to normative positions on the issue of humanitarian intervention. Rights can hardly be said to be upheld, however, when the risk of death or serious injury is constantly present because the effective protection of a 'safe area' is politically undesirable. They are also being denied when freedom of movement and the right to seek and enjoy asylum in other countries are effectively being curtailed. Adelman's position of a statist justification for humanitarian intervention can thus be taken a step further (or from a normative view point a step backwards). It could be said that the only

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[63] Ibid., p.34.

[64] Falk, Richard, 'Human Rights, Humanitarian Assistance, and the Sovereignty of States' (Chapter One), in Cahill, Kevin M. (ed.) A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters (Basic Books and the Joint Council on Foreign Relations: New York, 1993) p.35.

[65] Ibid., p.40.

[66] Ibid., p.31.

motivation for states seeming to give way to the human rights lobby by nominally protecting certain areas where massive human rights abuses are taking place is to uphold their own sovereign right to avoid mass influxes. Large arrivals would force states into an ethical quagmire as they battle with the concept of non-refoulement and its self-imposed qualification on this aspect of sovereignty, although they do not wish to allow in a flood of displaced people.

Under these circumstances the most practical means of flight is to head for neighbouring states. However, the mass influxes this creates have also and inevitably been problematic, and have lead to the conceptualisation of a long practised means of protection on a temporary basis.[67]

The cases studied demonstrate the ineffective functioning of the concept of preventive protection when put into 'practice'. At origin, the notion of permitting civilians the option of remaining at, or close to, their homes appears laudable, from the perspective of both human rights and humanitarian law. From the perspective of receiving states it must also appear useful in limiting the numbers seeking admission and asylum. However, in practice this concept appears to have the use of a denial of the right to leave, thus violating the rights codified in the instruments mentioned above. In order to be effective this concept would require a reconsideration of the norms of respect for sovereignty and non-intervention in internal affairs, in order for the delivery of humanitarian aid, and the safety of civilians to be assured. The concept of 'safe areas' can, in its practical application, be seen to be fraught with political and ethical dilemmas which cause it to be considered inappropriate to crises such as that in Bosnia Herzegovina.

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[67] They have also lead to imaginative suggestions for different types of internationally protected areas in states neighbouring a conflict area already referred to in Chapter 3. Since those ideas remain in the consultation stages and have not been developed in practice they will not form part of the discussion of the practical approaches. See Secretariat of the Inter-governmental Consultations on Asylum, Refugees and Migration Policies in Europe, North America and Australia, 'Working Paper on Reception in the Region of Origin' (Geneva, 1994).

2. Temporary Protection and Burden-sharing

2.1 Temporary Protection

If the first two elements of the comprehensive approach have proved impossible to implement or ineffective the result will undoubtedly be the exodus of civilians. They will inevitably head towards the closest border to them, or the easiest frontier to cross.

Like other elements of the comprehensive approach temporary protection is a multi-faceted, relatively un-tried[68] (at least in the western world) and only recently conceptualised approach to mass influx situations.

UNHCR advocates the use of this type of protection because it claims:[69]

> [T] protection offers a means of affording protection to persons involved in large-scale movements that could otherwise overwhelm established procedures for the determination of refugee status while privileging safe return as the most desirable solution to refugee problems.

Temporary protection as a practical solution to refugee crises, and in particular the situation caused by sudden mass influxes has a long history.[70] Perluss and Hartman, writing in 1986, saw the emergence of what was then known as 'temporary refuge' as a typical example of a customary norm in international law, and described it evolving as "the practical solution to situations of mass influx of

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[68] Only with the crisis resulting from the conflict in former Yugoslavia is a formalised mechanism of temporary protection being put into the asylum and immigration legislation of some European states, and then the form it takes differs enormously from state to state. This will be the subject of Part Three of the current work. In this section temporary protection will be discussed in more general terms, and the concern will be to place it within the context of a comprehensive approach. [It should at this point also be noted that very little work has been done on this subject outside of UNHCR and the individual ministries dealing with immigration and asylum in those states which have altered their laws to include this type of protection in the scope of their procedures.]

[69] UNHCR, Background Note, 'Comprehensive Response to the Humanitarian Crisis in Former Yugoslavia', Informal Meeting on Temporary Protection (Geneva, 21 January 1993). p.7. Section III Note 21.

[70] In fact, all protection was, if one follows strictly the line of the Convention, intended to be temporary - hence the cessation clauses (Article 1 C of the 1951 Convention Relating to the Status of Refugees). State practice (and a lack of political will and resources for finding those whose period of protection should have ceased due to a change of circumstances in the country of origin) has turned traditional asylum into a *permanent* refugee solution, especially in western states.

civilians fleeing internal armed conflict."[71] Notions of short term protection in mass influx situations were originally referred to as 'temporary asylum'. After lengthy debate in the thirtieth session of the Executive Committee of the High Commissioner for Refugees in 1979 it was decided to drop the term 'asylum', as it gave the impression of, and potential basis to, a watering down of traditional asylum. The term 'temporary protection' has emerged more recently.[72] The word protection has more positive implications in terms of rights accorded to those being protected over the negative implications of the seeking of 'refuge'. (The debate is now rather over the word 'temporary' - being qualified as provisional or conditional in the 1994 Dutch legislation). Perluss and Hartman traced the first granting of temporary refuge to 1936, when France and Britain provided safe haven to persons fleeing the Spanish Civil War, for the duration of the conflict.[73] Further historical examples of the practice include the temporary asylum offered in November 1956 by Austria and (to a lesser extent) Yugoslavia to 200,000 persons fleeing the unsuccessful October uprising in Hungary. This protection was offered for approximately nine months, by which time the majority of those who had initially fled to the two neighbouring states were resettled in other western European states and North America, settled in Austria or had returned. In 1968 Austria again offered a similar type of temporary asylum to people fleeing the Soviet invasion of Czechoslovakia.

Later examples come mostly from Africa and Asia, where localised, regional protection was offered to the large number of persons displaced by the conflicts of the post-colonial and Cold War period.[74] Western states received relatively few of those persons in flight from such conflicts, and those who did arrive at distant destinations usually entered the normal asylum procedures, which from the late 1970s onwards became increasingly over-burdened as other immigration channels were closed off. Mechanisms for coping with 'large influxes' of persons not

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[71] Perluss, Deborah and Joan F. Hartman, 'Temporary Refuge: Emergence of a customary norm', Virginia Journal of International Law (Spring 1986) p.580.

[72] Cf. Luca., D., 'Questioning Temporary Protection, together with a Selected Bibliography on Temporary Refuge/Temporary Protection', International Journal of Refugee Law Vol.6 (1994) p.535.

[73] Perluss and Hartman, op.cit., p.559.

[74] The OAU Convention was designed for this purpose.

meeting the Convention criteria in Europe had been developed in the late 1970s and early 1980s, *de facto*, humanitarian statuses, offering what Gallagher *et al* describe as 'safe haven', "intended to provide humanitarian relief from deportation for non-refugees of national concern."[75] The same writers note that "[t]o a large extent they [the policies of temporary safe haven] were intended to benefit fellow Europeans, but at the present time these mechanisms serve a much wider range of persons, from all parts of the world."[76] This is ironic, given that now it may be seen that such mechanisms are specifically not benefiting fellow Europeans partly because of perceived 'bad experiences' through non-return and the difficulties of integration and xenophobia where earlier groups of non-European *de facto* refugees were concerned.

Two important points should be noted here. One is the West's early criticism of the government of Thailand, for insisting on keeping the Cambodian displaced in camps close to the border, and within easy range of Vietnamese artillery. Perluss and Hartman see this as "illustrating that the core of the norm is the right to physical security of the group fleeing the conflict."[77] Given more recent developments putting the west European states in much the same position as Thailand found itself in in the 1970s this position seems very hypocritical, when the majority of displaced persons in Bosnia Herzegovina, being 'protected' in so-called 'safe areas' in the country of origin, are well within the range of artillery of all sides in the conflict. Secondly, the experiences of Southeast Asian and African states brought early calls for a sharing of the burden of protection - calls which were largely left unanswered. In addition, Western states soon began to hesitate over the emergence of a norm of temporary protection.[78]

The conceptualisation of the term, temporary protection, in spite of the long history of the practice, only came about in the 1970s with the Vietnamese Boat People Crisis, and, in fact, the first mention of this concept in official documents

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[75] Gallagher, D., S. Forbes Martin, & P. Weiss Fagen, 'Temporary Safe Haven: the need for North American - European Responses', in Loescher and Monahan (eds.), Refugees and International Relations (Oxford: Clarendon, 1990), p.340. See also, Cels, Johan, in the same volume.

[76] Ibid., p.344.

[77] Perluss and Hartman, op.cit., p.563.

[78] Ibid., 584.

comes in Conclusion 15 of the UNHCR Executive Committee in 1979, which was concerned with the reception of Boat People in coastal states.[79] During the early 1990s the validity and potential of temporary protection as a vital feature of international protection as a whole gained much ground. Indeed, a 1992 Statement by the UNHCR put its position as being that "persons fleeing from the former Yugoslavia who are in need of international protection should be able to receive it on a temporary basis."[80] Meanwhile, one response to the large influx of displaced persons fleeing the conflict in Bosnia Herzegovina has been the Slovenian government's proposal for the formulation of a new definition of "temporary refugee".[81] This implies an obligation to provide humanitarian necessities and amenities in accordance with the temporary nature of the stay of the refugees, who, having been displaced by conflict or aggression, maintain the desire to return to their homes.[82]

While there are no definitions of the criteria for establishing who might become a 'temporary refugee', there are the various domestic mechanisms for, and categories of, so called *de facto* refugees.[83] Arising in the 1970s as a response to the changing character of refugee movements, there are various titles for these categories, such as B-status; humanitarian status; and 'exceptional leave to remain'.[84] These types of status, together with the basis for non-return (and thus the logical extension of some form of protection) offered by the concept of

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[79] Executive Committee of the High Commissioner's Programme, Conclusion No.15 (XXX) Refugees without an Asylum Country 1979 30th Session. At its 31st Session, in 1980, the Executive Committee endorsed Conclusion 19 (XXXI) *Temporary Refuge* affirming the need for the "humanitarian legal principle of *non-refoulement* to be scrupulously observed in all situations of large influx", stressing the exceptional character of temporary refuge, and recognising that temporary refuge needed defining and further examining.

[80] UNHCR Background Note, 'Comprehensive response to the Humanitarian Crisis in the former Yugoslavia', Informal meeting on Temporary Protection (Geneva, 21 January 1993).

[81] Slovenian Government, 'Temporary Shelter of Refugees from Bosnia and Herzegovina in the Republic of Slovenia', (Ljubljana, March 1993).

[82] See for example, Grahl-Madsen, A., The Status of Refugees in International Law, (Leiden: A.W. Sijthoff, vol. 1, 1966) pp.78-9.

[83] The currently established (and 'establishing') mechanisms of temporary protection in a number of European states are to be analyzed in great depth below. These humanitarian statuses are the same as those referred to by Gallagher *et al*, op.cit..

[84] See Cels, op.cit..

nonrefoulement, as set out in article 33 of the 1951 Convention, offer a starting point for, and some sort of history to the concept of temporary protection, in spite of this latter never having been defined or institutionalised on a regional or global level.[85]

2.2 Temporary Protection during the former Yugoslav crisis

The most common perception of European immigration and asylum law prior to the crisis in former Yugoslavia was one of restriction and deterrence. Western Europe was expecting mass influxes of East Europeans as the Berlin Wall came down, bringing communism with it, and documents such as the Dublin Convention (between the 12 Member states of the European Communities) gave rise to concern over fairness with regard to admissions policies.[86] During the early stages of the Bosnian crisis, the advice given in at least two Council of Europe reports[87] was that the European states should accept more asylum-seekers, and give them a minimum of temporary protection as, "the neighbouring countries ... will have further difficulties in accommodating further influxes of Yugoslavs, unless international organisations and the other European countries provide appropriate assistance."[88]

Yet, as the conflict progressed, visa restrictions were imposed by EC Member States on citizens of some of the former Yugoslav republics, including Bosnia Herzegovina. While the use of flexible visa policies might undoubtedly allow for greater control, in terms of establishing that people do indeed come from the place they say they come from, it is very difficult to see how these particular

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[85] See for example Perluss and Hartman, op.cit., p.572; Goodwin-Gill, G.S., '*Nonrefoulement* and the new asylum seekers' in David A. Martin (ed.) The New Asylum Seekers: Refugee Law in the 1980s - the Ninth Sokol Colloquium on International Law, (Dordrecht: Martinus Nijhoff, 1988).

[86] 1990 Dublin Convention Determining the State Responsible for Examining Applications Lodged in One of the Member States of the European Community, CONV/ASILE, (1989); text in International Journal of Refugee Law, Vol.2 (1990) p.469. See for example Gillespie, Jim, Report on Immigration and Asylum Procedure and Appeal Rights in the 12 Member States of the European Community (London: Immigration Law Practitioners' Association, March 1993).

[87] Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Demography, Rapporteur; Sir John Hunt, 'Crisis in Yugoslavia: Displaced Population', Strasbourg (6 December 1991) and Council of Europe, Rapporteur; Mr. Fluckiger, 'Report on the situation of the refugees and displaced persons in former Yugoslavia', Doc. 6740 (19 January 1993).

[88] Council of Europe (1991), Ibid..

visa policies could achieve this aim; many embassies in Sarajevo closed, Croatia refused entry to those who could not offer documentary proof of proposed onward movement, and the visa requirement effectively meant further restrictions on flight for those not determined by international organisations as being particularly vulnerable and included in the quotas for evacuation. Visa policies also resulted in an even greater burden on neighbouring states, limiting the availability of temporary protection both in those states and further afield.[89]

The argument for the establishment of a mechanism of temporary protection in Europe has been eloquently put forward by Gil Loescher:[90]

> By sealing all escape routes and means of refuge, European governments are trapping refugees and displaced people in besieged cities and regions and placing them in the crossfire between warring forces. The consequence of ethnic conflicts unfolding in ex-Yugoslavia and in parts of the former Soviet Union, where expulsion and "ethnic cleansing" are the central objectives of the conflicts, have brought home the urgency and importance of both providing temporary safety and of keeping alive the notion of return. A new European refugee regime should allow for temporary sanctuary, followed by voluntary return in safety and dignity.

Most of those fleeing the civil war in Bosnia Herzegovina appeared to desire to return to their homes after the conflict.[91] They did not want or need asylum in the traditionally perceived sense of permanent or long term protection, but rather a place to shelter from the violence, in order still to be alive to rebuild their homes and country once a solution has been found.[92] To oblige people to face death daily, constantly to see devastation and destruction around them, is both inhumane

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[89] See Marx, Reinhard, 'Temporary Protection; Refugees from the former Yugoslavia: international protection or solution oriented approach?', (London: European Council for Refugees and Exiles, 1995) p.9.

[90] Loescher, G., op.cit. p.164. The situation in the former Soviet Union, even in the Chechen conflict, could not be described as 'ethnic cleansing' in the sense of the actions in former Yugoslavia, but the idea that such an objective could emerge in other ethnically-based conflicts is not redundant.

[91] Such desires were expressed to immigration staff, international organisations and non-governmental organisations in the early stages of the crisis. Since then, with the period of exile lengthening, and integration becoming a natural process, many are less sure of their desire to return, or of their ability to do so. [Interviews with officials in the British Home Office; Dutch Justice Ministry; Office of Immigration and Refugees, Slovenia. See also Morokvasic, M., 'Yugoslav Refugees, displaced persons and the civil war', Refuge: The Canadian Periodical on Refugees, Vol.11 No.4 (May 1992) 5-6 and The Government of the Republic of Slovenia, 'Temporary Shelter', op.cit..

[92] This statement assumes a solution satisfactory to all sides, which does not result in any ethnic group without a home, becoming what might be described as a European Palestinian problem.

and demoralising. If the long term aim of protection in such a situation is for the people concerned to rebuild their homes and lives and economy in the state or states which emerge, then the long term solution to such displacement crises is unlikely to be assisted by the creation of so-called 'safe areas' that are in fact difficult or impossible to protect, or by over-burdening nascent states. It is likely rather to lie in finding a swift and acceptable solution, and in the meantime, the supporting of both the people who will rebuild states, and of those states where the burden of protection is the greatest.

The policy of EU Member States was that those fleeing the conflict, other than former detainees, those who had been injured or were ill and could not be treated locally and those who were "under a direct threat to life or limb and whose protection cannot otherwise be secured"[93] were to be considered as manifestly not falling into the category of refugee, and as such not admissible to regular asylum procedures, even if they managed to arrive at the borders of Member States. Marx sees the failure to develop temporary protection policies in the case of former Yugoslavia as attributable to the lack of genuine agreement on burden-sharing between EU Member States and the inability of those same states to solve the conflict:[94]

> Considering the primary political character of temporary protection on the one hand and the obvious political inability, leaving aside doubts about the willingness, of the international community to solve the conflict in former Yugoslavia on the other hand, it is hardly justified to raise ambitious expectations with respect to this model as a solution oriented approach.

Before the displacements from former Yugoslavia, however, no temporary protection or burden-sharing mechanisms had been developed in Europe. All the measures implemented were *ad hoc*, and while they provide indications of what should be developed to cope with future similar crises, there is still no effective way to assess the effectiveness of a uniform or coordinated scheme. Moreover, the orientation of temporary protection policies should be seen in terms of a short-term and *intermediate* solution only - leaving the way open to the whole range of long and

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[93] Conclusions on People Displaced by the Conflict in the Former Yugoslavia of the Meeting of the Ministers Responsible for Immigration (London, 30 November - 1 December 1992).

[94] Marx, op.cit., p.7.

medium term solutions available to all concerned, with the cooperation of all the actors involved.

The European Consultation on Refugees and Exiles, meanwhile, noted that "many of the persons seeking asylum from the ethnic conflict in former Yugoslavia would probably fulfil the criteria for being granted refugee status according to the 1951 Geneva Convention."[95] The fulfilment of those criteria would have to be assessed by the receiving states, and would clearly depend on the restrictiveness of their application of the individualised approach. That those fleeing fear persecution, of either a group or individual nature, cannot be doubted in the light of reports of conditions suffered by civilian parties of all three sides involved in the conflict. This clearly demonstrates the restrictive nature of the application of refugee law to mass groups fleeing armed conflict as discussed above, and indicates that traditional asylum was not viewed as a suitable solution for those fleeing Bosnia Herzegovina. It also shows that in order for humanitarian protection to become a reality, a mechanism offering regularization, rights and security to individuals who have fled a conflict situation is needed, and that this could be found in the development of temporary protection.

The bases needed for this development of protection are present, but as this link in the chain of a comprehensive approach is yet to be fully developed or properly implemented in Europe, one needs to ask whether re-definition and re-focusing for specific cases is possible.

2.3 Burden-sharing

A further notion which the handling of the 'refugee' crisis of former Yugoslavia has brought to the fore is that of burden-sharing. This concept also has several levels of meaning. It could be the sharing of the burden of physical protection of displaced persons, resettled, perhaps through temporary protection schemes, from states neighbouring the conflict area to those further afield, although usually still within the same region. Alternatively, it could imply financial assistance to those states close to the conflict area which continue to bear the

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[95] European Consultation on Refugees and Exiles, 'ECRE position on policy aspects of the European response to the emergency in former Yugoslavia', (11 August 1992) 2(v).

physical protection burden. In a situation such as that in former Yugoslavia, this form of burden-sharing could include development and infrastructure-type incentives for poorer states. In the case of Bosnia Herzegovina this would include Slovenia, Hungary and, more problematically due to its role in the causes of displacement, Croatia. Such assistance may have the further advantage of increasing acceptance of the refugees who thus bring some benefits with them, and contributing to a wider comprehensive approach by reducing the causes of economic migration. Again, in the context of a group of states, such as the EU, such burden-sharing could imply the spreading of either the physical or economic burden through the Union.[96]

The roots of notions of burden-sharing can be found in the preamble to the 1951 Convention, where paragraph D recommends that,[97]

> Governments continue to receive refugees in their territories and that they *act in concert in a true spirit of international co-operation* in order that these refugees might find asylum and the possibility of resettlement.

More recently, the then High Commissioner for Refugees Jean-Paul Hocké suggested in his opening remarks to the UNHCR Executive Committee in 1986 that there was a need for "the industrialised countries [to] share the burden of accepting those ... who seek asylum outside their regions."[98] In their examination of the emerging norm of 'temporary refuge' Perluss and Hartman suggest that burden-sharing and this short term form of protection are closely tied, and that in fact the obligation to provide temporary protection should be contingent on the establishment of effective burden-sharing mechanisms.[99] They see this contingency as arising from the obligatory nature of the norm, because,[100]

> ...if the granting of temporary refuge is no more than a simple voluntary act of charity by the refuge state, there is no particular reason other states should be obliged to come to its assistance with

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[96] See the Commission of the European Communities, Communication to the Council and the European Parliament on Immigration and Asylum Policies, [COM(94) 23 final] (Brussels, 23 February 1994) paras. 98 - 101.

[97] 1951 Convention Relating to the Status of Refugees, Preamble, Paragraph D., (emphasis added).

[98] Jean-Paul Hocké, UN High Commissioner for Refugees, opening remarks to the thirty-seventh session of EXCOM, 6 October 1986, cited by Gallagher *et al*, op.cit.. p.340.

[99] Perluss and Hartman, op.cit.. p.587.

[100] Ibid., p.588.

> material support. If, however, the state of refuge lacks free choice because it is constrained by an international norm requiring that it grant temporary refuge, its moral claim to burden-sharing from the non-refuge states is a powerful one.

Basing their comments on reports at a series of UNHCR Executive Committee sessions, Perluss and Hartman describe the suspicions of states of the intrusion such a mechanism as burden-sharing might make on territorial sovereignty, and explain the international community's refusal to recognise burden-sharing as a precondition to temporary refuge as stemming from "a candid recognition that no mechanisms exist, or could be easily created, to make such a precondition viable". Finally they conclude that burden-sharing was rejected due to a sense that it would weaken rather than strengthen temporary refuge as a binding norm by providing hard-pressed states of first refuge an excuse for non-compliance.[101]

The discussions at that time were concerned with sharing the burden of displacement crises across regions - and western states were rejecting the notion of sharing the burden of protection in crises in Africa and Asia. However, the position on burden-sharing appears not to have changed even when the crises of displacement are within Europe. The states most affected by the former Yugoslav crisis, and offering temporary protection see burden-sharing as a necessary accessory to this mechanism, states further afield maintain the position of the intrusion of the concept on their sovereign rights to control admission, and present normative reasons for their position. The normatively based rejections of certain elements of the burden-sharing concept are still strongly represented in recent debates on the subject, but powerful arguments may also be made for the position that the inclusion of some aspects of the burden-sharing approach in new mechanisms for protection for those fleeing conflict would in fact strengthen the effectiveness of this practice.

One could question the reason for which any state feels a responsibility either to accept refugees or to assist fellow states when they find themselves under seemingly immense pressure due to the number of arrivals seeking protection. The European Council on Refugees and Exiles has emphasised the opinion that sheer numbers, rather than the cause of flight should activate a mechanism of

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[101] Ibid., 588; based on reports from 30th, 33rd, 34th, 35th sessions of the Executive Committee.

responsibility sharing among states.[102] However, the political will of states being so often expressed in terms of the defence of their interests means that the notion of responsibility and a duty to share a burden is more likely to be encouraged through a highlighting of the causes of flight, particularly if they involve persecution (as during the Cold War period when refugee status was largely accorded as a response to a vote against communism) or conflict in the region, which their is a desire to contain and resolve. Does sympathy with a cause of flight actually instill a sense of responsibility, or accord to the neighbouring states a right for their reponsibility to be shared? That is a difficult question to answer, however, a willingness to act, including to protect or share the burden of protection, would seem most likely to be motivated by a sense of responsibility to honour commitments made, and to strengthen international or regional solidarity. This was more visible in migration crises such as that of the Hungarians in 1956 where there was a strong ideological commitment and point to be made, than in the case of the former Yugoslavs in the early 1990s.

2.4 Burden-sharing and the former Yugoslav crisis

The first calls for burden-sharing in the Bosnian case came from the nascent states of Slovenia and Croatia, with later calls for consideration of this concept coming from Sweden and Germany.

The conflict in Croatia itself had caused the displacement of over 600,000 people, half of whom remained within Croatian territory. By the end of 1992, there were 618,000 registered displaced persons in Croatia, at least 324,000 of whom were from Bosnia Herzegovina. (To the 4.7 million Croatians, this was the equivalent of Italy taking in 7 million refugees, or Germany 10 million.) The majority of these displaced persons were housed by members of their families or friends, receiving little or no financial support. According to the Croatian authorities, the cost to the Croatian government of sheltering those with no relatives, and of humanitarian assistance additional to that received from outside, totalled $100 million per month in 1992, and a 'Report on Problems of Displaced Persons and

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[102] 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*, (London, March 1996).

Refugees in the Republic of Croatia' by the Croatian Vice Prime Minister[103] formed a request for financial burden-sharing by the European Community and other states, which has met with no response.

To the end of 1992, the financial burden of supporting the 49,000 registered and more than 25,000 unregistered displaced persons in Slovenia, many sheltered by families as in Croatia, had amounted to $250 million. Some aid had been received, but comparatively little in relation to expenses. Those families housing refugees were described as already on the edge of the "existential minimum".[104] Tensions between the displaced, who now made up more than 3% of the population of Slovenia, and those with whom they were staying were mounting, and thus pressure to move more people into communal shelters was rising. Capacity, however, was exhausted. Slovenia, a new state, with its own economic and political difficulties was helping Bosnia Herzegovina and its refugees to bear the burden of its conflict: it appealed for burden-sharing.

In March 1993, Slovenia indicated its opinion that "[t]he war in the Republic of Bosnia Herzegovina has brought a new dimension to the problem of refugees not provided for by legal acts".[105] The Slovenian government pointed out the difficulty that in strictly legal terms, the provisions of the 1951 Geneva Convention on the Status of Refugees were

> "inadequate in the case of an exodus provoked by military aggression, when people flee an area of conflict to save their lives without thought to improving their living conditions or finding employment in a foreign country."[106]

In response to this, the Slovenian government proposed the formulation of a new definition of "temporary refugee". The texts of the documents from the Croatian and Slovenian governments cited above imply that temporary protection can only be provided by local states with restricted resources for a limited length of time. An

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[103] Vice Prime Minister Mate Granic MD, PhD, 'Report on Problems of Displaced Persons and Refugees in the Republic of Croatia', (18 November 1992).

[104] Ministry of Foreign Affairs, Office for Immigration and Refugees in Slovenia, 'Information on the refugee problem in the Republic of Slovenia' (15 February 1993). Daily care was cited as costing $8 plus there was expenditure on urgent medical care of $1.5m per month, necessary repairs to collective centres etc.

[105] Slovenian Government, 'Temporary Shelter', op.cit..

[106] Ibid..

historical example is again provided by the 1956 Hungarian crisis. 170,000 of the refugees temporarily protected in Austria and Yugoslavia were resettled elsewhere within eighteen months, as the situation in Hungary did not alter, and the burden became too great for the states of first refuge to handle. Beyond a certain time (to be determined on a case by case basis), either financial or practical burden-sharing, in the form of economic assistance or temporary protection in states away from the immediate locality, must come into play, or local states will be forced to do as both of these states have done, and prevent more persons in need of protection from entering their territory.

A more recent example of such a situation is that of the Kurds of northern Iraq who were prevented from entering Turkey in 1991, and for whom 'safe havens' were established.[107]

Policies which prevent displaced persons from seeking protection are effectively equivalent to *refoulement*, for which responsibility might be said to lie not only with those states returning the displaced, but also with those apparently unwilling to share the burden. This contravention of one of the fundamental principles of refugee protection embodied in the Geneva Convention gives added weight to the arguments for the formulation of means of burden-sharing, on both the physical and financial levels, to be included in the development of an internationally agreed and respected programme of temporary protection.

Within western Europe, calls for burden-sharing can be traced to a resolution of the European Parliament in March 1987 which advocated a sharing of the financial burden of refugees between Member States, and, after the movements within and from former Yugoslavia had begun, the Conclusions of the meeting of the Council of Ministers of the European Community in Edinburgh reaffirmed the belief that the burden of financing relief activities should be shared more equitably by the international community, but did nothing to affirm the act.

In the Council of Europe too, calls for burden-sharing have emerged. At a Vienna Group meeting in Athens in November 1993, Sweden tabled a resolution aimed at fairer burden-sharing with respect to assistance and admission of refugees from former Yugoslavia, and a recommendation of the same group at its Strasbourg meeting in January 1994 spoke to the need to encourage collective cooperation in a

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[107] See Section 1 of this chapter.

spirit of solidarity between states.

Meanwhile, a major feature of the programme of the German Presidency of the European Union (July to December 1994), was discussion on the wording of a potential resolution on burden-sharing. The German proposal involved the use of indicative figures, based on the size of the population of Member States, the size of their territory and the amount of their Gross Domestic Product, all as a percentage of the Union total, leading to figures guiding the percentage number of people from a mass influx of displaced persons which each state should take. This indicative figure would be modified according to the Member State's contribution to peace-keeping forces and its particular use of foreign and security policy measures in the country of origin.[108] The reaction from other Member States was sceptical, not surprisingly since the proposing state is the one whose burden would be relieved by the institution of such a mechanism, whereas others would find themselves faced with more persons in need of protection.

The German proposal also faced problems because it involved the movement of people. The objecting states use human rights arguments against coerced movement with which to reject this call. Other states seemed to consider that if there has to be some form of burden-sharing it should be financial only, and tailored to meet the situation.[109]

The calls from Slovenia and Croatia, and the recurrence over time of the debate over burden-sharing, demonstrate the fact that some sharing of responsibility is needed at some level. The calls from smaller, new and less-developed first host countries (as well as from larger more liberal states) bring forward the question of whether there could be both a normative and statist argument for suggesting that states should in fact feel an obligation, not only to the displaced as human beings, but also to those states which are over-burdened by displaced persons. The normative argument would be supported by the position that forcibly moving the people, albeit for protection purposes, would be questionable from a human rights perspective and that one way of upholding their right to non-return and protection, including the possibility of easy return once the situation has changed, would be to financially assist in the continuation of protection for the necessary period. The

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[108] See 'Bonn wants EU to share refugee load', The Guardian, (5 July 1994), 11.

[109] Author's interviews with participants in Council Working Group Meetings.

statist argument would find support in upholding the right to control admission, as people would not be arriving at the borders of one's own (distant) state because their level of protection would be sufficient in countries close to the state of origin (thanks to financial assistance and logistical support), and because the development and integrity of the first country of asylum would also be supported.

However the primary arguments for burden-sharing lie in support of the principle of nonrefoulement and in its necessity as an accompaniment to a firmly established norm of temporary protection. *Nonrefoulement* is an essential and very widely accepted and supported concept in international protection which tempers claims to sovereign rights over admission, and offers a valuable safeguard to not only refugees but, through its wider application, to all displaced persons who have managed to cross an international frontier. Refoulement, even by proxy, is to be avoided at all costs. Thus, the principle of first country of asylum, and other recent restrictive developments in asylum policies need to be brought into question. Some of the results of these restrictive policies, potentially fatal to the up-rooted people, could be avoided through the development of temporary protection mechanisms. However, this mechanism, to be fully effective, must be accompanied by pragmatic burden-sharing. It must also include a willingness to keep borders open and allow protection to those who seek it, a guarantee which was not respected in the case of former Yugoslavs. This lack of respect for open borders has led UNHCR to have reservations over the practice of temporary protection by western states, even if it supports the humanitarian principles at the foundation of the concept, and the concept itself, if correctly implemented.[110]

4. Asylum

The concept of asylum has a history spanning at least 3,500 years, yet its status in international law and politics is highly ambiguous.[111] "There is a gap between the individual's right to seek and enjoy asylum and the state's discretion in

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[110] UNHCR, State of the World's Refugees (1995), op.cit., p.89.

[111] On the history of asylum see Grahl-Madsen, op.cit.; UNHCR, The State of the World's Refugees (1993), op.cit..

providing it."[112] The nature of who is to be considered, in legal terms, to qualify for refugee status has undergone much change during the twentieth century.[113] The traditional solution to displacement questions during the first seventy years at least of this century (and for centuries before that) was asylum. Historically, asylum meant the granting of refuge, although it originally had the double meaning of "a place or territory where one is not subject to seizure by one's pursuers, or ... protection or freedom from such seizure"[114]. It is now used in the latter sense in international law, with protection and freedom related to some geographical location. With the growth of nation-states asylum developed (particularly during the mid-eighteenth century) to mean the granting of protection, and the heart of asylum in the twentieth century is "protection granted to a foreign national against the exercise of jurisdiction by another state".[115] It also includes the accordance of rights within the protecting society, and the type of protection involved in the grant of asylum varies from state to state.[116]

Asylum is not an obligation inherent in international refugee law. In spite of Article 14 of the Universal Declaration on Human Rights, states are under no international obligation to grant asylum.[117] Indeed attempts to introduce a notion of an individual right to be granted asylum have always met with opposition and had to be abandoned.[118] Any right involved in the granting of asylum belongs to the

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[112] UNHCR, Ibid., pp.32-33. See Chapter 2.

[113] See Chapter 1.

[114] Grahl-Madsen, Atle, The Status of Refugees in International Law, Vol. II 'Asylum, entry and sojourn' (Sijthoff: Leiden, 1972) p.3.

[115] Goodwin-Gill, G.S., The Refugee in International Law, (Oxford: Clarendon Press, 1983) p.102. See also Grahl-Madsen, Ibid., p.4.

[116] See Hailbronner, Kay, 'The right to asylum and the future of asylum procedures in the European Community', International Journal of Refugee Law Vol.2 No.3 (1990) p.347. Also, ICMPD, 'A Comparative Analysis of Entry and Asylum Policies in Selected Western Countries' (Vienna, May 1994) and la Cour Bodtcher, Anne, Jane Hughes and Vagn Klim Larsen, 'Legal and Social Conditions for Asylum Seekers and Refugees in Selected European Countries', (Copenhagen: Danish Refugee Council, February 1993).

[117] Goodwin-Gill, op.cit., p.104.

[118] See Kjaerum, Marten, 'Article 14' in Eide, Asbjorn, Gudmunder Alfredsson, Goran Melander, Lars Adam Rehof and Allan Rosors (eds.), The Universal Declaration of Human Rights; a Commentary (Oslo: Scandinavian University Press, 1992) pp.219-220 for a description of efforts in the drafting of Article 14 and subsequently in the Declaration on Territorial Asylum and the European Convention on Human Rights.

state, not the individual, and the corresponding duty is that of respect for asylum, once granted, by other states. The institution of asylum has been strengthened by regional as well as universal instruments (eg the European Convention on Human Rights, and the OAU Convention) but there is still no acceptance of an international obligation.[119]

While other protective concepts have been entering the practice of the international handling of displacement crises, the nature of the fundamental protective solution, asylum, has been evolving. State practice, particularly in western, developed states, has been altering to narrow the notion of who may be granted asylum, and what asylum means. Among the developments of recent years are the promotion of the concepts of manifestly unfounded claims, concurrent with accelerated procedures, carrier sanctions, safe country concepts (both of origin and first asylum) and stricter visa policies.

Since the 1950s, the assessment of asylum claims has been carried out on an individualised basis, as asylum-seekers need to demonstrate their personal fear of persecution in the state of origin in order to be accorded refugee status and the full protection of the asylum state. According to the 1951 Convention, refugee status is to endure until such a time as the cessation clauses come into effect.[120] In other words it is to be of a temporary, limited term, nature. In practice, however, even when circumstances would allow for cessation of protection, western states have not put these clauses to work, generally finding it too expensive and (for humanitarian reasons) politically unpalatable, to organise deportations.[121] As the Convention

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[119] Ibid., pp.106-107.
This situation leads one to question whether *human* rights stem from the fact of being human, or from citizenship. See also Hailbronner, op.cit., p.354. Even the 1951 Convention does not confer the obligation to accept refugees, only not to return them.

[120] The cessation clauses are to be found in Article 1 C of the 1951 Convention. It is stated that the Convention shall cease to apply if a person has voluntarily re-availed himself of the protection of his country of nationality; has re-acquired his nationality if it was lost; has a new nationality; has returned to his country of origin; the circumstances in connection with which he was recognised as a refugee have ceased to exist.

[121] Cunningham, op.cit.. See Hailbronner, Kay, op.cit., p.348 (where he discusses how negative results in complicated procedures often have no real bearing on the chances of a person remaining in West Germany, or Western Europe generally) and Hailbronner, Kay, 'The concept of 'Safe Country' and expeditious asylum procedures: a western European Perspective', International Journal of Refugee Law Vol.5 No.2 (1993) p.33, where it is claimed that an estimated 80 per cent of rejected asylum seekers stay on, whether or not they receive a residence permit, and that anyway they often are accorded a humanitarian status, since it is considered that during procedures which can take years a certain level of integration has taken place.

was mainly aimed at those fleeing communism in eastern Europe, it was always assumed, and for almost forty years was held to be the case, that return would not be appropriate. Asylum has essentially come to be seen as a *permanent* solution to refugeehood.

3.1 Restrictions challenging asylum

The granting of refugee status implies the acceptance of an asylum application, and accords full rights and entitlements. State practice of the 1950s and '60s led to asylum in western states being granted fairly liberally. The number of asylum-seekers arriving was, for a variety of reasons, relatively limited compared with the totals from the latter half of the eighties onwards. Asylum policies then went hand in hand with relatively open immigration policies, as an increase in population was often seen as a positive input in the context of economic redevelopment after the second world war.[122] With the economic crises of the 1970s came a desire, cited as a need, to limit immigration generally. As regular immigration and 'guest-worker' channels were gradually closed down, the number of migrants continued to rise. Those who might earlier have been able to honestly apply to immigrate to western states for economic reasons were forced to start claiming asylum for political (often false) reasons as the only means of entry. As western governments realised this was happening, they increased their restrictive application of the 1951 Convention and domestic asylum laws, in order to combat what were seen as abuses of the asylum system.[123] While asylum is a distinct element of overall immigration policies it was for some time (in Europe) confused with more general policies aimed at controlling the movement of people. The result of this confusion has been a restrictive turn in asylum policies alongside restrictions in immigration generally.

The restrictions on asylum led to the apparent abandonment of refugee

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[122] The positive reception of asylum claimants, including a waiving of immigration regulations in some instances was evident in the 1956-7 case of the Hungarians. See Chapter 9 for an account of the employment opportunities created for Hungarians in the UK.

[123] See for example Amnesty International, '*Europe*: the need for minimum standards in asylum procedures', (Amnesty International EU Association Brussels, June 1994) p.1. and Hailbronner, 'Right to Asylum', op.cit., p.344.

protection as an exceptional element of general immigration control. According to Shacknove the restrictions on asylum can be seen within two overlapping categories, control and containment, which provide a useful starting point for analysis. Restrictions used to control or prevent arrival include visa, passport and frontier regulations; the extension or re-introduction of carrier liability;[124] quota admissions and orderly departure programmes.[125] Meanwhile restrictive policies aimed at containment also involve visa requirements and carrier sanctions as well as the return of asylum seekers to so-called 'countries of first asylum' and the creation of safe areas and humanitarian intervention.[126]

Restrictions preventing arrival, and policies of safe areas and humanitarian intervention have already been addressed in this chapter. The two other restrictive approaches to the handling of asylum claims were the subject of resolutions of the European Communities' Council of Ministers in London in December 1992.

The 'safe country' notion has two manifestations. One is the classification of countries of origin as safe, and the second is a similar categorisation of 'safe' countries which were transited *en route* to the state in which asylum is sought, or in which protection had already been received. The reason for the former notion is to demonstrate, without further individually based investigation, that a person could not have had a well-founded fear of persecution in their country of origin because persecution apparently does not take place there, or at least that there was an internal flight alternative.[127] It is thus assumed that applicants from such countries are abusing the system to avoid strict immigration controls. The use of the latter notion of 'safe country' is not in line with spirit of the Convention, which does not stipulate the territory in which an application must be made. It is, however, a result of the process of territorial integration of European states, and as a consequence presents a certain need for harmonisation of admissions policies and procedures.

The notion of 'safe countries' is an essential element of accelerated

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[124] See Chapter 3 on Schengen.

[125] Examples of these are the Comprehensive Plan of Action for Indo-China and some of the mechanisms established for Bosnians, for which see Part Three.

[126] Shacknove, Andrew, 'From Asylum to Containment', The International Journal of Refugee Law, Vol.5 No.4 (1993) p.516.

[127] Hailbronner, 'Safe Country', op.cit..

procedures. These are aimed at clearing the backlog of asylum cases built up since the 1970s as the number of applicants has increased throughout Europe. The enormity of the individualised case load is overwhelming the procedures and threatening to undermine the possibilities for generous policies. Ironically, it is also leading to the ultimate granting of humanitarian statuses even for those whose claim is found to be baseless, as their extended period of residence during procedures means they have established family ties or built up other reasons giving rise to compassionate recognition.

There are several problems surrounding these notions. Firstly, how is 'safe' to be defined, and who is to determine whether or not a state is 'safe'. This difficulty has already been referred to in the context of labelling nominally protected areas as 'safe' in situations of humanitarian intervention for assistance purposes. ('Safe areas' in Bosnia Herzegovina could not reasonably have been considered as internal flight alternatives to which those who had fled the country could be returned.)

How should assessments of safety be carried out? Should only the reports of a state's diplomatic mission in a given country be consulted, or should more independent media and human rights groups' reports also be used in assessment? If lists of 'safe countries' are being drawn up, how often should they be re-evaluated? Switzerland had the situation of Algeria being on its safe country list and having to adapt this when civil strife became very marked from 1992.[128]

Some countries could undoubtedly be considered 'safe': an asylum-seeker from Sweden pleading to enter the Netherlands, for example, would be greeted with great scepticism. However, listing the EU states, the US, Canada, Australia and New Zealand as 'safe' would not be very restrictive, as the numbers applying for asylum from those countries over the period of a decade could be counted on one hand. It is when lists start to include countries from which there are considerable numbers of applicants, but which might generally be safe that difficulties arise for the asylum-seekers, human rights groups and ultimately governments. For example, Romania in 1995 might be considered quite 'safe', and many Romanians seeking to enter EU states as asylum-seekers might well be more accurately described as

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[128] Hailbronner, 'Safe Country', op.cit. p.50. Hailbronner points to this example as demonstrating the flexibility of these policies. Others doubt that rapid flexibility might always be demonstrated.

seeking economic betterment. However there have been reports of persecution of homosexuals and gypsies in that country. So a blanket refusal to consider cases where the country of origin is Romania could mean a refusal to examine a genuine case.[129] Under some circumstances it would be too simplistic to say a country is safe.

While attempting to streamline procedures by evaluating some countries as 'safe', there is no simultaneous attempt at rationalising the protection system by deciding that certain countries are 'unsafe'.[130] Such a determination would also speed up procedures, since the initial decision on admission could be made for an entire group, with individualised procedures to decide on specific cases coming at a later date.

Designation of 'safe countries of origin' presents significant difficulties. The determination of 'safe first host countries' or 'safe third countries' poses other problems. Within a group of states such as the EU, determining which state is responsible for deciding on a claim, sometimes because it was the first host, has some logic. The deciding state is potentially going to permit access and residence to its own territory accompanied by the eventual possibility for the successful claimant to move within the entire EU territory. What is more, there is a certainty that all states involved in such an agreement as the Dublin Convention have a certain set of standards in their procedures and protection. However, there are no such guarantees in the case of other states, and establishing that they will give sufficient assessment to a claim and maintain full adherence to all elements of international agreements on refugees and human rights may not be evident. Furthermore, considering any state as a safe first port of call in a mass influx situation and the return of all protection seekers to that state reinforces the need for some sort of burden-sharing. A perfectly safe country can become an unsafe place to which to return protection seekers if it is likely, due to a sense of over-crowding with refugees or a sense of

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[129] What is more, placing Romania on a list would not dramatically alter the numbers of applicants who needed full procedures. This could only be significantly reduced by considering such countries as Sri Lanka, from which there are significant numbers of applicants as safe, even though parts of the country continue in 1995 to repeat the descent into a state of war.

[130] Amnesty International point out that from their assessment of cases in the UK, after the introduction of 'safe third country' practice with the 1993 Immigration and Asylum Act, the use of the principle has proved costly, and been neither fast nor productive. All it has achieved is a heightening of hardship for those who fall within its scope. Amnesty International , Playing Human Pinball: Home Office Practice in 'Safe Third Country' Asylum Cases, (London: Amnesty International, 1995).

the unfairness of shouldering the entire burden, to begin programmes of *refoulement* or to close its borders to further people in need.

3.2 The challenge of harmonisation

It was in this climate of restrictiveness that the development of harmonised policies on immigration generally and also asylum in the European Communities (and later the European Union) began.[131] In many instances, the (as of 1995 far from completed) programme of harmonisation has come to be seen by many as a search for the lowest common denominator.[132] The discussions since 1993 have been observed and commented upon by UNHCR, although they are not a formal party to the agreements reached. All texts emerging from the EU on asylum matters contain paragraphs concerning the continuation of respect for international instruments, in particular the obligations of the 1951 Convention. However some texts have not appeared to meet those strict standards.[133] What is more, the harmony reached has been of a non-binding variety, permitting the continuation of divergent policies, law and practice.

Hailbronner suggests that the reason for the low level of achievement lies in the fact that refugee policy affects both foreign and domestic affairs, and is determined by ideological and political factors.[134] It is true that the formulation of refugee policy is both influenced by and exercises influence on the domestic political climate and the operation of foreign policies, including those towards European partners. As the line between European policies as part of the domestic or international agenda thins the formulation of refugee policies needs to be increasingly influenced by the wider regional aspects of its creation and implementation. The search to harmonise in Europe is not only aimed at achieving

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[131] See Chapter 3.

[132] See eg. Hailbronner, Kay, 'Right to Asylum', op.cit., p.352. Hailbronner discusses the European Parliament's criticism of the coordination of asylum policy which has been that "European coordination of asylum law implies reducing individual rights to their lowest common denominator, and denying access to refugees in contradiction to the humanitarian tradition of Europe."

[133] Amnesty International (1994), op.cit..

[134] Hailbronner, 'Right to Asylum', op.cit., pp.346-7. Hailbronner supports this statement with the fact that attempts to create an obligation to admit refugees in all fora have failed, from the Geneva Convention onwards.

a concrete obligation towards refugees, but also towards creating and fulfilling obligations towards partner states. Those latter obligations have thus far been seen in terms of restricting the obligation towards refugees in order to control admission and keep numbers down on behalf of the entire EU. The need to harmonise to create a concrete and humanitarian obligation to admit and protect refugees has been overtaken by restrictiveness. The burden-sharing debate, together with the human rights agenda, demonstrates a need to consider wider positive duties and to turn the focus away from the restrictions which are threatening the nature of asylum.

Restrictions also have the consequence of legitimising intolerance and bringing anti-immigration politics into the mainstream debate.[135] Many refugee provoking crises are rooted in some form of intolerance. Promotion of tolerance can be seen as a method of prevention. Tolerance is, however, also an integral component of effective asylum and protection.[136] The creation of a refugee policy involves compassion, an element of tolerance and a level of state interest. As regions and the world become more integrated and cooperative on various levels, there is some need for a reduction in the nationalistic perspective in the creation of refugee policies.[137] The ongoing search for limitations is seen as a major challenge to the nature of asylum in the late twentieth century.

3.3 Where does the real challenge lie?

Goodwin-Gill has pointed to the major challenge to asylum as emanating from the inertia of institutions rather than the restrictive measures of states.[138] The restrictions imposed by states create much of this inertia, as without state willingness the institutions operated with the support of those same states cannot evolve, develop or adapt themselves, or their rules and standards. Without consensus on an obligation towards refugees, which, Goodwin-Gill forecasts is

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[135] See for example, Geddes, Andrew, 'Immigrant and Ethnic Minorities ad the EU's Democratic Deficit', Journal of Common Market Studies, Vol.33 No.2 (June 1995) p.207.

[136] Goodwin-Gill, G.S., 'Editorial, Asylum: The Law and Politics of Change', International Journal of Refugee Law, Vol.7 No.1 (1995) p.17.

[137] Teitelbaum, Michael S., 'Right versus Right: Immigration and Refugee Policy in the United States', Foreign Affairs Vol.59 No.1 (Fall 1980) p.46.

[138] Goodwin-Gill, 'Editorial', op.cit., p.9.

unlikely to emerge, a re-evaluation of the meaning and direction of asylum is needed. The requirement is a shift towards asylum as protection and away from asylum as integration. In other words, there is a need to see protection as paramount in refugee policies, not long term integration. Offering asylum has evolved away from an offer of protection towards an offer of a new and settled life over the last decades. We need now to either re-consider asylum as short-term protection, or to recreate forms of short-term protection and admit that what we now know as asylum means integration. If the latter course is adopted then measures focused on groups and individuals, on crises which are foreseen to be limited and those which have no imaginable ending in the short-term could be separated and dealt with concurrently in different ways. By distinguishing the elements of a holistic refugee policy and admitting to a comprehensiveness in approach the longer term success of over all refugee policies as protection could be more secure.

CONCLUSION

It is possible that a comprehensive refugee protection policy, resting on existing international legal obligations, with a strong moral basis and involving a notion of manageability, could challenge both the nature of asylum as integration and the institutions which support that notion. However, the challenge which evolution towards such a policy presents need defeat neither asylum practices nor existing institutions. Institutions can and should adapt. UNHCR's mandate has evolved since 1950, and its role in protecting the internally displaced as well as refugees is one of the biggest questions hanging over the evolution of institutionalised protection in the 1990s.[139] The challenge to asylum is a challenge to find protective mechanisms which deny integration as the only resolution to forced migration, but which both include the notion that return is not the only imaginable outcome and, as a consequence, retain asylum as integration for certain cases.

In protection terms the role of 'safe areas' in upholding human rights and dignity must be questioned. The concept's basis in existing legal obligations is new and evolving, but it clearly does not maintain any level of upholding a right to seek and enjoy asylum in other countries. Its moral basis might similarly be suspect.

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[139] See Deng, op.cit., pp.12-13.

The implementation of this policy without clear back-up from other protective measures or guaranteed security and strategic planning which assures the safety of those seeking safety also limits the scope of manageability and control. In certain 'right' circumstances policies of internal protection for those refused entry to neighbouring or more distant states should be developed. In order to have a morally based, legally sound protection policy which allows effective management, however, it is the policy and concept of temporary protection which should be given most attention. Such a policy must not challenge asylum practices, but rather build upon them to guarantee safety and humane living conditions to the majority of victims and not the politically selected few. Those who need to should continue to receive, from the time of their arrival, the support of the longer term protection offered by Convention status and asylum accompanied by clear integration strategies. Temporary protection should be developed to support the standards of nonrefoulement, non-discrimination and fundamental human rights, including family unity. It should be developed as a position which both mediates between limiting protection and advancing exclusion and broadens protection including the promotion of inclusion.

Chapter 6

THE DESIRABLE, DURABLE SOLUTIONS

> While being a refugee should be a *temporary* state of affairs, there is a real danger of refugee situations and the problems of refugees becoming institutionalised and of people remaining refugees forever. The foremost challenge facing the international community today is to reverse this trend.[1]

There are commonly perceived to be three routes to the goal of those who become refugees remaining so for the shortest possible time. These are return or repatriation; resettlement in a third country and integration in the first host state.[2] These outcomes would apply to all forms of displacement, be it internal or across international frontiers, and originally considered as temporary protection or as asylum.

The three solutions were originally based on an exile oriented approach. While the emphasis was formerly on integration or resettlement, during the 1980s in particular the focus shifted towards *voluntary* repatriation.[3] This coincided with a shift in thinking away from an exile-centred approach towards a refugee-centric one: repatriation is claimed to be the preferred scenario not only of host states but also of

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[1] UNHCR *Note on International Protection*, Executive Committee of the High Commissioner's Programme, 37th Session [A/AC.96/680] (July 1986).

[2] Newland defines these routes as: voluntary repatriation; settlement in the country of first asylum and resettlement in a third country. (Newland, Kathleen, Refugees: The New International Politics of Displacement, (Washington: Worldwatch Paper 43, March 1981). It should be noted here that the vast majority of the research in this area has been done on a country by country basis, with little work on the broader meanings of the concepts - particularly in the politics and international relations field.

[3] Of course there is always the question, after conflict situations, of whether the use of the words 'return' and 'repatriation' is appropriate, since even if borders remain the same after a conflict, the previous homeland is no longer the same, and there is rarely a situation of actually achieving the UNHCR ideal of refugees returning to their own former homes villages and land. (Executive Committee of the High Commissioner's Programme, 36th session [A/AC.96/663] (July 1985)). However, the notion as addressed here is that of a departure from the host state to the general area or territory which the displaced person was forced to flee. Bach realistically claims that the new emphasis on the desirability of repatriation has come about because return "somehow represents a denial of the entire refugee experience." Bach, Robert L. 'Third Country Resettlement' in Loescher, Gil and Laila Monahan, Refugees and International Relations, (Oxford: Clarendon Press, 1990) p.313.

refugees themselves.[4] With the end of Cold War bi-polarity the shift in approach to refugee crises is continuing towards an emphasis on the state of origin, with resolution of conflicts, change in governmental regimes, moves towards democracy and the upholding of human rights being promoted as ways of preventing forced movements in the first instance and permitting return as a consequence. One highly pertinent question in this shift of emphasis is whether the focus on the voluntary element of return could be diminished, further removing the exilic bias and placing more and more of a burden on states of origin to protect their own peoples.

Of these three solutions return or repatriation is often considered to be the most desirable. The assumption is that return to the state of origin, or the state(s) that territory has become, following the conflict which caused the flight, allows for the most satisfactory resumption of the previous 'normality'. For example, Goodwin-Gill notes that:[5]

> Return is the objective to which international law aspires; it derives from the conception of nationality in international law, being coterminous with the notions of attachment and belonging; and is supported by the concept of fundamental human rights; now including the positive legal implications of the right to development.

Legally, the nationality of a refugee remains that of his or her state of origin until naturalisation takes place, unless the group is made stateless by the country of origin. Even with the granting of Convention refugee status and/ or long-term legal residence, most host states require residence of at least five to ten years before the granting of citizenship can occur.[6] In the case of temporary protection naturalisation is not an open prospect, and the notion of attachment and belonging is assumed to remain with that state. The attachment envisaged is often to the country of origin in conditions of peace, and over time can become an attachment to an

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[4] UNHCR, The State of the World's Refugees: in search of solutions, (New York: Oxford University Press, 1995) p.82.

[5] Goodwin-Gill, Guy, 'Voluntary Repatriation: Legal and Policy Issues', in Gil Loescher and Laila Monahan (eds.), Refugees and International Relations, (Oxford: Clarendon Press, 1990) p.270.

[6] While the Convention is silent on the subject of integration Article 34 is entirely concerned with the legal process of naturalization:

> The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

idealised vision of what the state was or could be.[7] Generally speaking, however, those fleeing armed conflict fall into Kunz's "majority-identified reactive fate-groups" that is to say refugees who are "firm in their conviction that their opposition to the events is shared by the majority of their compatriots" and who flee reluctantly, without a solution in sight, in reaction to a situation they perceive to be intolerable.[8]

In addition, the right to return, enshrined as it is in the Universal Declaration of Human Rights[9] can only be said to be upheld when there is a real possibility to return, in safety and with all other human rights upheld. In other words the flight provoking conflict needs to be settled and its causes buried. Return would also be the solution posing the fewest problems from the point of view of the sovereign integrity of host states, as no integration or assimilation of a new minority group is necessary. However, when considering the outcome of a period of protection one must allow for the fact that for some groups and individuals 'return' may be impossible, as it could essentially mean going to a new state of persecution due to the make up of the resulting state(s) and the outcome of the conflict. For this reason resettlement and integration must also be considered as positive outcomes of the period of refugeehood.[10]

While it has been widely assumed that return or repatriation is the only viable end to a period of temporary protection, the linkage of the word 'temporary' should be considered as related not to the period of stay, but to the type of protection. Such thinking would indicate that the protection is of a non-durable type, and that *a*

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[7] See Bach, op.cit.. Some might argue that if the attachment to the state of origin were really strong, than the people in question would have remained to fight for their homeland. There is, however, a big difference between a sense of belonging and a willingness to risk one's life in a war one may view as senseless. This is particularly the case in an ethnic conflict, where those who flee may not sympathise with the instilled ethnic hatred and strong nationalism, or may be those whose families are ethnically mixed.

[8] Kunz, Egon F., 'Exile and Resettlement: Refugee Theory', International Migration Review, Vol.15 No.1 (1981) pp.42-44.

[9] Universal Declaration of Human Rights, United Nations General Assembly resolution 217 A (III), 10 December 1948, Article 13 (2), 'Everyone has the right to leave any country, including his own, and to return to his country'.

[10] This argument has been made in Thorburn, Joanne, 'Transcending Boundaries: Temporary Protection and Burden Sharing in Europe', International Journal of Refugee Law, Vol.7 No.3 (1995). It must be considered, however, that the psychological identification of the self as a refugee is most likely to continue under circumstances in which a person is still in exile, unless and until a high degree of integration takes place.

durable solution needs to be found. While return is certainly a strong candidate for the desirable outcome of such a period, as it satisfies both the human rights questions and the integrity of the host state's sovereign right to control membership of its society, it could equally prove that resettlement or integration would be as or more desirable both for the displaced group and for the state or states in question.

1. Return/ Repatriation

There are a number of significant questions to be considered when examining the question of return or repatriation in the light of a discussion of the evolution of a mechanism of temporary protection. These include whether the according of temporary protection might assist in motivating 'spontaneous' return if that is constantly considered to be the final goal of the period of flight, admission and protection. Could a consciousness of this ultimate scenario encourage the organisation and planning (by the individual, the host state and UNHCR) of return, and discourage the growth of attachment to, and integration in, the host state?[11] Alternatively, might the knowledge that return is an inevitable criteria for the short-term protection received result in an instinct for over-hasty return? (that is return before the situation has really improved, leading perhaps to the re-displacement of the individuals or groups involved.) Would the lack of integration cause a state of 'limbo' and loss of dignity for the refugee? Who is to determine when a state is safe enough for return, and is there a minimum period of time which should elapse between a cease-fire, peace treaty or change in situation and the return of those who were forced to flee? What happens to those who still fear return or simply do not want to go? What happens if control of the specific territory which people fled has changed hands under a settlement? These are some of the questions which the protecting states and former Yugoslav republics were, under the guidance of UNHCR, beginning to address in January 1996.[12] The initial idea seemed to be for the internally displaced to be re-housed or to return to their place of origin within

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[11] This is pointed to as one of the perceived advantages of temporary protection by UNHCR, although it also points to a need to re-examine the assumption that this is necessarily always the case. State of the World's Refugees, (1995) op.cit., pp.87-94.

[12] UNHCR hosted a meeting on the subject in Geneva on 16 January 1996.

Bosnia Herzegovina first. Following that those who had fled to neighbouring states, particularly Croatia and Serbia should return, and finally those in more distant states should repatriate. Whether this organised phasing of return can occur or not is a story which remains to unfold. The extent to which people and governments might assume their roles in this strategy is questionable, as personal desires of the displaced people, dislike of the territorial divisions of the peace accord and fear of return may remain.

The major question is, of course, that of whether a definition of the duration of 'temporary' is necessary, in terms of a number of years, and how such a definition could be developed. Deciding how long a situation of short-term protection is to last before becoming more long-term if return was not possible would be a delicate political task, balancing concerns for the protected persons' rights and psychological well-being with sovereign concerns over the possibility of the stay becoming permanent. It would also involve consideration of the role of the same state's conflict prevention and resolution measures in conjunction with international partners.

This non-exhaustive list of questions does not give rise to immediate or obvious answers, not least because the situation of a mass influx of people in need of protection has not yet been met by a ready established mechanism for providing only temporary protection. However, they guide the discussion which follows.

Reference has already been made to the lack of confidence in western European states that return would be the ultimate scenario in the Yugoslav crisis. Both Croatia and Slovenia acknowledged in the early days of the conflict that the solution of many problems posed by the refugee crisis lay with the resolution of the conflict. However, a Slovenian report states that:[13]

> since the situation does not indicate an early end to hostilities, it is necessary to seek solutions to alleviate the consequences within the given framework. We would like to emphasise in particular that the activities of the entire European Community, and above all the countries to which refugees from Bosnia and Herzegovina have fled, should concentrate on the creation of conditions for an early return of temporary refugees to their homeland where they could resume their normal life.

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[13] Republic of Slovenia, 'Temporary Shelter of Refugees from Bosnia and Herzegovina in the Republic of Slovenia' (Ljubljana, March 1993).

The underlying question in the concept of early return is whether it can be justified while there is any possibility that sniper fire and shells might continue to rain down indiscriminately in the very country to which the 'temporary refugees' are desired to return. In order for the UNHCR standard criteria of return in safety and in dignity to be kept, it would be necessary for the conflict to have been resolved.[14] Indeed, return would be part of, and an indicator of the cessation of hostilities. However, UNHCR acknowledges that "in several countries, the return of refugees is an essential part of the transition to peace, rather than simply a result of it."[15] It would thus not be viable for protection, and assistance, to cease with return. Protection against the re-emergence of fighting, or persecution due to residual hostility, would have to be maintained. Also, the assistance of the international protection regime in the material aspects of re-building homes and the state and the psycho-social re-building of the sense of community and civil society would be required if re-patriation were to be successful.[16]

1.1 Voluntary and/ or safe return?

In civil war cases the vast majority of those who flee do not wish to do so, but are forced to do so, and the initial feeling, which may diminish over time, is one

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[14] UNHCR's pre-conditions for return, taken from UNHCR, Durable solutions, EXCOM 36th session [A/AC.96/663] (July 1985) and cited by Cuny, Fred and Barry Stein, 'Prospects for and Promotion of Spontaneous Repatriation' in Loescher, Gil and Laila Monahan (eds.), Refugees and International Relations (Oxford: Clarendon Press, 1990)p. 296 are:

> First and foremost, it must be voluntary ... Secondly, there must be clear and unequivocal agreement between the host country and the country of origin both on the modalities of the movement and the conditions of reception; thirdly, it is vitally important that returnees be allowed to return to their places of origin - ideally to their own former homes, their villages, their land.

[15] UNHCR, The State of the World's Refugees: the challenge of protection, (Middlesex: Penguin, 1993) p.103. Also, Cuny, Frederick C., Barry N. Stein and Pat Reed, (eds.) Repatriation During Conflict in Africa and Asia, (Texas: Centre for the Study of Societies in Crisis, 1992) p.15.

> Today, most voluntary repatriations occur during conflict, without a decisive political event such as national independence, without any change in the regime or the conditions that originally caused flight. Countless individual refugees and sizeable groups of well-organised refugees return home in the face of continued risk, frequently without any amnesty, without a repatriation agreement or program, without the permission of the authorities in either the country of asylum or of origin, without international knowledge or assistance, and without an end to the conflict that caused the exodus.

[16] The question of the length of time for which protection of returnees should last is also open to much debate, not least due to the question of dependency on external help and the relative merits of self-sufficiency in completing a positive return scenario.

of a desire to return. However, the voluntariness of return is an important point which must be examined in the context of temporary protection.

The scepticism of Western governments is heightened by the view that many refugees do not return to their country of origin. In 1939 John Hope Simpson wrote that:[17]

> Deliberate repatriation on a large scale is scarcely relevant in a discussion of practical instruments of solution. In predictable circumstances voluntary return of refugees to their home countries will occur on so small a scale as to not affect the refugee problem itself. The possibility of ultimate repatriation belongs to the realm of political prophecy and aspiration, and a programme of action cannot be based on speculation.

However, discussing primarily the situation in the Third World, Cuny and Stein claim that substantial repatriation *does* take place, but that it is masked by the many who remain as refugees. In substantiating this, they cite research by Gervaise Coles:[18]

> If, however, a broad interpretation is given to embrace all forms of displacement, particularly those as a consequence of armed conflict, serious internal disturbance, or famine or drought, this view is the reverse of the truth. In regard to displacement generally, return is, on the whole, the rule rather than the exception.

The major difficulty here is that while Cuny and Stein note that Simpson is talking about those fleeing religious or ethnic strife, and Coles about those fleeing armed conflict, the situations the international community is faced with in the 1990s combine these two elements. Protection during the Cold War often assumed that return would be impossible, in particular to the communist states of East Europe, and progress towards an upholding of the right to return was frustrated, not least by the emphasis on the importance of the right to leave.

We are left to query the importance of the elements of voluntariness and spontaneity in return. In addition, we need to assess the 'double-edged paradigm shift' noted by Chimini towards preventive protection[19] and obligatory return, in

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[17] Hope Simpson, John, The Refugee Problem: Report of a Survey (London: Oxford University Press, 1939), cited by Cuny and Stein, op.cit., p.293.

[18] Coles, Gervaise, 'Voluntary Repatriation: Recent Developments' Yearbook 1985 (San Remo: International Institute of Humanitarian Law, 1985), cited in Ibid., p.294.

[19] See Chapter 5.

which the major criterion becomes safety rather than willingness and desire to go back on the part of the displaced person.[20] The evidence Chimini gives for this paradigm shift comes from two UNHCR related documents. The first, dating from 1985 states that:[21]

> The repatriation of refugees should only take place at their freely expressed wish; the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety ... should always be respected.

The second document says that "the relative weights of voluntariness of return and guarantees of safety upon return may need to be measured against one another."[22] Chimini sums up his argument by saying:[23]

> 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 refugees, is to create space for repatriation under duress, and may be tantamount to violating the principle of *non-refoulement*. Once this space is created it will be difficult to stop other negative practices like withdrawal of rations and services, restricting income generating opportunities, limiting freedom of movement and association, etc. in the state of asylum.

The principle of nonrefoulement (or non-return) is held to be the fundamental right of refugees, the basis for temporary protection and "the minimum content of asylum which is required by international law."[24] Given this, the question is whether states should actively encourage return. Both the negative aspects of host state encouragement of return cited by Chimini, and the positive elements of encouragement such as cash incentives and re-development assistance can be seen as to some extent removing the voluntary aspect of return. Emphasising the positive assistance in the homeland rather than focusing on a withdrawal of protection in the

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[20] Chimini, B.S., 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation', International Journal of Refugee Law, Vol.5 No.3 (1993) p.445. Chimini sees the motivation for 'encouragement', 'promotion' or 'facilitation' of return is often the lack of burden-sharing - states can't keep up the burden for long. He also notes (p.447) that in 1992 20% of UNHCR's Kenya budget was spent on creating a 'preventive zone' in regions of Somalia bordering Kenya, because Kenya threatened to return Somalis if no burden-sharing occurred. "Thus, conceptually speaking, *preventive protection* and *involuntary return* came to be linked to the detriment of the principle of protection."

[21] EXCOM 36th session, conclusion 40 (XXVI) 1985 cited by Chimini, Ibid., p.454.

[22] UNHCR Working Group on International Protection (cited by Ruiz - *World Refugee Survey 1993* 'Repatriation: tackling Protection and Assistance concerns') Chimini, Ibid., p.454.

[23] Chimini, Ibid., pp.454-455.

[24] Goodwin-Gill, op.cit., p.260.

host state would certainly be the more humanitarian path. Chimini sees the issue as one of potential danger in that refugees could be encouraged to return, and express their willingness and desire to do so after UNHCR and host state information campaigns, but in fact return to a place where conflict is only in abeyance rather than where it is eradicated.[25]

This question comes down to a challenge not only to the bases of international refugee law, but also to a test of the very notions of nationality, belonging and attachment. The position expressed above in the context of the offering of protection to those whose flight is caused by armed conflict was that in the spirit of the upholding of human rights and with humanitarian goals in sight, protection should be offered. However, that protection should, initially, be of a temporary nature, as the situation could change, and the need for protection of the group (though not of every individual within the group) could be of limited duration. The granting of such protection would mediate between the recognition of the rights of the displaced persons and the sovereignty of the host state. The position expressed by Chimini (and others) is that while individuals have a right to return to their state of origin, they should not be coerced, encouraged or assisted to do so. They should return only if they so desire. Past experience in western Europe would seem to indicate that policies which contain no element of a requirement to return once the situation allows it lead only to a reluctance to grant protection to other groups who may need it at a future date. It is precisely because very limited numbers of *de facto* refugees from the developing world, who fled conflicts with varying underlying causes (including colonialism), have returned to their states of origin from the developed world that western European governments do not believe in the idea that temporarily protected persons from former Yugoslavia will return even if conditions allow them to do so. It is believed that having experienced the standard of living, education and economic benefits of the West people will remain, even illegally, but probably with humanitarian statuses.[26]

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[25] Chimini cites the example of Afghanistan, where international conflict in the 1980s was masking the internal strife apparent in the 1990s. op.cit., p.455.

[26] It should be borne in mind that those who fled former Yugoslavia did, in the main, enjoy a standard of living comparable to that which they would have been able to achieve in western Europe during three years of protection. Many of those who were able to flee were professionals, and their standards were reduced by having to arrive in centres with two or three families in each room, with no clothing etc. See for example a VPRO (Vrijzinnig Protestantse Radio Omroep - the liberal Protestant

The question really has to become one of whether in order to permit the development of policies of temporary protection for potential future crises a certain 'duty' to leave has to be attached to the right to receive protection for the period necessary. If it was found that such a duty to leave, in conditions of safety and dignity, would be a necessary factor in the future protection of victims of conflict then the subordination of individual willingness to return to the criterion of safety may indeed need to occur, with a significant reason being the possibility that return would allow for future protection, when and if other cases of mass influx arise.

Chimini concludes his article by saying that:[27]

> only when these words [facilitation, promotion, encouragement] are looked at in the backdrop of the paradigm shift taking place, and the restrictive practices which have all but become the norm in the developed world that they can be given content. In general, the concern today is less with the refugee community, or for that matter with the host countries, which in the case of 90 per cent of the world's refugees is the developing world, but with the need to ensure that refugees do not disturb the peace of the developed world. In other words, the developed states will attempt to give these words expansive meaning for it would help them to contain the problem in the developing world. While voluntary repatriation is perhaps the ideal solution, its idealness should not be the pretext to coerce refugees to go back to situations from which they fled in the first place.

The whole notion of safe return, however, must revolve around the fact that the situation is safe - and therefore not the situation from which the refugees fled in the first place, and that for an initial period at least protection within the state of origin must continue.[28]

1.2 Political problematics

It must be recalled that in recent decades "[v]oluntary repatriation [has been]

Broadcasters) documentary series in the Netherlands on the lives of two female refugees and their children from arrival in that country.

[27] Chimini, op.cit., p.458.

[28] See, for example, Goodwin-Gill, op.cit., p.282. Goodwin-Gill asks who is to protect returnees after repatriation and for how long. His answer is that UNHCR should - but that the length of time should be on a case by case basis.

the durable solution least effectively promoted by the international community",[29] and that the only international legal instrument concerned with refugees in which voluntary repatriation figures is the OAU Convention.[30] The decade from 1985 to 1995 saw a new emphasis on re-integration and rehabilitation needs in the country of origin: a change from the days of transporting refugees back to the homeland and expecting them to fend for themselves.[31] Cuny and Stein also note that promotion can be dangerous, due to the charged political atmosphere. Loescher meanwhile describes repatriation as dependent[32]

> for its legitimacy and effectiveness on conditions in the home country and on the refugees' willingness to return. In past decades, large numbers were repatriated following the successful conclusion of wars for national independence against Western colonial powers. The reduced tension between the two erstwhile superpowers during the 1990s and their disengagement from several major internal and regional conflicts that generated huge numbers of refugees in the past have opened up opportunities for the termination of conflicts and for the arresting of refugee flows.

He goes on to say, however that the revival of deep-rooted nationalist, religious and ethnic conflicts complicates return for many in the South in particular, and to describe damaging effects of long-term stays in camps which were meant to be temporary. He contrasts the massive amounts of money spent on fuelling Cold War conflicts, with 'lukewarm' and 'modest' responses to helping to finance return, rehabilitation and reconstruction programmes, and, like Cuny and Stein, describes the ultimate problems of return - or not - as political, not logistical.[33]

Newland too describes voluntary repatriation as:[34]

ideal for both the refugees themselves and for the countries and

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[29] Cuny and Stein, op.cit., p.311.

[30] OAU Convention Article 5: "The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will."
It figures also in the Universal Declaration of Human Rights (see note nine above). It is also interesting to note that there is no separate section in the European Commission's 1994 Communication on the subject of return, in spite of this policy document's advocacy of some form of temporary protection.

[31] UNHCR, State of the World's Refugees, (1995) op.cit., p.47.

[32] Loescher, Gil, Beyond Charity: International Cooperation and the Global Refugee Crisis, (New York: Oxford University Press, 1993) p.149.

[33] Ibid., p.150.

[34] Newland, op.cit., p.14.

> institutions that work with them. Logistically and psychologically it is the easiest solution, but politically it may be the most difficult. It requires as a starting point that the problem that drove the people from their homeland be resolved. Material support for the returnees may also needed [sic], at least until they can reestablish their livelihoods.

The political difficulties to be faced in the return of protected people to their country of origin are manifold. There are the problems to be faced in the host country - due to sentiments of racism and xenophobia displayed by the host population (and electorate) it might be politically expedient to encourage and promote return. However encouraging return prior to the establishment of genuinely safe conditions could lead to cries from the same population of human rights abuses. As well as violating human rights, the forced repatriation of an unwelcome population to a newly recognised state could result in new calls of abuses of that state's integrity. In the meantime, assisting former temporarily protected persons to re-build their lives and re-integrate can cause tension between returnees and the population which did not flee, but stayed (through their own will or through having nowhere to flee to once doors were closed) and lived through the conflict. In order to avoid as many of these political difficulties as possible, cooperation between the states and international organisations involved needs to focus on the political ramifications of return on all concerned, as well as the logistics of organised movement and exercises such as re-housing and re-building. In addition the root causes of the initial displacement need to be addressed and resolved[35] and finally the political settlement of the conflict must not be jeopardised through the return movement, but rather ways must be found to make return of those who fled the cementing of the new situation, and an enhancement of it.

1.3 Return as the only outcome of temporary protection?

In his discussion of the language associated with return, Chimini notes that debate over temporary protection is taking place in Europe and that obligatory return is seen as the foundation upon which such protection will be granted in cases of

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[35] See Chapter 4.

mass influx.[36]

> While in the case of temporary protection the notion of 'safe return' has been advanced in order to increase protection to those who do not have it today, especially refugees from the former Yugoslavia, the content of 'safe return' is open to many objections. There is not yet any specification of the conditions and standards which must be met before obligatory return can be pursued. Equally worrisome is the fact that the decision of the concerned state is to be final even as it consults with UNHCR. Finally, there is the problem of dual standards. While voluntary repatriation would be the standard in the rest of the world, safe return would be the norm in Europe in so far as mass influx situations are concerned. In the circumstances, it is to be expected that host states in the developing world will also want to embrace the notion of safe return, with serious implications for the principle of protection.

This quotation raises two major questions. Firstly there is the question of the assumption that return is presumed to be the only viable or suitable conclusion to temporary protection, and secondly the question of the voluntary versus obligatory nature of return - a question which requires, as Chimini suggests, serious consideration in an evaluation of the potential of a mechanism of temporary protection for those fleeing armed conflict.

Chimini is quite correct when he says that the encouragement given to Western states, by UNHCR and others, to provide temporary protection to those fleeing the conflict in former Yugoslavia was that the protection would be only temporary, and that return would be the almost inevitable result.[37] However, many governments maintained a constant scepticism on this latter point.[38] So, while the very nature of the notion of temporary protection has come to involve a concept of the requirement of return, it could be suggested that future mechanisms, offering temporary protection in a spirit of humanitarianism, might involve the idea of three possible durable solutions - return, resettlement and integration - with the former potentially being seen as the most desirable, although the others should not be

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[36] Chimini, op.cit., pp.454-5.

[37] See, for example, UNHCR, 'International Meeting on Humanitarian Aid for victims of the Conflict in the Former Yugoslavia (Comprehensive Response to the Humanitarian Crisis in the Former Yugoslavia (HCR/IMFY/1992/2)), and European Community, 'Conclusion on People Displaced by the Conflict in the Former Yugoslavia', (London, 1992).

[38] Interviews with Andrew Cunningham (British Home Office) and Dennis de Jong Secretariat General of the European Commission).

considered entirely undesirable.[39]

The varying schemes being established in Europe imply a long-term aim of return, but the test they offer is perhaps not the same as the outcome of a pre-established mechanism might be. In spite of individual desires for return appearing strong amongst those who fled former Yugoslavia, and the hope of governments that repatriation would be the outcome, the precise necessity of return was not a pre-established element of the *ad hoc* procedures of their flight or reception, but was left implicit. In whichever way the questions raised in discussions concerning the promotion of return are eventually answered, the possible alternative and permanent solutions of asylum and integration in the first country of asylum or resettlement and integration in a third state, must never be rejected by host state or refugee. Indeed the UNHCR Background note to the informal meeting of 23 March 1994 notes that in two of the major host countries "the vast majority of cases from Bosnia [have] either [been] recognised as refugees under the 1951 Convention and the 1967 Protocol, in one country, or [been] granted humanitarian status, in the other."[40] In this same note, the requirement of well planned return programmes, as well as a measure of pragmatic flexibility in according more secure status to those whose exile has already proved to be rather too long-term to be labelled 'temporary', is registered. This notion of long-term planning, together with a degree of flexibility is undoubtedly essential in any mechanism to be developed.

1.4 The early indications for return for Bosnians: the Dayton Agreement[41]

The linkage between return and rehabilitation is strengthened by the full

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[39] For example the Dutch scheme of provisional protection, to be discussed at length in Part Three, includes a progressive move towards integration over a period of three years, after which time a permanent residence permit would be granted.

[40] UNHCR Background Note, (March 1994) op.cit., p.7 paragraph 24.

[41] The document resulting from the Proximity Peace Talks held at Wright-Patterson Air Force Base, Dayton, Ohio, from November 1 to 21 is referred to by various names. It consists of a General Framework Agreement with eleven annexes. Initialled in Dayton on 21 November 1995 and signed in Paris of 14 December 1995, it has not been registered as a treaty by the UN. It has however, been circulated as a UN document, on 30 November 1995 under the heading *General Framework Agreement for Peace in Bosnia and Herzegovina*. As a UN document it bears the General Assembly document number A/50/790 and Security Council document number S/1995/999. In this text the document will be referred to as the Dayton Agreement.

implementation of temporary protection policies which include return after the resolution of a conflict. In the Bosnian case, the right of return for refugees and displaced persons has been included as an ambitious element of the Dayton Peace Agreement of 21 November 1995. European policy-making for reconstruction of Bosnia Herzegovina was underway as the agreement was being initialled, including ideas for rebuilding infrastructure and houses in such a way as to bring the communities together again.[42] The right of return was being seen as a key to any reconstruction aid, including the right to return to the area (and house) one left, regardless of which ethnic grouping was to be in control of that area.[43] The EU was to hold a money-raising conference within weeks of the implementation conference in London on December 8, 1995. However, the date set by the European Commission of 20 December was rejected by EU foreign ministers as being "too early", with concrete projects and financial targets not yet identified.[44] Great scepticism over the eventual return of the refugees persisted with the initialling of the Dayton Agreement.[45]

The return of refugees and displaced persons is one of the key components of the outcome of the Proximity Talks which took place at the Wright-Patterson Air Force Base, Dayton, Ohio from November 1 to 21, 1995. Annex 7 is devoted to agreements on the return of refugees and displaced persons, and the issue also enters other areas of the agreements made. In Annex 3 (Elections), Article IV states that[46]

> The exercise of a refugee's right to vote shall be interpreted as confirmation of his or her intention to return to Bosnia and Herzegovina. By Election Day, the return of refugees should already

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[42] UNHCR suggested in its 1995 report on The State of the World's Refugees, op.cit., that some of the difficulties it faced in creating confidence after a conflict were due to the UN role as peacekeepers overseeing a peace accord (p.107). In the Bosnia Herzegovina case NATO will be performing the role of peacekeeper, so it will be interesting to see if this facilitates or hampers UNHCR's role in return and rehabilitation. The British Overseas Development Administration announced an allocation of £20m for reconstruction in Bosnia on 18 December 1995 (BBC, Radio 4 News, 18 December 1995).

[43] Helm, Sarah, 'EU dreams of rebuilding a war-torn land', The Independent, (24 November 1995), p.14.

[44] Helm, Sarah, 'EU delays meeting on reconstruction', The Independent, (5 December 1995).

[45] Ibid..

[46] Dayton Agreement, Annex 3 to the General Framework Agreement (Elections), Article IV: Eligibility, 1: Voters.

> be underway, thus allowing many to participate in person in elections in Bosnia and Herzegovina.

Annex 4 (Constitution) Article II (Human Rights and Fundamental Freedoms) paragraph 5 (Refugees and Displaced Persons) establishes that:[47]

> All refugees and displaced persons have the right freely to return to their house of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements made under duress are null and void.

The ideal of return to *homes of origin* is repeated in Article I paragraph 1 of Annex 7 (Refugees and Displaced Persons).[48] The same paragraph notes that:

> The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties [The Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska] confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.

Paragraph 2 states that the Parties will ensure that refugees and displaced persons can return in safety, "without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion." These conditions describing the safety to be guaranteed to returnees largely mirror the defining characteristics of a refugee according to the 1951 Convention relating to the Status of Refugees. They also broadly describe the conditions of insecurity under which the refugees and displaced persons fled, yet those people were mostly not accorded Convention status, but a temporary protection the final phase of which should be return according to the conditions expressed in the Dayton Agreement.

Those conditions of return are further described as being with a free choice of destination, and no pressure to remain in dangerous conditions; with respect for family unity and with accurate information on conditions in the country provided by the Parties prior to return (Article I, paragraph 4). The actual process of return is

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[47] Ibid., Annex 4 (Constitution) Article II paragraph 5.

[48] Ibid., Annex 7 (Refugees and Displaced Persons), Chapter I (Protection) Article I (Rights of Refugees and Displaced Persons).

to follow a programme coordinated by UNHCR in consultation with the Parties and host countries, including priorities for "certain areas and certain categories of returnees."[49] Economic, political and social conditions which are conducive to *voluntary* return and reintegration of refugees and displaced persons are to be created by the Parties within their territories.[50] In addition short-term repatriation assistance is to be provided to all returnees who are in need, in accordance with the plan developed by UNHCR[51] and a Commission for Displaced Persons and Refugees is to be established with the task of deciding on claims for property or compensation for property which cannot be returned.[52]

The plan worked out by UNHCR was outlined by the High Commissioner, Sadako Ogata, on 16 January 1996. It is a three step, phased programme, giving priority to the approximately one million displaced still inside Bosnia Herzegovina, followed by the estimated 670,000 who were in other former Yugoslav Republics and finally the approximately 700,000 refugees and temporarily protected in other (mainly west European) states. Mrs Ogata reportedly expressed the hope that some 870,000 people would return during 1996. She also urged European governments to continue temporary protection until it was clearly safe for people to return:[53]

> Let us make sure that the promise of peace signed in Paris is becoming a reality on the ground before we take a step that will affect the lives of hundreds of thousands of people, who have already endured enormous hardships in the past.

UNHCR estimated that it would need to raise $400 million to finance its 1996 programmes in former Yugoslavia, including the cost of providing food and humanitarian aid, but excluding return transportation and resettlement grants, which host countries were being requested to provide.[54]

Central concerns over these ambitious plans lie with the notion that return to

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[49] Ibid., Annex 7, Chapter 1, Article I, paragraph 5.

[50] Ibid., Article II (Creation of Suitable Conditions for Return).

[51] Ibid., Article IV (Repatriation Assistance).

[52] Ibid., Chapter 2 (Commission for Displaced Persons and Refugees), particularly Article XI (Mandate) and Article XII (Proceedings before the Commission).

[53] Williams, Frances, 'UN plans to return over 2m Bosnians to homes', The Financial Times, (17 January 1996) p.3.

[54] Ibid..

the exact house from which people had fled would be possible, or that many displaced people would find that desirable. It is far more likely that compensation will be sought and those who do 'return' will go to areas which are now governed by their own ethnic authority. Indeed the ethnic partitioning of the country was increasing during the early months after the signing of the Agreements, as, for example, thousands of Serbs left Sarajevo suburbs to avoid coming under the authority of the Federation of Bosnia Herzegovina government, rather than of the Republika Srpska.[55] There are also concerns over the implications of taking part in the elections, in which voting would be the expression of a desire to return, and could be used as pressure for return to take place sooner rather than later.

In addition, assistance in reconstruction and the development of economic capabilities in Bosnia Herzegovina must take place, and have a long-term perspective, for there to be genuine encouragement for the voluntary return of the temporarily protected. The inclusion of 'return of refugees' as in the General Framework Agreement and its development in Annex 7 of the Agreement, offers both a means by which to assess the progress in this manifestation that peace is working, and, through mal-interpretation, a reason for European governments to take the initiative in encouraging, facilitating and even forcing the return of those from Bosnia Herzegovina who received temporary protection. The calls for return began within days of the initialling of the Agreement, with German Chancellor Helmut Kohl announcing that the 400,000 people who had received protection in Germany (by far the largest group in any European state) must return as soon as possible, with the winter of 1995-6 being used for planning the operation.[56] Money for reconstruction and assistance to returnees would form part of the plan, he suggested. An alternative strategy was put forward by the Dutch in January 1996, by which people could return to Bosnia Herzegovina for a trial period, to assist in reconstruction and see how life would be for them in their country of origin. Their visas for a return to residency in the Netherlands would remain valid for an

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[55] See for example, Metiljevic, Asim, 'Divided we stand', Warreport, No.40 (London, April 1996); Reuters, 'Bosnian Serb Speaker appeals to Serbs not to leave Sarajevo' (24 January 1996); Reuters, 'Senior Official warns most Serbs may leave Sarajevo' (5 February 1996).

[56] 'Bonn seeks return of 400,000 refugees', The Daily Telegraph, (25 November 1995), p.13.

unspecified limited period.[57] This type of arrangement demonstrates the psychological as well as political battle which must be waged to achieve the optimal result for all concerned.

The return of the refugees to Bosnia, and indeed the return or re-housing of the internally displaced, will be a test of the strength of the peace agreement. The outcome of the protection phase is inextricably linked to the outcome and resolution of the cause of flight. Bosnia Herzegovina represents a challenge to the international refugee regime, not only in terms of how to protect the victims of 'ethnic cleansing' but also because the consequences of 'ethnic cleansing' are to be seen in the resolution of the conflict, dividing a so-called whole state into two ethnically led regions - one a republic the other a federation. Return will not take place overnight. The gradual return of the refugees would be a sign that the deal struck was a successful one.

One concern for the broader picture of the development of temporary protection has to be that if the agreement reached in Dayton holds, and the violence ceases, but refugees do not return, governments will be persuaded that their scepticism was well placed, and the evolution of temporary protection policies as contingency planning for future crises will be halted. UNHCR's suggestion that developing temporary protection mechanisms will encourage generosity could be proved wrong if the 'temporariness' of the protection is not substantiated by large numbers returning to a peaceful state.[58] How to encourage and assist return in safety, and guarantee security in the long-term might be a greater, and more important challenge than including the notion of return in the peace agreement suggested.

2. Resettlement

Return or repatriation is not, and should not be, the only possible goal or end result of a period of, and policy of, temporary protection. The 'temporary' nature of the protection implies only that the *current form of protection* is to be of a short-

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[57] De Volkskrant, 'Bosniërs mogen terug met behoud van verblijfsrecht', 31 January 1996, p.8. (Bosnians may return with their right to stay intact).

[58] UNHCR, State of the World's Refugees, (1995) op.cit., p.87.

term nature. It is a protection which is provisional, and contains an element of conditionality. It rests on the condition that the situation in the host country has not altered in such a way as to make the possibilities for return in safety and dignity, by spontaneous or organised means, so favourable that voluntary return is to be supported, encouraged and facilitated. If, however, the condition upon which the temporary protection rests is sustained for a period of time which can no longer be considered as short-term, then other non-temporary (or at least less temporary) solutions need to be considered. While return is certainly one of these it need not be the only one, and resettlement and integration should also be considered as legitimate outcomes of a period of temporary protection.

According to UNHCR, "[r]esettlement in third countries is offered to no more than 0.5 per cent of the world's refugees."[59] It has come to be seen as a solution of last resort, and only ten states have regular resettlement programmes.[60] It is a complicated and expensive operation, but one which is, nonetheless, vital if the potential of refugee protection is to be fully realised. The impact of some resettlement cases in the 1970s and '80s was negative, and it has gradually become a more selective process.[61] In recent decades, resettlement has been presumed to mean the transfer of refugees from developing first host countries to developed third countries, that is from countries in the region of origin of the crisis to the Western states. However, as Loescher notes, "faced with economic difficulties and growing popular xenophobia, Western nations are much more reluctant to admit large numbers of people who are not easily admissible."[62] These difficulties are not only met by the imposition of restrictions on the entry of those seeking non-Convention statuses, but also a reluctance to undertake to resettle those who have found shelter in local states, and in the context of a European crisis, this reluctance to face the resettlement issue translates into a reluctance to respond to calls for physical burden-

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[59] UNHCR, State of the World's Refugees, (1993) op.cit., p.104.

[60] UNHCR, State of the World's Refugees, (1995) op.cit., p.92. The ten states are: Australia; Canada; Denmark; Finland; the Netherlands; New Zealand; Norway; Sweden; Switzerland and the US.

[61] In the Bosnian case, individual refugees with high educational qualifications have, according to anecdotal evidence, been recruited from Slovenia and Croatia to go to start a new life in Canada and the US.

[62] Loescher, op.cit., p.148.

sharing.[63] If the role of resettlement is to be developed in conjunction with the concept of burden-sharing it must proceed in a way which does not increase the risk of restrictions on numbers in states of first asylum, but rather encourages those states to be more generous in the knowledge that their generosity will be supported by more distant states when the numbers or length of stay become objectively too much to be managed by neighbouring states.

In many ways, just as return is seen as the most desirable solution, third country resettlement is, as Bach suggests:[64]

> considered by most international agencies and observers, if not by refugees themselves, to be the least desirable solution. The further refugees are moved, the less likely they are ever to return home. And to return is the cherished goal.

Resettlement could, for this very reason be viewed almost as a defeat of temporary protection, as it would be seen as a durable solution, leading to integration in a third state, one step further from the homeland, especially since the initial programmes of *temporary* protection would have been ended.

However, in the sense that it could fulfil the practical side of burden-sharing, resettlement could be considered as a part of, rather than solution to temporary protection.[65] Resettlement plans could be part of a temporary protection scheme. States close to the borders of the state in which a displacement-provoking crisis occurs could be encouraged to protect the displaced in the first instance with the promise of resettlement further afield if an early solution was not found or numbers increased dramatically. However, as was seen in the work of Perluss and Hartman,[66] Western states were reluctant to share the burden or to participate in massive resettlement programmes to assist the developing world in the 1970s, and

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[63] See Chapter 5 for a discussion of the notion of burden-sharing.

[64] Bach, op.cit., p.313. UNHCR, State of the World's Refugees, (1993) op.cit., p.45. describes repatriation as:

> often the least satisfactory solution to a refugee problem because of the difficult cultural adaptations involved. It is normally turned to only as a last resort, when there is no other way to guarantee protection and safeguard human rights.

[65] This was the case in the major historical example of such protection in Europe ie. the case of Hungarians who initially fled to Austria and Yugoslavia in 1956. The most successful large-scale resettlement cases were those at the end of World War Two, and the re-location of hundreds of thousands of Indo-Chinese Boat People in the 1970s.

[66] Perluss, Deborah and Joan F. Hartman, 'Temporary Refuge: Emergence of a customary norm', Virginia Journal of International Law, (Spring 1986). Cited at length in Chapter Five.

more recently in the case of Turkey's response to the movement of Kurds in 1991, Western states demonstrated that they are unlikely to offer guarantees of resettlement, even when the crisis is in their midst.[67] Without such guarantees, however, as Newland points out, "some countries undoubtedly would refuse to allow refugees to claim even temporary asylum, as has happened in Thailand, Malaysia, and, reportedly, Honduras."[68]

The primary defence given for this position by Western states is that sharing the physical burden (resettling populations) would involve the violation of the right to freedom of movement. This defence is very difficult to deny. However, it is possible that there would come a point where an evaluation of the qualitative differences between the violation of the freedom of movement (for example from a 'safe area' to an international frontier) and a violation of the right to life, might have to be made. If the aim of states (other than the state of origin) during a crisis of mass forced displacement was to offer (all be it limited) protection to, and uphold the right to life of, the greatest number concern for the violation of the freedom of movement of the displaced may need to be subordinated to the greater claim of the right to life, particularly in situations where local states begin to return displaced people when they feel they can no longer cope.[69]

The primary humanitarian 'flip-side' argument to this is that certain cases, especially those of family re-unification, could require resettlement (of family members from their first country of asylum to the state in which other members of the family have found refuge) in order to respect the right to family life. In the Bosnian case many families have been split up, even between western European states, and face great challenges in achieving re-unification, and thus the resettlement

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[67] See for example Adelman, Howard, 'Humanitarian Intervention: the case of the Kurds', International Journal of Refugee Law, Vol.4 No.1 (1992).

[68] Newland, op.cit., p.21. NB Newland describes 'international solidarity' - essentially burden-sharing, as involving material support - eg money, supplies, personnel and transportation equipment [for setting up camps and running them], which can only be provided at the invitation of the host government; bi-lateral aid; and the assistance of voluntary, private organisations. She notes that Western states are the top aid givers. It should perhaps also be noted that western states physically protect least refugees region by region.

[69] As noted in Chapter 5, most states and commentators agree that financial burden-sharing, avoiding resettlement, allowing the displaced to remain as close as possible to their country of origin (with the aim of return in mind) and permitting the host states to bear the burden is preferable to forced resettlement.

of one or more members.[70]

Organised resettlement, like organised return, involves the co-operation of UNHCR, and the two states involved. Thus, discussions on the subject of resettlement also bring us back to the question of the sovereign right to control entry to the state already referred to in Chapter 5. In the case of resettlement, the exercise of this right is perhaps under the greatest possible control by the distant state, as its participation in an organised programme is a pre-requisite of mass resettlement.[71]

Being held to be the least desirable outcome of a displacement situation, and thus the least desirable outcome of a temporary protection scheme, it is unlikely that resettlement of masses of people displaced by armed conflict would ever be effectively promoted. However, even as a last resort solution it is an option that must be maintained, particularly within regional mechanisms where it eventually could form an integral part of the burden-sharing required to resolve the problems of neighbouring states if a conflict has lasted for a number of years, making imminent return ever more unlikely. Whether displaced people can eventually return, are resettled or remain in their first country of asylum, however, an essential element of the desirable ending of their plight must be their integration within the society in which they find themselves.

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[70] See Family Reunification for Refugees in Europe, International seminar, 15-17 May 1993 Helsingor, Denmark, organised by the Danish Centre for Human Rights and the Danish Refugee Council, under the auspices of the European Council on Refugees and Exiles (Copenhagen: The Danish Refugee Council 1993). In a submission to the seminar entitled The Family and International Law, Peter J. van Krieken (Head of UNHCR's Peshawar Office, formerly Deputy Regional Representative of UNHCR Regional Office in Stockholm, covering Nordic and Baltic countries) suggests that an analysis is needed of a restrictive approach to family reunification,

> "but it could well be submitted that there is a wide-spread feeling that once families have ben reunited, it will be very difficult to contemplate or even implement (voluntary) repatriation of a whole family to the country of origin once the circumstances there have improved to such an extent that more or less normal life back home would be possible. It could also be submitted that a restrictive reunification policy is meant to stem the influx, to give some 'negative' signals." p.30.

[71] Of course, limited numbers of individual refugees may attempt to cause their own resettlement by fleeing the country of first asylum and arriving at the borders of a third state. In such a situation they would, in the early 1990s almost inevitably be returned through policies of "Safe First Countries" as described in Chapter 5.

3. Integration

Some of the temporary protection mechanisms introduced in Europe involve plans for gradual integration, preparing for a situation where return appears to become impossible, or where the length of stay makes a lack of integration into society an unnatural occurrence. Integration into the society in which one lives is at least a natural desire, if not always quite a natural phenomenon.

3.1 Semantics: Integration, assimilation and acculturation

Due to the marked contrast, though semantic similarities, between the terms involved (particularly between integration and assimilation), our first concern has to be with the definitions of the terms to be used, and with the value attached to the various forms of acculturation. Barbara Harrell-Bond offers a "very simple definition of integration" as:[72]

> a situation in which host and refugee communities are able to co-exist, sharing the same resources - both economic and social - with no greater mutual conflict than that which exists within the host community.

She immediately rejects this definition herself, saying it would not stand up to detailed analysis, since access to resources may be unequal, one group may be exploited by another and conflict within the host society may have increased due to the pressure of the greater numbers brought about by the refugees' presence. The important thing to note, however, is that integration happens not only to the refugee, but also to the host community. Amongst the mass of complex definitions of what integration, assimilation and other terms associated with the relationship between refugees (and migrants or minority groups generally) and host, or dominant groups, the clearest and most logical position is that of the social-psychologist John Berry. He defines acculturation, of both the individual and group, as "culture change that results from continuous, first hand contact between two distinct cultural

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[72] Harrell-Bond, Barbara E., Imposing Aid: emergency assistance to refugees, (Oxford: Oxford University Press, 1986) p.7.

groups."[73] This definition implies a situation of mutual cultural exchange between dominant and non-dominant groups, although as Berry notes, the major changes are in the minority (migrant) group, resulting from the influences of the majority (host) group. When in the situation of encountering a new societal environment, groups and individuals tend to adapt. Adaptation is defined by Berry as "the generic term used to refer to both the process of dealing with acculturation and the outcome of acculturation."[74] There are various strategies for dealing with adaptation described as adjustment (changes made by the incoming group or individual to increase the 'fit' with the new environment - the most common phenomenon); reaction (changes involving retaliation against the new environment - not often successfully engaged in) and withdrawal (changes to reduce the pressures of the environment, in a sense, removal from the adaptive arena. This is often not a real possibility).[75]

Berry uses the following model to give dichotomous answers to the questions of whether the cultural identity and customs of the minority group are viewed by individuals within that group as of value and something to be maintained, and whether the same individuals should seek relations with the larger society. There are a number of variables in the model, including the nature of the dominant group; the nature of acculturating group; the modes of acculturation (there are four in the model) and individual factors such as demographic, social and psychological characteristics; pre-migration experiences; prior cultural knowledge and encounters; age; gender; marital status and social supports.

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[73] Berry, J.W., 'Acculturation and Psychological Adaptation: a conceptual overview', in Berry, J.W. and R.C. Annis (eds.), Ethnic psychology: Research and practice with immigrants, refugees, native peoples, ethnic groups and sojourners: selected papers from a North American Regional Conference of the International Association for Cross-Cultural Psychology, (Swets and Zeitlinger: Amsterdam, 1988) p.41

[74] Ibid., p.43.

[75] Ibid., p.43.

FOUR MODES OF ACCULTURATION[76]

		Question 1 Is it considered to be of value to maintain cultural identity and characteristics? YES	NO
Question 2 Is it considered to be of value to maintain relationships with other groups?	YES	INTEGRATION	ASSIMILATION
	NO	SEPARATION	MARGINALISATION

Within this model assimilation is defined as:

> relinquishing one's cultural identity and moving into the larger society. It can take place by way of absorption of a non-dominant group into an established dominant group, or it can be by way of the merging of many groups to form a new society, as in the "melting pot" concept.[77]

Integration:

> implies some maintenance of the cultural integrity of the group (that is, some reaction as resistance to acculturative pressures) as well as the movement to become an integral part of a larger societal framework (that is some adjustment). Therefore, in the case of integration, the option taken is to retain cultural identity and move to join with the dominant society. In this situation, there are a number of distinguishable ethnic groups all cooperating within a larger social system.[78]

When there are no substantial relations the group controlling the situation (dominant or non-dominant) determines the option - and this results in either separation (a pattern imposed by the non-dominant group) or segregation (a pattern imposed by the dominant group).

Marginalisation meanwhile is difficult to define precisely, because it is

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[76] Ibid., p.45.

[77] Ibid., p.45.

[78] Ibid., p.45.

accompanied by a good deal of collective and individual confusion and stress.[79]

> It is characterised by striking out against the larger society and be feelings of alienation, loss of identity, and ... "acculturative stress".... Groups lose cultural and psychological contact with both their traditional culture and the larger society (either by exclusion or withdrawal).

The model can be employed at four distinct levels. These are the national policies of the dominant group or larger societies; for the acculturating groups use to articulate their wishes and goals; for individuals - in order to assess attitudes in non-dominant group and to assess individual attitudes in the dominant group - about how others should acculturate.

Berry points out that those whose involvement is involuntary such as refugees and native peoples find more difficulty in the acculturation process than voluntary migrants, and he suggests that "those only temporarily in contact and who are without permanent social supports (eg sojourners) may experience more problems than those more permanently settled and established (eg ethnic groups)."[80] He also suggests that there are many differences between the dominant groups, for example between pluralist and homogeneous societies. In addition he notes that individuals experience the stresses of acculturation in different ways.

In a critique of Berry's work, Kuhlman claims that this model is too limited, as, he suggests, interaction between groups and interaction within one's own group in attempts to maintain the minority culture, are not different things but closely related - particularly in the temporal sense of contact in the one group taking away time from contact with the other.[81] Kuhlman claims this sense of limited contact with two groups causes the model to lose its meaning.

I would suggest however, that Berry's model gives us the clearest sense possible of what integration means or should mean. If the refugee or member of the non-dominant group is in contact with both his or her own cultural group and others - both the dominant and other non-dominant groups in the same society - then those groups must also, on a reciprocal basis be in contact with the refugee group.

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[79] Ibid., p.45.

[80] Ibid., p.46.

[81] Kuhlman, Tom, 'The Economic integration of refugees in developing countries: a research model', Serie Research Memoranda, (Vrije Universiteit Amsterdam, Faculteit der Economische Wetenschappen en Econometrie, 1994) p.6.

Thus, the criterion of effect on all groups within the host society is met. The temporal limitation in contact in fact proves that integration is occurring as the groups mix, and come to an understanding with and of each other, while maintaining elements of their distinct identities.

Having established that integration involves the maintenance of the cultural identity of the refugee group while it simultaneously comes into contact with the host group, and mutual contact and understanding is established, it is important to mention the types of societies into which integration is more commonly possible. In developing countries, with fragile economies and often domestic ethnic tensions, which can be exacerbated when the immigrant group upsets an already delicate balance, integration is not likely to be promoted by the host government. Rather it is likely that the emphasis will be put on motivating and supporting the desire to return. In developed countries, particularly economically strong, pluralist societies, there is likely to be more chance of integration, through or in spite of the governments own policies. Kunz, describes how[82]

> overpopulated or demographically self-sufficient countries are less likely to accept large numbers of refugees. Because they are not particularly anxious to retain and assimilate new arrivals they are less likely to press the refugee to abandon a home oriented outlook and activities. Being more complete, more mature and self-assured, such societies are usually more tolerant and more willing to offer the refugee a sanctuary without forcing the adoption of their particular way of life. Great Britain, Switzerland, France, Belgium and Holland have traditionally shown such a tolerant attitude to political refugees.

Research by Steen into the situation of Tamil (*de facto*) refugees in the UK and Denmark has supported this view. It was found that the Tamils in the UK, where there is seemingly no policy of integration as such, were actually "more self-reliant, ambitious and determined" than those in Denmark, who were involved in Danish Government and Refugee Council operated training schemes and programmes, aimed at their greater integration.[83] Steen does not suggest that leaving refugees to help themselves is the best integration policy. Rather she submits that too much assistance, ignoring the needs and desires of the refugees in the aim of creating an idealistic integration policy for them, does not really work.

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[82] Kunz, op.cit., p.48.

[83] Steen, Ann Belinda, 'Refugee Resettlement: Denmark and Britain compared', RPN: Refugee Participation Network, 14 (January 1993) pp.8-11.

The integration, whether with an assimilationist or multi-culturalist bias, of new refugee groups renews the question of policies on minorities for the host societies. One way of tackling the causes of flight is to try to encourage a democratic handling of 'old' minority issues within states in such a way that minority and majority groups can co-exist peacefully, with full recognition of rights for all. Integration of refugees, particularly when it emphasises the multi-cultural co-existence of communities, creates 'new' minorities in host states, some of which are already struggling to cope with existing minority issues. Some states work through active programmes to integrate new minorities into the social structure of societies. Others adopt a more *laissez-faire* approach.[84] Active programmes may in fact result in the dissolution of the ethnic culture and identity of the immigrant group over generations. However, they also offer greater opportunities for wider policy harmonisation between the means of encouraging or facilitating integration and education and information for all in society aimed at minimising or avoiding racial tensions. Temporary protection policies in some European countries have included a phased approach to integration, aimed at regulating its progress to maintain the spirit of hope for return rather than a permanent stay.

3.2 Integration of migrants in Europe, and the link to temporary protection

In its 1994 Communication, the European Commission describes integration as allowing people to live 'normally'.[85] Such a situation can, it suggests, be achieved if the state provides resources, such as language courses; housing; education; vocational training and if the immigrants demonstrate a willingness to adapt without losing their own cultural identity, accepting the equal obligations that accompany the accordance of equal rights in their host state. In other words, the Commission seeks integration not assimilation. To achieve successful integration of

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[84] See Stanton Russell, Sharon and Charles B. Keely, 'Multilateral Diplomacy to Harmonise Asylum Policy Among Industrial Countries: 1984-1994, in Rogers, Rosemarie and Sharon Stanton Russell, (eds.), Toward a New Global Refugee Regime (Forthcoming, 1995) [Mimeo: cited with the permission of the authors]. The UK offers an almost unique example of the *laissez faire* approach, which as Stanton Russell and Keely point out, and as is reinforced in the case studies below, the rest of Europe is unlikely to follow.

[85] European Commission, Communication to the Council and the European Parliament on Immigration and Asylum Policies, [COM(94) 23 final], (Brussels, 23 February 1994).

current and future legal immigrants, including creating the right climate of acceptance in society for possible future mass influxes of refugees, the Commission highlights the need for the monitoring and development of integration policies, and for awareness of the political sensitivity of this area. It divides integration policies into four areas: the improvement of the situation for third country nationals legally resident in the European Union; the creation of the right economic and socio-cultural environment; the meeting of information needs and promotion of dialogue; combatting racism and xenophobia.

In order to improve the situation of legally resident third country nationals the Commission suggests that the prospect of security and permanent residence status are essential. Without this, uncertainty will, it says, permeate all other aspects of integration policies. In particular it highlights the need to reassess the status of family members whose status currently often remains dependent on the main immigrant, regardless of situations of death or divorce, and for generations who may in fact have been born and brought up after migration, but who have not become citizens of the state in question. Besides this, it puts forward the need for a reassessment of the question of free movement within the Union for resident third country nationals, which is currently permitted only between the Schengen states, including movement for the purposes of economic activity.

The creation of the right economic and socio-cultural environment for integration of migrants is, it is suggested by the Communication, made difficult for several reasons. For the migrants themselves, employment is often hampered by inequality of qualifications, the precarious position of industries traditionally employing immigrants, poor language abilities, and, generally disguised, discrimination in recruitment. In addition, housing and healthcare problems faced by nationals and immigrants alike hamper the creation of a more open environment, as does the lack of education and training - particularly for older immigrants.

Böhning also suggests a need to move towards regulations based on three key features in the attempt to integrate those who are already in Europe.[86] These features are non-discrimination, the maintenance of cultural identity and demarginalisation. He also suggests the need for permanent residence status for all.

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[86] Böhning, W.R., 'Integration and immigration pressures in western Europe', International Labour Review, Vol.130 No.4 (1991).

In associating these to the concept of temporary protection an obvious tension arises.[87] The conceptual difficulty the Commission and Member States face when addressing the need and desire of humanitarian categories of refugees for limited protection is mirrored in the suggestions for improving the conditions in EU Member States for third country nationals. The long standing notion in Europe is that after arrival migrants have a diminishing desire to leave, whatever the cause of their flight. Concurrently, it is held to be morally complex to support, encourage or facilitate return to a state from which a person has fled, and where standards of life may be more demanding than in the place where protection was sought and offered.[88] These suggestions for facilitated integration reflect the will to support human and minority rights and combat racism and xenophobia cherished as European values in the late twentieth century. It is difficult to say whether such will for smooth integration, including proposals for immediate reference to permanent residence, would in fact facilitate the position for protected persons or the wider community. The desire for integration in terms of an acceptance and understanding of all cultures concerned and an ability to co-exist harmoniously surely assists all concerned: the push towards permanency of a situation might actually produce greater tension for persons wishing to keep their will to return to the country of origin, and assist in its re-establishment after a period of conflict or tension might not in fact be as positive as it first appears.

That temporary protection policies, like all refugee policies, should involve non-discrimination and promote the maintenance of cultural identity and demarginalisation during and after the initial protection period is not disputed. However, the idea that there might be any more than a promise for eventual permanent residence if the situation in the state of origin does not alter to allow return within a specified period challenges the very notion of offering a period of short-term protection. If all those who receive any sort of protection were to be

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[87] Temporary protection measures should result in any of the longer term 'ideal' scenarios of return, resettlement and integration. The initial period of protection in a host state should, under temporary protection, be considered short term by both protected and protector. That the total period of stay must be temporary need not be considered essential. See Thorburn, Joanne, 'Transcending Boundaries: Temporary Protection and Burden-Sharing in Europe', International Journal of Refugee Law, Vol.7 No.3 (1995).

[88] See Chimini, B.S., 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation', International Journal of Refugee Law, Vol.5 No.3 (1993).

instantly offered a permanency of status, the chances of encouraging future generosity would soon dry up. In the zeal for reducing racism and xenophobia policy-makers should recall the merits of maintaining the potential for return within a certain period, rather than cutting off that chance forever.

However, even in a situation of temporary residence, the ability and right to work, receive education and training, and keep 'human dignity' alive through such measures is an essential feature of positive protection. That immigrant groups who might be within a society for only a limited period should be accepted and integrated is surely a positive aim for all sides.

In general terms, influxes of refugees are regularly seen in a negative way in the developed world as they so often stoke feelings or fears of racism and xenophobia.[89] This impression of racism towards migrant groups, even towards political and forced migrants, has lead to restrictive asylum and immigration policies. However, Spencer describes the British government policy of recent decades of "no integration without limitation" as in fact creating a public sentiment of racism rather than to responding to one.[90] She describes how immigrants are blamed for unwelcome social change and socio-economic problems, when the problem is, in fact, fuelled by discrimination and restrictiveness in immigration policies.[91] As well as the portrayal of economic migrants as the harbingers of socio-economic problems and social ills[92], refugees are, she says[93]

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[89] UNHCR in State of the World's Refugees, (1993) op.cit., notes the irony that while human intolerance is the major cause of most refugee flows, the protection of those refugees elsewhere is blamed for new racial prejudice and the rise of xenophobia. (p.58).

[90] Spencer, Sarah, 'The Implications of Immigration Policy for Race Relations', in Spencer, Sarah (ed.), Strangers and Citizens: a positive approach to migration and refugees (London: IPPR/ Rivers Oram Press, 1994) p.307.

[91] Ibid., p.310. In fact, Spencer says, it is "as a result of discrimination in the labour market, [that] skills and experience are lost to the British economy."

[92] See, 'Immigration: A Commitment to Australia: The Report of the Committee to Advise on Australia's Immigration Policies' [Fitzgerald report], (Canberra: Australian Government Publishers' Service 1988), cited by Ibid..

[93] Ibid., p.316. This distinction in portrayal can be picked up even from UNHCR's publicity in Western Europe. In 1992-93 their 'advertisements' involved pictures of famous refugees, such as Einstein, and noted that this distinguished 'American' scientist *was a refugee*. 1994-95 advertisements from UNHCR on CNN and in newspapers show scenes of 'Playmobil' dolls - asking who is the refugee - and pointing out that it is the one who has nothing in his hands. The public is asked to give him something to make him happy. In the light of the comments by Spencer, this could be seen as rather a regressive campaign from the standards of the Einstein one, or as a reflection of the need to pamper to the

> portrayed either as vulnerable dependents in need of our help (and resources) or as scroungers who defraud social security. We could instead be informed of the skills and experience which they bring, from which in the long term we shall benefit.

The key surely must be that if 'we' (and the refugees) are to benefit from the period of time during which we come into contact, whether it be long or short, in the long-term it would be to everyone's benefit for *integration* (but not assimilation) to take place. Even during a period of temporary protection some measure of integration (contact with the host group while the culture of the country of origin is maintained) must be beneficial. Its benefits would include the achievement of a positive environment during that particular time; the maintenance of good relations whether the group is forced into longer exile or returns; permitting, encouraging and enhancing prospects for return both through the maintenance of the home culture during exile and through the experience the refugees have of integration with groups whose life experience differs from their own - which may after all be the case after return too; and to permit an atmosphere in which future forced mass movements if they occur will be treated in a humanitarian spirit.

Conclusion

In this Chapter it has been demonstrated that while return to the country of origin, in safety and dignity, can perhaps be considered the 'best' solution to displacement crises it should not be considered to be the only result of a period of temporary protection, and it should not be pursued blindly without acknowledgement of the rights and continuing protection need of the groups and individuals concerned.

While the voluntary component of the refugees' return was seen to be a desirable element, and indeed often considered essential, it was suggested that in fact return might almost be seen as a duty, upon which a right to temporary protection could rest, once conditions of safety could be seen to prevail, and with the protection of international organisations such as UNHCR and IOM, as well as the assistance of NGOs, all supported by the host states. In considering the coercive elements of the encouragement and promotion of return, it was noted that these measures, while they should not become forceful, do in fact have a role to play in

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image the West has of refugees in order to get their compassion and donations.

keeping the desire to return alive, and thus encouraging the upholding of the right to return enshrined in the Universal Declaration of Human Rights.

The other desirable and durable solutions to a period of temporary protection, resettlement in a third country, and permanent settlement in the first country of asylum, it was suggested, should always be kept alive as viable if less desirable options. Integration is a particularly necessary component of the 'comprehensive approach' as some level of integration is necessary for the refugee and host groups to co-exist during the period of temporary protection, as well as beyond that if necessary either in the first host state or a third state, or indeed upon return to the country of origin. In all three of these situations the refugee faces potential problems, above all racism. The political difficulties associated with the three durable solutions are those which, at this end of the approach, need the most detailed, and delicate handling, particularly if a further displacement situation, and the protection difficulties that entails, are to be avoided. As UNHCR says:[94]

> [Refugees] do not invite racism. On the contrary, they are the principal victims.

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[94] UNHCR, State of the World's Refugees, (1993) op.cit., p.59.

CONCLUSION

Within the context of a thematic comprehensive approach to forced migration, temporary protection forms an axis around which other measures turn. If the causes of flight could not be managed to prevent exodus in the first instance it can offer a means of protecting *de facto* refugees while further negotiations or intervention to solve the violence and conflict take place, making return a realistic possibility for many. It could develop into a mechanism which encourages host governments to act swiftly and conscientiously to solve a crisis causing spreading instability, although it did not have this effect in the Yugoslav case.[1] In protection terms, short-term policies, well coordinated and including a spreading of the 'burden' could provide a practical and conceptual balance between protection in 'safe areas' and the seemingly longer term commitment of the granting of refugee status and accompanying asylum.

> The concept of temporary refuge, in the context of large-scale influx, thus stands paradoxically as both the link and the line between peremptory, normative aspects of *non-refoulement* and the continuing discretionary aspect of a State's right in the matter of asylum as a permanent or lasting solution.[2]

In order to demonstrate the mediating and intermediate nature of temporary protection and burden-sharing in the handling of displacements a useful model can be developed. If one imagines a spectrum, on the one hand taking a philosophical or conceptual line spanning the full recognition and upholding of all human rights and the full upholding of the sovereign right of states to control admission and membership it is possible to envisage temporary protection as mediating the opposing claims during an intermediate period. This position finds support in the work of John Vincent. In discussing humanitarian intervention he correlates the duty of states to intervene for humanitarian reasons with "the right on the part of

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1 UNHCR, The State of the World's Refugees: in search of solutions, (New York: Oxford University Press, 1995) p.90.

2 Goodwin-Gill, G.S., The Refugee in International Law, (Oxford: Clarendon Press, 1983) p.121.

individuals everywhere not to be treated outrageously."[3] In asking why the rules of international society should be modified to admit the right to life he argues that changes should be made because of the commitment to human life. The value of human life should not, he says, "be diluted by the mere boundaries which human beings happen to have constructed against each other."[4] The boundaries to membership set up by human beings thus need to be modified to allow for the temporary admittance and protection of human beings whose lives are at risk, allowing time for policy formation leading to longer term solutions.

Meanwhile, another spectrum spanning the practical measures taken to protect persons no longer protected by their state of nationality or habitual residence (that is our thematic 'comprehensive approach'), would see a line drawn between protection in 'safe areas' and integration in a state of asylum or resettlement. Temporary protection and burden-sharing would form the transitional links in this chain of responses. This would constitute a balanced approach, as in a situation where policies addressing root causes had failed, and policies of humanitarian intervention and 'safe area' creation had proved inoperable, temporary protection could first be assured in the region of origin, backed by financial burden-sharing and by the guarantee of resettlement for a further intervening period or more long term protection if such a step became necessary.

The concept and practice of temporary protection could satisfy the major requirements of all sides, offering protection but not full membership, permitting the individuals to seek and receive protection, without hastily or unacceptably transgressing the boundaries of state sovereignty.

To summarize, many of the displacement crises most easily envisaged in and around Europe in the post Cold War 1990s may be best dealt with by the granting of temporary protection, in line with the minimum protection guaranteed by nonrefoulement[5], and in keeping with the notion of burden-sharing. The

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[3] Vincent, R.J., Human Rights and International Relations, (Cambridge: Cambridge University Press, 1986), p.125.

[4] Ibid.

[5] The concept of *non-refoulement* has been expanded in customary international law to include the non-return of those who do not fall under the Convention's definitional criteria, but who nonetheless are acknowledged to be in need of international protection. See for example Goodwin-Gill, G.S., '*Nonrefoulement* and the new asylum seekers' in Martin, David A., (ed.), The New Asylum Seekers: Refugee Law in the 1980s - the Ninth Sokol Colloquium on International Law, (Dordrecht: Martinus

consequences of restrictive refugee and immigration policies and strict interpretation of the 1951 Convention definition of 'refugee', together with the erection of barriers to entry and the containment of forced migration in countries or regions of origin can be lethal for those up-rooted in places such as former Yugoslavia.[6] A mechanism of temporary protection, together with appropriate burden-sharing measures, is urgently required in Europe to complete and link the elements of a comprehensive approach and thus permit more success in handling future displacement crises than has been the case so far. The focus of temporary protection should not lie on the length of stay being short term, but on the period of this minimal form of protection being of limited duration. This period should offer safety to the displaced, and a time for reflection for them, the host states and other supporting states, international and non-governmental organisations leading to a search for satisfactory outcomes. The result could be the resolution of the causes of flight and safe return to, and re-integration in, the area from which people had been displaced. Alternatively it could be longer term protection and integration in the host state or a state of resettlement. Even after the end of the temporary protection period, however, eventual safe return should be a goal and a hope which is kept alive.

Nijhoff, 1988).

[6] See for example Loescher,G., Beyond Charity: International Cooperation and the Global Refugee Crisis, (New York: Oxford University Press, 1994); Shacknove, A., 'From Asylum to Containment', International Journal of Refugee Law, Vol.5 No.4 (1993).

PART THREE

CASE STUDIES:

Temporary Protection

in Four

European States

INTRODUCTION

From the whole of Yugoslavia by summer 1995 estimates on the number of the pre-war population of 23 million people who had emigrated during the four years of conflict ranged from 3.5 to 5 million.[1] In July 1992 it was already estimated that 2.3 million people had been displaced. The war in the former Yugoslav Republic of Bosnia Herzegovina had, up to summer 1995, caused the displacement of approximately 2.3 million people, of whom 1.3 million were still within Bosnia Herzegovina, many in the besieged enclaves or 'safe areas'. 500,000 displaced people were in Serbia and Croatia, and the remaining 500,000 were in other, mainly European, states.[2] Those who reached areas beyond the states of former Yugoslavia were assisted in arriving there by UNHCR organised quotas and evacuations, through spontaneous arrival, resettlement, or because they already resided in those other states, for employment or study purposes, prior to the break up of former Yugoslavia and wars in Croatia and Bosnia Herzegovina.[3]

What follows is a study of the reception and protection of those persons who arrived at the four selected states during the period of 1991 to 1995, that is from the time the conflict and displacements started until the point at which field research for this thesis was carried out in summer 1995. The end point of this research coincides with a period of displacements through 'ethnic cleansing' on a scale which had not been seen since the first year of the crisis, and renewed calls for protection places in

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1 'Nations on the move', The Economist, Vol.336 No.7928 (19-25 August 1995).

2 Ibid.. Statistics taken from the ICMPD 'Newsletter on Bosnia and Herzegovina', Issue No.1, December 1994 also suggested 2.3 million displacements within and from Bosnia at that time. In July 1995, 120,000 of those who had already been displaced once were left to their own resources , and to the mercy of Bosnian Serb 'ethnic cleansing through mass murder or further displacement in the fallen 'safe areas' of Srebrenica and Zepa. ['Victims of Bosnian Realpolitik', The Economist, Vol.336 No.7924 (22-28 July 1995) p.37.] 150,000 Serbs were also forcibly displaced from the Krajina by Croat forces. ['Croatia's Blitzkrieg', The Economist, Vol.336 No.7927 (12-18 August 1995) p.31.] UNHCR made a request in the first week of August 1995 for 5,000 new places for temporary protection outside Bosnia Herzegovina for those fleeing the fallen 'safe areas' and an eventual potential capacity of 50,000 for those fleeing the Krajina region. ['Britain asked to let in more Bosnians', The Guardian, (31 July 1995) p.7.]

3 As of 24 July 1992, Germany had accepted 200,000; Hungary 60,000; Austria 50,000; Sweden 44,000; Switzerland 12,200; Italy 7,000 and the UK 1,100. Helsinki Watch, War Crimes in Bosnia-Herzegovina, (Washington: Human Rights Watch 1992) p.141.

western Europe from UNHCR.

The four states to be looked at in this study are the Netherlands, Austria, Slovenia and the United Kingdom. These states have been selected as essentially representative of the European handling of the crisis. However, one of the points to be made is that on the question of temporary protection there is no fixed pattern of development of either policies or legislation. The cultural and societal variations between European states have made their mark on this flexible approach, in particular on the strategies for the integration of the temporarily protected.

The selection of these states as subjects of this case study was made on the following lines. Three of them are Member States of the European Union, and as such involved in all the processes of harmonisation. Arising at a time when Member States were beginning their process of harmonisation of asylum policies, one might imagine that there was broad scope for the development of a coordinated, EU policy on temporary protection as a new element of those policies. However, in reality, each state came up with its own range of mechanisms and provisions on every detail of short term protection. As a consequence, this plethora of schemes may ultimately result in a policy area with major harmonisation problems in the future. One of the selected states, Austria, is however a very recent Member, having acceded only in January 1995, and therefore its handling of this crisis took place in an atmosphere of prospective membership of the Union, with all the apparent restrictiveness that Union's Members had been developing. Slovenia meanwhile, as will be seen in Chapter Seven, is developing its policy lines with membership of the European community (and potentially the EU itself by 2020) very much in mind.

While none of the selected states border on Bosnia Herzegovina, Slovenia as a fellow former Yugoslav republic is very much in the frontline, both of the displacement crisis and as a gateway to the EU, and Austria is the first EU port of call for many migrants, not only from Bosnia Herzegovina, but also from other Central and East European States. The states closest to the crisis have, perhaps logically, borne the greatest weight of the displacements, particularly as the general assistance of earlier crises, such as Hungary in 1956[4] has not been in evidence, and as policies of containment: keeping people close to their place of origin to facilitate

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[4] See Chapters 8 and 9 below.

return have become more popular. Ulrike Davy points out that figures given by newspapers towards the start of the crisis (in July 1992) demonstrated that in general, the closer a state was to the crisis, the higher the number of 'refugees' arrived at its borders.[5] She puts this down to visa restrictions imposed by more distant states. Her point is interesting, however the reasons for this distribution may go further than she suggests. For example, Germany and Sweden can be distinguished as being higher up the list than would be expected if only proximity was to be taken into account. Other factors must surely have played a role. These could include their relatively liberal policies and in Germany's case the large number of guest workers whose situation and reason for being in Germany changed with the degeneration of the situation in their country of origin into conflict. In addition, there was the policy of keeping people as close to their place of origin as possible to facilitate return, a policy practised by all European states, and emphasised by UNHCR. It is noticeable that the new states, which had been part of Yugoslavia, and in most cases were still to some degree involved in the conflict or in supporting one or other party within Bosnia, with their own interests in view, had become home to significant numbers of displaced persons, including their own internally displaced. It is however, in the context of burden-sharing, interesting also to note that the distribution of the displaced payed no regard to the size of the host state or its ability in economic and social terms to cope with such large influxes or movements. According to the New York Times, Croatia admitted 630,000 persons due to the fighting in the former Yugoslavia (although it is not clear how many of these were internally displaced); Bosnia-Herzegovina had 593,000; Serbia 375,000; Germany 200,000; **Slovenia 66,000**; Hungary 60,000; **Austria 50,000**; Sweden 44,000; Macedonia 31,000; Switzerland 12,000; Italy 7,000; **the Netherlands 3,400**; Norway 2,000; **the United Kingdom 1,300.**[6]

Slovenia has the additional attraction of offering a case where absolutely no

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[5] Davy, Ulrike, 'Refugees from Bosnia and Herzegovina: are they genuine? A closer look at the asylum practice in Austria and Germany', Suffolk Transnational Law Review, Vol.18 No.1 (Winter 1995) p.131.

[6] 'Yugoslav refugee crisis Europe's worst since 40s', The New York Times, 24 July 1992, p.1. The Independent of 27 July 1992 puts Switzerland's figure at 40,000 and Italy's at 2,000. 'Britain attacked for ignoring Bosnian refugees' p.1. As ever statistics are rarely precise or fully comprehensive in migration matters, but these figures perhaps allow for some comparative judgement of relative proportions.

asylum or aliens legislation was in place before this crisis, so every development, while coloured by historic ties and future hopes, is a clearly new step, untinged by past migration patterns.

Finally, the Netherlands and the United Kingdom offer examples from opposing ends of the EU spectrum on asylum and migration. The Netherlands is a traditionally liberal, humanitarian state where asylum matters are concerned, while the United Kingdom has a reputation for restrictiveness, especially in connection to sending-countries with which it has no cultural or historic links.

Part Three of this thesis is divided into four chapters, each dealing with one state. Each chapter will begin with a summary of the position on temporary protection in summer 1995. The position as it developed during the early days of the crisis will then be described, followed by an analysis of the new policy and legal developments. The reception and integration arrangements and enacting of policies in each state will then be discussed, including the matters of cost, humanitarianism, social acceptance and overall restrictions. The limited notions of eventual return will be discussed and then each chapter will turn to European coordination and burden-sharing from the point of view of each state in the light of its own domestic actions and legislation. Chapters 8 and 9 on Austria and the UK also include a historical perspective through a brief study of previous cases of practical short-term protection and burden-sharing. Although the structure of the four chapters is roughly uniform, they are in no way intended to form the type of formal survey offered in documents such as the periodic UNHCR Surveys on Temporary Protection, precisely because such readable surveys already exist.

The four chapters are based on interviews carried out with officials of the ministries concerned with these policies, with UNHCR staff, with representatives of the relevant non-governmental organisations and academic institutes, and with people working in reception and centralised accommodation facilities. In the case of Slovenia, there is also a first hand account of collective centres visited during the course of this research.[7] The accounts given here are the result of my own perceptions from what they told me, and what I saw in each country, as well as references to official documents from each state's government, from UNHCR, and

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[7] None of the people interviewed will be quoted directly, although a list of their names and positions is to be found in the first section of the Bibliography.

the limited number of relevant academic reports which have appeared on this subject to date.

Two major themes will form the core of all four chapters. Firstly, there is the *ad hoc* nature of policies on temporary protection and secondly, the cultural and societal basis of those developments which have occurred. On the first point, it will be seen that if laws have been created, as is the case in three of the four states considered here, then their creation has been for the purposes of regularising the situation of the displaced persons, for their own and the host populations' sakes, and of creating rules around which the *ad hoc* policies which may be needed in future crises can be based. That is to say that flexible policies have been concretised into relatively fixed laws, in order to give a solid basis for future political flexibility.[8] As Kratochwil points out:[9]

> While policy, even if cast in rule form, is designed to guide inferences towards a goal, leaving the relevant decision-maker with a great deal of discretion as to the time, place and mode of implementation, legal rules "provide relative firm guidance not only with respect to ends but also to the means to be adopted" to the contexts or settings of application, and to admissible and inadmissible exceptions.

I would take this one further step to say that the relatively firm guidance offered by legislation can offer a firm foundation for future policy flexibility, not straying too far from the established rules but allowing adaptation. The lack of that firm legislative basis may lead to disarray and confusion over what are admissible and inadmissible exceptions to the rule form-cast policy.

Three of the four states, Austria, The Netherlands and the United Kingdom gave full Convention refugee status to some arrivals from Bosnia Herzegovina,

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[8] Fisk, Robert, 'Zagreb ensures Serbs will never see their homes again', The Independent, (7 September 1995) p.10 reports that the Zagreb authorities are said to be drawing up a new "temporary management of abandoned property law", because it wants to control the property of Serbs who fled the Krajina region. An example of policy becoming law. Poole, Teresa, 'So many women, so little time', The Independent Section Two, (7 September 1995) p.2 cites a participant of the UN women's conference in Beijing saying, "Although many countries have passed good legislation, there is still an extremely big gap between what the legislation says and reality." This is a demonstration of how laws do not really affect the social reality.

[9] Kratochwil, Friedrich V., Rules, norms and decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs, (Cambridge: Cambridge University Press, 1989) pp.206-7. [The citation used by Kratochwil is from Gottlieb, G., 'The nature of International Law: Towards a second concept of law' in Black, Cyril and Richard Falk, (eds.), The future of the International Legal Order, Vol.4 (Princeton: Princeton University Press, 1972) p.332].

particularly the earlier arrivals whose coming preceded the creation of new legislation. This seemingly arbitrary granting of Convention status with all its attendant rights has led to calls of unfairness of treatment from some quarters, and is a question which will be treated in the chapters to come. In general, however, in these states and others, Convention status has not been granted to persons fleeing Bosnia Herzegovina.[10] It is precisely as a means of offering a formalised and legitimised status that these *ad hoc* policies, and eventual legislation, have been created.

On the second point, the conclusion will be that however much Europe may be 'European', the situation of each state vis à vis migration remains, however slightly, different. These differences are based, for example, on structural variations on the level of the state decision-making apparatus and of civil society, and on divergent humanitarian traditions, and attitudes towards both immigration and emigration. It is not the intention to start analyzing cultural and societal variations between states, but rather to suggest that such variations lay at the root of differences in refugee integration and settlement policies. It is the differences in these policies which will be set out in the four chapters.

The Conclusion to Part Three of the thesis will involve a discussion of the scenario of the asylum-shopper. The possibility of a refugee selecting the state which might offer him or her the type of protection and lifestyle which would suit him or her best will be investigated. The conclusion includes this notion for a variety of reasons. One is to demonstrate the ridiculous nature of the idea that a person genuinely in need of protection to save his or her life would spend time, before flight, investigating the options and shopping around for the best deal. The second is to show that the major reason there is an idea that they could do this is the vast difference between policies of European states. A third reason is to show that a European level fixing of the nature of entitlements and opportunities of lifestyle in the host state could be detrimental not only to the society of the host state but also to the refugee.

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[10] In her work on the genuineness of asylum claimants in Austria and Germany, Ulrike Davy has found that usually one of four reasons is given for denial - that the reason for flight was that of the general state of war in Bosnia Herzegovina (ie that there was no individual targeting), that expulsions or *ethnic cleansing* was not directly attributable to the state, that any harm inflicted was not for one of the reasons delineated in Article 1a of the Convention or because the punishment prompting flight was delivered for legitimate reasons such as draft dodging. See, Davy, Ulrike, op.cit..

Migration towards the EU caused by the break up of former Yugoslavia seems to demonstrate that the political and economic situations and positions of receiving states are not yet sufficiently convergent for an entirely uniform mechanism of temporary protection to be suitable.[11] Rather, the conclusion of this case study will be that the Bosnian displacement crisis has shown the urgent need for policy formulation on a European level with regard to minimum standards and guarantees of the protection of civilian lives. The formulation of a flexible European policy on temporary protection should include the capacity for, on the agreement of the ministers responsible for immigration, a regional acknowledgement that a case requires short term protection away from the state in which conflict is taking place. It should also determine how the capability to cope with that protection on the financial and human-capacity levels should be distributed. However, regional regulations (or even guidelines) on standards of entitlements and the extent of integration of the temporarily protected into society, could not, it is suggested, be reasonably worked out. Indeed trying to focus on the details of the entitlements of the protected rather than on the protection of their lives might be the stumbling block over which a regional temporary protection policy could fall.

[11] Geddes makes a link between the economic logic of interdependence which encouraged the creation of a single market and the pressure to restrict immigration into the EU once that single market with free movement of EU citizens was established. See Geddes, Andrew, 'Immigrant and Ethnic Minorities and the EU's 'Democratic Deficit', Journal of Common Market Studies Vol.33 No.2 (June 1995) p.200.

Chapter 7

TEMPORARY REFUGE IN SLOVENIA

1. The situation in Summer 1995

The first reading of a draft law on temporary protection in Slovenia was passed in early March 1995. The second reading, as of August 1995 in a revised draft form according to the Parliament's initial conclusions, was expected to pass within a few weeks. The Slovene government's intention is twofold: they wish to legalise the existing situation of people from Bosnia Herzegovina who have been in Slovenia during the period since the start of the conflict in 1992 with legislation that could, in future, be used to protect other groups as designated by a governmental decree.

According to May 1995 data from the Office for Immigration and Refugees of the Government of the Republic of Slovenia, 21,500 'refugees' from the Republic of Bosnia Herzegovina had found temporary shelter in Slovenia (which has a population of 2.2 million), but it is a number which changes daily, through third country resettlements, the arrival of family members, and even return.[1] As many as 170,000 people from Bosnia Herzegovina have sought protection in Slovenia at some point between 1992 and 1995. Slovenia is one of the very few states to point out the ethnic composition of the people it is protecting from the conflicts in Bosnia Herzegovina in its reports - perhaps because, after its own recent independence struggle, it is still anxious to distinguish itself and its people from others who existed together in what was Yugoslavia.[2] Throughout the existence of Yugoslavia,

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[1] 'A Cry to the World', Office for Immigration and Refugees of the Government of the Republic of Slovenia (June 1995). The figure for 31 December 1994 was 23,000 according to 'Persons under Temporary Protection in the Republic of Slovenia', Office for Immigration and Refugees; the Government of the Republic of Slovenia, (undated mimeo).

[2] In other available documentation, only Austria (as well as Slovenia) has statistics on ethnic make up of displaced people from Bosnia Herzegovina, although this is not in Austrian government papers, but in a report from ICMPD, 'Background Data on Refugees from Bosnia and Herzegovina in the C.E.I. States', March 1995. 77% of the people from Bosnia Herzegovina in Slovenia are Bosnian Muslims, 17% are Bosnian Croats, 2% are Bosnian Serbs, and 4% are classified as 'other'. In Austria the figures are 62%, 13%, 16% and 9% respectively.

Slovenia had tried to maintain a distinct identity, retaining its culture, language, literature and its economic strength.[3]

All people from Bosnia Herzegovina in Slovenia as of July 1995 were on the temporary protection scheme. No applicants had yet ever been recognised as refugees in Slovenia, from any country or for any reason, although in July 1995 there were seventy or so cases in the Convention procedure. Many applicants of various nationalities apparently leave the country before a decision is taken. From late 1992, only humanitarian and family reunification cases have been legally permitted to enter Slovenia from Bosnia Herzegovina, although inevitably many 'illegal entries' have been made.[4] These entries to Slovenia must be dealt with, as people cannot be returned to an acknowledged war zone, however, many people from Bosnia Herzegovina are probably not registered with either the government or the Red Cross. The statistics may well alter dramatically once registration procedures in line with the new legislation get under way. UNHCR's activities in Slovenia have largely been within its self-defined role as bridges builder between refugees and the newly independent state, although in January 1995 it already considered standards there as corresponding to the rest of Europe.[5]

2. Before Summer 1995

Prior to its declaration of independence in February 1992, Slovenia, as part of former Yugoslavia, had no legislation of its own on asylum and immigration or indeed other matters. Its legislators' and practitioners' experience of and familiarity with the Yugoslav asylum system was minimal, not least because Yugoslavia, in spite of its presence in the conference of plenipotentiaries negotiating the 1951 Convention Relating to the Status of Refugees and its proximity to crises such as that of Hungary in 1956, was not an immigration or protection country, but rather a state

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[3] See, Glenny, Misha, The fall of Yugoslavia: the third Balkan war, (London: Penguin, 1992) p.86; Cviic, Christopher, Remaking the Balkans, (London: Pinter/RIIA, 1991) pp.69-71.

[4] It is estimated that over a thousand people from Bosnia Herzegovina entered Slovenia in 1994.

[5] 'Interview: Cengiz Aktar is the new chief of the UN Mission in Ljubljana', Daily News, 4 January 1995, p.4 (Unofficial translation).

of transit.[6] Slovenia's entire experience of refugee and asylum policies and legislation therefore consists of its practical management of the displacement crisis thrust upon it in the earliest days of independence, as the wars in Croatia and Bosnia Herzegovina escalated and endured far longer than Slovenia's own ten day conflict with the JNA.[7]

The Office for Immigration and Refugees (OIR), an independent professional service of the Government of the Republic of Slovenia, established by governmental decree started operations on 1 July 1992, by which time 70,000 people were registered as 'protection seekers' in Slovenia.[8] Its tasks, according to the decree, include the monitoring of problems concerning immigration and refugees; preparation of proposals and initiatives for solving such problems, including visa policies; organizing collective centres and other types of accommodation for 'temporary refugees'[9]; supervision of health screening procedures for 'temporary refugees', asylum seekers, political refugees and other immigrants; organizing the repatriation of 'temporary refugees' and the resettlement of political refugees; preparing proposals for the treatment of immigrants and refugees and proposals

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[6] During the Hungarian crisis of 1956, Yugoslavia played a somewhat dubious and shady role. On 5 December, 1956, it was reported in The Times under the headline 'Return to Hungary of Refugees' that the Yugoslav government was returning refugees to Hungary, having never given them any status, and without disclosing the numbers involved. The following day, the same newspaper, under the heading 'Refugees who wish to return' reported that the Yugoslavs had said they would act in accordance with international rules on the right of asylum, and with the wishes of the refugees. The numbers involved were still unknown, but small groups of Hungarians were arriving at western embassies in Belgrade to request visas. On 7 December the UK Foreign Office expressed concern that Yugoslavia had forcibly returned still undisclosed numbers of Hungarians, in organised hand overs on two separate occasions, and at two separate crossing points, during the previous week. On 8 December The Times ('Yugoslavs begin repatriation of refugees') reported that 141 adults plus some children had been repatriated from Yugoslavia in two handovers, while 300 had chosen to go on to other countries. It commented that it was very difficult to understand the secretive attitude of the Yugoslavs compared with the openness of other states.

[7] JNA - the Yugoslav National Army. See Cohen, Lenard J., Broken Bonds: The Disintegration of Yugoslavia, (Boulder: Westview, 1993) for an account of Slovenia's movement towards independence, declared on June 26 1991, and the build up to, and early months of, the break up of Yugoslavia, as well as notions of Yugoslavism. See also Glenny, op.cit..

[8] Statistic found in Helsinki Watch, War Crimes in Bosnia-Hercegovina, (Washington: Human Rights Watch 1992) p.140.

[9] The Government of the Republic of Slovenia used the term 'temporary refugees' to describe those people from Croatia and Bosnia Herzegovina who were seeking and receiving temporary shelter in Slovenia from the start of the crisis until mid 1994. The terminology was then altered to talk of 'people receiving temporary refuge', largely because the term 'temporary refugee' raised so many eyebrows in international circles. As seen above, Convention refugees are, due to the very nature of the Convention, meant to be in a temporary situation, until such a point as cessation can take effect, but to actually add the adjective 'temporary' to the legal term 'refugee' raises too many status related questions.

concerning the standards of services in homes for refugees and collective centres; setting up an information service for asylum seekers, 'temporary refugees' and political refugees in Slovenia; issuing publications and other information material; organizing the training of professionals working with refugees and asylum seekers; and performing professional tasks connected with examining complaints of those who were denied refugee status. In particular the Office took over the accommodation of and assistance to 'temporary refugees' from Croatia and Bosnia Herzegovina from the coordination group of the Republican headquarters for civil protection within two months after this decree came into force. It cooperates directly with UNHCR, and with other international, state and non-governmental organisations.

This Office is one of the few government departments in Europe to openly point to the distinction between Convention refugees and those coming from a conflict situation such as that in Bosnia Herzegovina as a 'legal void'.[10] In attempting to fill this void, it prepared the draft law on temporary asylum which in 1995 at last began its journey through Parliament, to regularise the situation of those Slovenia accepted even without a legal framework. The law had been in drafting since 1993, and the exact cause of the slowness in procedure is unknown.[11]

People who receive the *ad hoc* temporary protection get healthcare, live in collective centres (of which there are twenty six) or with 'host' families - although those housed in the latter way are being pushed by their relatives to enter centres as finances are low. Care and maintenance of temporary refuge seekers from the beginning was shared between governmental bodies and the Red Cross of Slovenia and other non-governmental organisations (Caritas, the Slovene Foundation, Most and others).[12] Accommodation in collective centres is organised by OIR, and

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[10] 'A Cry to the World', op.cit..

[11] Cohen describes the problems Slovenia had in its transition from an authoritarian one party system to democracy. Politicians were not used to being in political parties, or to allegiance to their party's policies. Also, people were habituated to examining the personality of the policy maker rather than analyzing policies. This caused "a pattern of chaotic decisionmaking and endless parliamentary disputes." Cohen, op.cit., pp.275-6.

[12] Of the Slovene NGOs only the Slovene Foundation proved both willing and organised to discuss this subject during field work. Other NGOs which were contacted expressed interest and willingness to talk, but on arrival turned out to have abruptly moved offices, or all staff were away - usually on overseas visits to conferences etc. OIR staff say this is unsurprising as there are repeated difficulties in communication and cooperation with the NGOs.

before them was dealt with by the civil defence authorities, while NGOs provide assistance to those in private accommodation, and give psycho-social support to those in need. All expenses have been covered by the government and donations from International Organisations, other governments and private donors up to summer 1995. The monthly cost for a temporary refuge seeker in collective centres was calculated in the draft law to be SIT 11,000 (£65)[13], and for health care an additional SIT 2,600 (£15) per month. People can try to get Convention or immigrant status, although there has been a political decision not to grant Convention status. If a legal status is achieved, then naturalisation is possible after ten years, or one year after marriage with a Slovenian citizen.

3. The origins of the temporary refuge legislation, initiation and influences

With the draft law on temporary protection, it is explicitly stated that there is a need, after three years, to legalise the existing unregularised situation of acquired temporary refuge and the rights and obligation arising therefrom, while providing legal foundations for future conduct. The aim of the legislation is to establish how temporary refuge can be granted and removed, the rights and obligations of temporary refuge holders and the role of governmental bodies dealing with this issue. UNHCR has been fully involved in the drafting of the new law, and has had some influence on it through its cooperation with the drafters and NGOs, as well as its attendance at parliamentary drafting sessions.

To summarise the draft law:

In cases where the government acknowledges, with information based on reports from various sources, that another state is at war or in similar circumstances, where there is occupation or massive human rights violations, then Slovenia will offer temporary refuge to people fleeing that state, setting a quota if domestic financial constraints so demand. Family reunification and strong humanitarian cases will be permitted to exceed the quota if one is established. In Article 27, persons from Bosnia Herzegovina are specifically mentioned as people who can benefit from

[13] Exchange rate at July 1995.

these provisions, although they must register within a thirty day period after the law becomes effective.

Temporary refuge can be granted to people who resided in a country when the situation giving rise to the accordance of temporary refuge began and, due to those circumstances, came directly to Slovenia, those who were already in Slovenia and were prevented from returning, and to families (spouses and minor children) of those referred to already. It is open to citizens of the state in question and to stateless people who were resident in that state.[14] People cannot receive temporary refuge if they are guilty of crimes against humanity and international law, guilty of criminal acts punishable by three years or more imprisonment in Slovenia, already have refugee or residence status in Slovenia, or rejected, through their own will, temporary refuge already granted in Slovenia. Cessation will occur when circumstances are judged by the Slovenian government to have changed, when resettlement occurs, after voluntary return or if Slovenia accords another legal status.

In the first draft it was stated that if people did not seek the status or went beyond the quota limit, or if they revoked their status or resided illegally in Slovenia then restrictions could be imposed on their movement, although care and maintenance would be guaranteed. Those limitations to movement will be reviewed in the second draft, and certainly will not include imprisonment. The notion was described to me as one of quarantine to protect Slovenian security where such protection was considered necessary. People not complying with orders restricting movement may be fined a minimum of SIT 2,000 (£11-50).

Temporary refuge does not count towards residence for naturalisation purposes, and asylum applications will not be heard while a person is benefiting from temporary refuge status. Applications for temporary refuge for future arrivals must be made on entry, using an official form. Authorised officials will search the applicant and belongings. Then the temporary refuge seeker is to be transported to a collective centre, for further data collection and identity checks. OIR administers the application procedure, and an internal organisation of the Interior Ministry takes the decision on the application. The procedure may be shortened if sufficient

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[14] Slovenia is particularly sensitive to the issue of statelessness in the former Yugoslavia, where so many people find themselves in that situation.

information is gathered. Once granted temporary refuge, a person is issued with a special card. Denial of temporary refuge may be appealed. Appeals are heard by the Ministry of Interior. The period of temporary refuge is specified in the original decision, but is not set in the legislation. Changes of residence must be notified to the Ministry of Interior - failure to do so three times can result in a revocation of the status, and a minimum fine of SIT 1,000 (£5-75).

People with temporary refuge have the right to residence, care and maintenance in the Republic of Slovenia for the specified period, to health care, education and work under certain conditions, as well as to receive humanitarian assistance. People can reside in collective centres, and, if they have an income, must contribute to them according to their capabilities, to an amount determined by the government. Primary education is assured, secondary and post-secondary depends on resources, although UNHCR is encouraging access to secondary education for older children.

The most important right outlined in the new law, according to OIR, UNHCR and NGOs is the right to work. This is seen as important for independence and dignity, and to balance the situation, as constantly receiving is seen as damaging to self-respect. Many have worked on the black market, but with the new legislation there will be a legitimate right to employment for temporarily protected people in Slovenia. OIR is to mediate with Employment Offices to find work for temporary refuge holders. After referral, the person in question is to contact the prospective employer, and a copy of the contract is to be sent to OIR. If the regulations are not adhered to, the employer may be fined at least SIT 160,000 (£915), and the responsible officer would get a personal fine of at least SIT 16,000 (£91-50), as would the individual employer. For temporary or casual work, no work permit is required. UNHCR is offering to assist OIR in pinpointing areas in which this new labour force can be effectively used, including via joint ventures, to the benefit of the Slovene economy as well as of the individuals in question, and in introducing self-employment. Repatriation, if it can take place, will be organised by OIR.

The explanatory notes to the draft law strongly indicate that Slovenia is establishing this category in order to imitate regulations in other states, and that temporary refuge is specifically for mass influx situations - the acknowledgement being that "a refugee <u>individually</u> flees to a recipient country on the grounds of

persecution....". The quota system is indicated to be part of Slovenia's concept of burden-sharing and international solidarity, and if they decide they cannot cope with the numbers arriving, they will turn to other states. That only people coming directly to Slovenia can get this status is emphatically laid down (perhaps as a result of so many returns from EU states enacting safe third country legislation).

Once the law has been passed, the new legalised status will be publicised via the mass media and OIR will issue a brochure for those concerned. Information concerning the procedure, status and rights will also be passed on to people from Bosnia Herzegovina currently in Slovenia via the collective centres and NGOs.

4. Centres and Integration[15]

Having just won its own independence in 1991, after a ten day battle with troops of the JNA loyal to Serbia and the ideal of Yugoslavism, Slovenia found itself with empty, and partially destroyed, army barracks, as well as former factory housing blocks from the socialist era, which were relatively obvious and easily adaptable centres for the massive influxes from Croatia and later Bosnia Herzegovina from 1991 onwards. In July 1995 there were twenty four collective centres, all said to be in accordance with international standards. One third of the refugees (about 8,000 people) were in collective centres in July 1995, the other two thirds being with host families - usually relatives of Bosnian origin who had been naturalised as Slovenians since independence.

People staying with families receive aid from UNHCR and the Red Cross. Donations of clothing are received from NGOs, although the Slovenian authorities are very careful over the donation of medical supplies, as they had bad experiences with overrun expiry dates on early supplies. There are strict controls on imports - and the vast majority of medical donations must be made via pharmaceutical purchases in Slovenia. Collective centres offer care and maintenance in terms of food, housing, clothing, psycho-social aid and medical care. People are encouraged to organise their own lives in the centres, independently looking after order and cleanliness, and sometimes cooking too.

Former centres, once they are no longer needed for this purpose are, and will

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[15] See Appendix 2 for two first-hand accounts of Slovenian Collective Centres.

be, used for other purposes[16], or used for future influxes of asylum seekers and refugees.

Basic medical care in Slovenia appears to be quite high, a remnant from the socialist days, during which period there was a health service for everyone, with both basic and specialist healthcare. Refugees get basic health care: in Ljubljana, a refugee health service is operated in one of the three collective centres, run by two doctors, and those staying in private homes in the capital also use this facility. Elsewhere in Slovenia there is access to local services, although these are not so closely geared to the particular needs of refugees. Health care needs have, however, after 3 years become more normalised, without so many special problems and injuries specific to the conflict.

Slovenia is particularly active on the level of psycho-social assistance for people from Bosnia Herzegovina. The Slovene Foundation, funded on a project by project basis by, amongst others, UNHCR, UNICEF, WHO and the Soros Foundation, works in cooperation with the Education Ministry, the Red Cross and UNHCR. It has mental and social health teams made up of doctors, psychologists and teachers from Slovenia, Bosnia Herzegovina and other states, who visit collective centres and meet people, especially children and their mothers, for individual and collective counselling. The belief of the foundation is that a population oriented approach is most productive, so they work on motivating the refugees who they perceive to have low energy and a low capacity for coping, although the aggression rates are lower than the foundation staff had expected to encounter. The teams concentrate particularly on psycho-social difficulties of traumatised children - generally normal reactions to the abnormal situations they have encountered, having previously been psychologically secure, but lost their whole environment of security.[17]

Integration in Slovenia is aimed at as a natural process rather than through a detailed programme. On the one hand, the common Yugoslav history and similar languages could facilitate this process. On the other hand, the long held Slovenian view of themselves as the rich intellectuals of Yugoslavia and the Bosnians as the

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[16] One in Ljubljana was, in August 1995, being converted into a boarding school, for example.

[17] The Slovene Foundation, 'Psycho Social Help to Refugee Children', (undated mimeo, received July 1995).

poor rural kin might not be easily overcome, and my own anecdotal experience was that this undercurrent was strongly present, even amongst officials dealing with the centres and procedures. It is also demonstrated in the adherence to ethnical breakdowns of statistics referred to above. In addition, there is a perception that the people from Bosnia Herzegovina in Slovenia are the most deprived category of those who managed to escape - the richer and more intelligent having been able to resettle further afield.

In the end, participation might be the key. For the last three years, children from Bosnia Herzegovina were taught in 'Bosnian schools', either in centres, or using Slovene schools out of Slovene teaching hours. From September 1995 all children will go to Slovenian schools together, and older children from Bosnia Herzegovina will have the right to secondary education, without charge, whereas other foreigners must pay. They may also go to university - either without fees if locally possible, or on scholarships from foundations such as the Soros Foundation.[18] In the usual way of swings and roundabouts, there are people who will lose out from this newer type of participation. Many qualified teachers from Bosnia Herzegovina had been working in the 'Bosnian schools', and they will now suffer a second blow by losing their profession, although NGOs are pleading for some of these teachers at least to be given a role in maintaining Bosnian language and culture lessons for children from Bosnia Herzegovina.

There are also vocational training programmes operated notably by foreign NGOs. For example, in September 1995, Nuova Frontiera (an Italian NGO)[19] planned to start its fourth project in Slovenia. Its first project was concerned with buying food and renovating collective centres. The second and third projects, of which the fourth is a continuation, have been increasingly large projects of vocational training for 15 to 25 year olds. There are five or six targeted professions: computing; waiter/ cook; hairdressing; bricklaying and nursing, on which courses take place all over Slovenia, run by the Slovenian Popular University. At the end of the course, students receive a valid Slovenian certificate which is

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[18] Separate mother-tongue is also available, and several summer camps, including for example one entitled 'Getting to know Slovene Culture'. See 'A cry to the world', op.cit..

[19] Established in 1985, with no political, profit or religious motives, Nuova Frontiera started its work in Slovenia in January 1994. It receives funding for its Slovenian projects from ECHO and from the regions of Italy (eg Lombardia and Bologna offered money for food) but no central Italian Government funds. It presents proposals to ECHO, which monitors the projects, using its EC delegation in Ljubljana. Nuova Frontiera also has contacts with other overseas and local NGOs working in Slovenia.

internationally recognised. The subjects for the courses were chosen together by the NGO, the government (OIR); UNHCR and the Bosnian embassy, bearing in mind both the possibility of a longer term stay in Slovenia and that of return, as well as what people may want to do.

5. Return

If repatriation of people to Bosnia Herzegovina becomes possible it is expected to be based on a bi-lateral agreement concerning the questions of the place to which 'return' is to take place; how it is to be effectuated; the amount and type of financial aid from Slovenia to the individuals concerned; and the amount of financial assistance from Slovenia to the area to which they are being repatriated (ie rehabilitation assistance). Everything is to be organised by OIR.

It is true that return and rehabilitation, of individuals and their towns and communities, are inextricably linked. In Slovenia's case, thinking about whether people will or will not return is probably irrelevant, given the large numbers disappearing from monthly statistics, especially as resettlements would be known of, either through bi-lateral arrangements or the implementation of safe third country returns. Although conditions since 1994 have been far from ideal in Bosnia Herzegovina, homesickness and a sense of not belonging in Slovenia has caused many to return, as well as a willingness to re-join the fight on the part of many young men. The Slovene Foundation through its close psycho-social work with people receiving temporary refuge has found that many people want to go back, not least because as a largely rural population they feel a very strong attachment to the land they have left behind. After the signing of the Dayton agreements some people began to return spontaneously. However, they were quickly replaced with new protection seekers who had been among the internally displaced during the conflict, but who felt they could not go home because the territory from which they origniated had changed hands. So the overall numbers from November 1995 to January 1996 had remained at approximately 24,000 although the faces behind the statistics had changed.[20]

Once the new legislation is in place, the statistics will become clearer. At a

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[20] Marolt, Dominika, 9 January 1996.

point such as that, where registration becomes essential and attractive to persons seeking protection and the new rights including that to employment, it would be interesting to analyze the number who simply had not registered in the past, and to establish whether such new rights, and a feeling of greater security in the host state, cause a diminution in the perceived rate of spontaneous return.

6. EU: influences on and cooperation with Slovenia

As a new state bordering on the EU, Slovenia has already expressed its desire for membership of the organisation as it widens. In the meantime, on the migration level, the collective policies of the European States are already being felt and anticipated. For example, it is foreseen that when Schengen and Dublin will be implemented, there will be major effects for Slovenia. The new laws and policies being created in Ljubljana nearly all contain elements of harmonisation with those of the EU Member States. At the same time, Slovenia sees no need for wider regional instruments to regularise a situation such as they have faced with the influxes from Bosnia Herzegovina, once it has domestic legislation in place.

In addition, Slovenia is, since its initial calls for burden-sharing, becoming increasingly reluctant to request financial aid from the EU, partly through a desire to demonstrate that it is rich and organised enough to join the 'club', partly through a reluctance to in fact have to take on a greater share itself. In fact, it sees that it must become a wider donor country if it is to be accepted. Indeed, the draft law says that "...due to Slovenia's increasing "rapprochement to Europe" the world expects the Republic of Slovenia, to like other European countries, gradually become capable of baring the burden of the different kinds of refugees by itself." [sic].[21]

Many of the European NGOs operating in Slovenia are sponsored for particular projects by ECHO, although acquiring such funding is apparently becoming increasingly difficult. Funding via UNHCR is also becoming more difficult, as donor governments are not targeting their assistance at Slovenia any more. UNHCR is now contributing only $3 million (£2m) to work in Slovenia, whereas the government is spending $19 million (£12.7m) on refugees in 1995.

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[21] Draft Law, Explanatory Notes.

This matches the amount the government spent in 1994.[22]

According to the preface to the draft law, in 1992 the OIR budget for its first six months of operation was SIT 1,222,537,710 (£7m) from the government and SIT 544,270,511 (£3.1m) from other sources (Solidarity Fund, UNHCR, individual donations). In 1993 the budget from the government was SIT 2,192,459,327 (£12.5m) and SIT 420,749,166 (£2.4m) from other sources. In 1994, for the first six months, OIR was allocated SIT 1,378,813,000 (£7.9m) from the budget. It also had a $1,268,690 (£850,000) contract with UNHCR and received 1,317,000 ECU (£1m) from the European Social Fund. There are also other contributions made via aid to international NGOs working in Slovenia.

The cost of caring for 'refugees' was already described in 1993 as "troubling to the Slovene economy and also add[ing] to traces of xenophobia and nationalism at the fringe of the political spectrum."[23] Partly as a result of stirring up fears over immigrants attaining Slovenian citizenship and entering the job market, the Slovene National Party (SNS) received 12% of the vote in elections of December 1992, and while not in the coalition government is the fourth largest party in Parliament.

Conclusion

As a newly independent state, with no legislation or practical experience in asylum and immigration matters, Slovenia had only international guidelines and standards, through international Conventions and what it could see of the practice of other states, to direct it during the early days of handling the sudden and on-going influx of people from Croatia and then Bosnia Herzegovina. After three years of experience, draft legislation to regularise the *ad hoc* position to the benefit of both the state and the persons seeking temporary refuge began its slow path through Parliament. Based on international commitments, and guided by both the desire to join a wider European Union and not to be a victim of restrictions elsewhere in the established Union, the legislation maintains flexibility in terms of requiring government decrees establishing that a situation requires temporary refuge to be

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[22] OIR acknowledges solidarity from Austria, Belgium, France, Germany, Italy, the Netherlands, Sweden and Switzerland, in its pamphlet 'A Cry to the World', op.cit..

[23] Cohen, op.cit., p.279.

given and how many may receive such protection in Slovenia.

In the particular case of the protection of people from Bosnia Herzegovina it is possible to detect a particular cultural and societal basis to Slovenia's style of protection once temporary refuge has been offered, based both on the host country and on the history of relations with the country from which those in need of protection have fled. On the first point, as, until recently, a republic of a socialist state, it is not surprising that Slovenia has a strong ethic of care and community running through its policy of protection. None of the temporarily protected persons live in independent housing, but are rather all in collective centres or guests of friends and relatives already established in Slovenia. Besides the basis of state and societal care, this fact is rooted in the scarcity of available housing in the country, and the availability of large buildings once used by the Yugoslav military or the communist workers. It is also possible to detect a strong sense in Slovenia that the refugees will return to what evolves of their country of origin, not least because of an understanding of the attachment to the land which the Bosnian population feels, and because return is seen taking place on a daily basis. Finally, Slovenia is able, and its new law shows it willing, to make use of this labour force in its own drive towards prosperity, much as was the case for west European states during refugee crises of the 1950s.

Chapter 8

TEMPORARY RESIDENCE IN AUSTRIA

1. The situation in summer 1995

In summer 1993, a residence act came into force in Austria, of which paragraph 12 allows the government to grant, by decree, a temporary residence status to people who have fled their country of origin for humanitarian reasons.[1]

> During times of heightened international tension, armed conflict or other circumstances that endanger the safety of entire population groups, the Federal Government may order that directly affected groups of aliens who can find no protection elsewhere shall be accorded a temporary right of residence in the federal territory.
>
> In the order referred to in paragraph 1, the entry of the aliens and the duration of their residence shall be regulated in a manner that takes into account the circumstances of the particular case.

At the same time as the act came into force, a decree was issued allowing a temporary residence permit to people from Bosnia Herzegovina who had arrived before July 1993, initially to last for six months.[2] Since then the permits have been gradually extended, and the latest extension is for one year, to 30 June 1996.[3] People from Bosnia Herzegovina who entered Austria after 1 July 1993 are also eligible for temporary residence permits if they entered the country legally, that is via an official border crossing, presented themselves to the guards there and were

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[1] Section 12 of the Residence Act, 'Bundesgesetz, mit dem der Aufenthalt von Fremden in Österreich geregelt wird (Aufenthaltsgesetz)'. Unofficial translation by UNHCR. Date of entry into force 1 July 1993, Reference in the Official Gazette, 466/1992 - appearing on 31 July 1992).

[2] Temporary residence is, as of summer 1995 only for Bosnian Muslims - although the legislation gives the possibility for decrees concerning other nationalities in the future. Thus there is no perception of discrimination, as all could be included.

[3] 'Verordnung der Bundesregierung über das Aufenthaltsrecht von kriegsvertriebenen Staatsangehörigen von Bosnien-Herzegowina', Bundesgesetzblatt für die Republik Österreich, (9 June 1995).

subsequently allowed entry. An official stamp must be received as proof of legal entry. If people did not know that they should have entered in this way, then they should go to the Aliens Police, who should verify whether the failure to cross at an official post was due to genuine ignorance of the regulation. This check of the legality of the entry seems to be a subjective process, largely based on trust. The aliens police also are to look at the situation of former residence, and if the person was in another country for more than fourteen days, where protection could have been or was received, they are to be rejected.

People from border-towns between Bosnia Herzegovina and other republics are allowed a temporary residence permit if they arrived before July 1995, and Muslims from mixed areas in Serbia and Montenegro are also administered under this scheme. Other citizens of former Yugoslavia do not qualify for this type of status, and must file a regular asylum claim.[4] The majority appear to have been rejected.

Reports from non-governmental and international organisations suggest that there is an arbitrary acceptance of illegal entrants, although no one with fake documents is accepted. If people arrived illegally it is possible for them to be rejected and receive a deportation order together with a suspensive stamp. However, any Bosnians coming into the care projects must have a residence permit in accordance with paragraph 12. Some illegal arrivals go to the NGOs and are hosted by them. While civil servants claim that such Bosnians are anyway covered by the principle of non-refoulement, other organisations report that some deportations either directly or indirectly to Bosnia routed via Hungary have taken place.[5] Reports of detentions are also increasing. An Amnesty International (Austria) Report of November 1993 points out that contact with border police alone is insufficient if Austria is to uphold its commitment to the 1951 Convention as it claims to, as these police are not necessarily qualified to make judgements on the finer points of non-refoulement commitments, and often return people or refuse

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[4] See UNHCR's 'Update on the implementation of temporary protection and developments relating to voluntary repatriation to Bosnia and Herzegovina', (mimeo), June 1995. This paper states that from 1992 to 1994, 98% of former Yugoslavs from areas outside Bosnia Herzegovina who filed a claim were rejected.

[5] UNHCR report that people have been returned to Hungary from Austria, and it is known that Hungary has deported persons from Bosnia Herzegovina to their country of origin. See for evidence, Helsinki Watch, War Crimes in Bosnia-Hercegovina, (Washington: Human Rights Watch 1992).

entry, although the claim to protection may be valid. Amnesty International, whose worldwide mandate on refugee protection is almost exclusively confined to the upholding of respect for the right of non-return, point out that they have particular concern for persons fleeing civil war, who, while they may or may not fulfil the Convention definitional criteria, quite likely have a genuine need of protection. They are also concerned about the practice of returning people to Croatia and Slovenia as nominally safe third countries, although Amnesty has evidence that these countries in fact practice refoulement regularly.[6] If a person has fake documents they are considered to have committed a crime, and are put into detention.

Temporary Residence status is received instantly, or within one or two weeks, depending on the province. During any waiting period Bosnians who entered legally are already essentially accepted without the permit. It is possible to apply for asylum while being in receipt of a temporary residence permit. Initially people lost temporary residence status, including the *ad hoc* care and maintenance if they went into individual procedures, and received no government assistance. This position was overturned by the high court and individual asylum application while in receipt of a temporary residence permit no longer entails a shift to the care and maintenance procedure of the Asylum Act. If a person does remove him or herself from the temporary residence scheme they can not move back on to it.

The recognition rate for Bosnians in individual procedures is said to stand at around fifty percent. Initially people were not accepted on the basis that flight from civil war was not covered by the Convention definition. However, the High Court last year said that Bosnians fleeing ethnic cleansing are refugees *en groupe* and since that precedent they have been forced to grant asylum. There is therefore a problem of dual standards, as those who are recognised get Convention rights and others with temporary residence do not. This is seen as a question of unfairness.

While there is thus a legal regulation covering the residence status of persons seeking protection from war, there are no legal provisions covering their integration into Austrian society. Their status is essentially that of aliens, with no free access to either the labour market or the social welfare system. However, an *ad hoc* project for the care and maintenance of people with this status coming from Bosnia

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[6] Amnesty International (Austria), 'Insufficiencies of the Austrian Asylum Policy: an AI appeal to the Austrian Government', 11 November 1993.

Herzegovina has been established by the Interior Ministry and the provincial governments.

2. Before Summer 1993

The initial reaction of the Austrian government to the influx of Croatians and, later, people from Bosnia Herzegovina, seems to have been one of liberal humanitarian action, acknowledging that the situation might prove to be temporary, acting in an *ad hoc* and seemingly pragmatic way. The concept of short term protection[7] was created for the Croats in September 1991, when many came to live with their family members who were in established Croatian communities in eastern Austria, as guest workers of the second and third generations. The person in the 'Lände' government who was responsible for aliens asked the Ministry of the Interior for help in supporting the host families, as the Croatian community was generally poor. A joint support project was created by the provincial governments and the Ministry of Interior, with an agreement reached based on both private law and financial arrangements for an initial duration of 6 months.

After the first influx from Croatia there was an increase in numbers, and other provinces of Austria became involved. There were not enough ethnic Croatian host families, so it was necessary to find other host families and to arrange centralised accommodation (in camps). The Ministry of Interior then signed similar supportive agreements with other provinces. By December 1991, 13,000 Croats had fled to Austria. This case proved to be a positive example of short term protection, and resulted in the return of the majority of the protected people. In March 1992, the project closed and assistance for return, in the form of a transport ticket, was offered. Those, between one and two thousand, who, for political reasons, could not return had an extension for two months, and then started to be integrated. The initial agreements were extended for people from Bosnia Herzegovina. This influx was high and lengthy: over 40,000 entered in just a few months of 1993. An appeal was made to the Austrian people to host newcomers from Bosnia Herzegovina, and a

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[7] It seems that the Ministry of Interior in Austria rejects the terminology of "temporary protection" as the position in Austria is seen not as one of temporary protection but as one of temporary residence, with any relationships between Austrians and the people from the former Yugoslavia receiving this status being based on a close history, and long standing communication and travel between Austria and former Yugoslavia.

number of camps were organised. Two thirds of the displaced initially stayed with families and there was enormous assistance from the Austrian population, who also organised volunteer groups in communities and parishes.

At first a normal residence permit was granted to incomers as there was no specific legislation to deal with them. Conditions were not restrictive, no passport was necessary, for example, although people had to show they were from Bosnia Herzegovina, and all three ethnic groups were accepted. When former Yugoslavia divided into new nations, and Croatia was recognised, followed by Bosnia Herzegovina, the situation concerning residence permits changed and only Bosnian Muslims who could prove their nationality received a temporary residence permit. The fact that the displacement of the Bosnians might not be so short term was acknowledged, and the pragmatic *ad hoc* measures were translated into a more fixed legal structure.

To summarise, prior to 1991 there was no specific legislation or policy in Austria for influxes of people fleeing conflict and hoping their flight would be temporary. After the experience of the Croatian influx, and the development of *ad hoc* policies, the question of temporary residence was settled with paragraph 12 of the 1993 Residence Act, but the protection of those persons who could live in Austria - and the way they could organise their lives there - had no legal basis still, and, as of summer 1995, still did not.

3. The origins of temporary residence status, initiation and influences

After October 1990 elections, a new government came to power in Austria in December 1990. The existing asylum and immigration laws were, naturally, still based on the notion which had been fact for over forty years that there were generally strict exit controls which limited emigration from Eastern Europe, and that those who did arrive were voting with their feet, to be welcomed, and often would be accepted by other Western states. With the end of communism to Austria's east, this was no longer the case, and with conflict seen as highly possible in neighbouring states, and 'bad' experiences already from the outflow of Rumanians after the fall of Ceaucescu, the time was deemed right for new, more restrictive,

legislation to be passed. Essentially, the existing legislation concerning asylum and immigration seemed not to correspond to Austria's needs. The new government therefore enacted new legislation on immigration, including on asylum.

The new programme of legislation was presented to the cabinet in early 1991, and each part was passed one by one. First was the new Asylum Act,[8] which deals with asylum seekers and refugees and aims to accelerate procedures, while claiming to comply fully with the 1951 Convention. This is the element of the new Austrian laws which has caused most political controversy, particularly in Austria's relations with UNHCR.[9] Secondly, there was the new Residence Act already referred to, which includes the paragraphs relevant to temporary residence status,[10] and thirdly, legislation on immigration generally, which affects Bosnians with temporary residence status by impacting upon their right to work under a quota system.[11] Finally, the Aliens Act[12] regulates the programme of entry to, and residence in Austria of asylum seekers and deals with rejections.

The agreements and paragraphs of legislation concerned created a problematic basis for temporary protection. While there is legislation for temporary residence, there is none for care and maintenance which creates difficulties for those granted temporary residence, as well as competition for competence between the provinces and central government. The agreements which have been reached on integration, care and maintenance are exceptional, and revisable by the politicians.

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[8] 'Federal Law concerning the granting of asylum (1991 Asylum Act)', issued on 7 January 1992, reprinted in the Federal Law Gazette of the Republic of Austria [V.984 27986 (E)].

[9] The only impact of this debate on the subject of temporary residence, is that persons awaiting the adjudication of an asylum claim receive temporary residence only if they entered Austria legally. As 90% of cases involve limited transit through a 'safe third country', most entrants are considered to be illegal. Illegal entrants to Austria are detained - and this includes Bosnians. See the report 'AUSTRIA, Strong criticisms by UNHCR' in the Migration News Sheet (Brussels April 1995) on the UNHCR report "Everyday life of Refugees in Austria", and strong criticisms of the Austrian system made by Mrs Ogata, the High Commissioner, in interviews in Vienna - criticisms which were also addressed directly to the Ministry of Interior. Both the Minister and senior officials refuted the allegations of restrictionism.

[10] According to information from a staff member of the Interior Ministry at the time of drafting, this paragraph on temporary residence for those fleeing conflicts was included in the Act at the last moment, due to apparent foresight based on past experiences of conflicts in neighbouring states, and mass exoduses from Hungary in 1956, Czechoslovakia in 1968 and Poland in 1981. It is claimed that there was no discussion on whether or not this paragraph should be included, and that it is proving to be a very useful and efficient provision which has brought down the number of asylum requests.

[11] See **3. Centres, Rights and Integration** below.

[12] 'Federal Law promulgating the Aliens Act and Amending the 1991 Asylum Act and the Residence Act', issued on 29 December 1992, in the Federal Law Gazette of the Republic of Austria [V.94 25208 (E)].

It has not been in the political interest of the government to regulate the system due to the high costs. An efficient and flexible system for this situation was created on an *ad hoc* basis. However, the impression received from people working closely on the policies towards Bosnians with temporary residence was that it would be preferable to have legal regulations concerning who is to be responsible for care and maintenance in case another similar situation arises and to establish at least a minimum outline of the manner in which to proceed under similar circumstances ie to promulgate some concept of crisis management, based on the lessons learnt from this crisis. In fact, as a result of this crisis, the provinces have created a minimum "union" structure to deal with the situation. Ironically, it is also felt that in the past it was easier to organise temporary stays and integration because there were not so many laws, just one aliens act which was liberally implemented. Now with all the narrower acts referred to above, it is felt that progress on practical matters for non-asylum seekers, such as the Bosnian influx, gets blocked. The overwhelming impression is that there are in some ways too many laws and in other ways not enough. Essentially it seems there are a whole host of laws and articles within apparently non-associated legislation which affect the handling of care for those with temporary residence permits - but no straightforward law on their situation.

The lack of a political decision to integrate people can to some extent be put down to racial tensions and xenophobia, or at least a fear thereof. The right wing parties in Austria have seen an increase in support in recent years, accompanied by an increasing negative opinion towards aliens, a tension or xenophobia which, in part at least, might be said to be manufactured (or at least heightened) through a reluctance to broach the question of facilitated integration, and through the denial of the fact that Austria has become an immigration state. The negative impact of this has, according to workers in the migration field in Austria, been discovered too late. In the period after 1990 it was realised that something must be done, and a new department dealing with the integration of migrants and refugees was created in the Interior Ministry. At first the desire was to do things quietly, without making it a big political issue. After five years, the need for clarity was realised, even at the risk of unpopularity. The issue is therefore being increasingly brought into the public arena, and the arrival of a new Minister in April 1995 is said to have facilitated this process.

The question of precedent with regard to the temporary residence scheme is of concern to some commentators. It is felt that this system of temporary residence status has worked for the Bosnians, but the worry is that such a scheme, without integration facilities also rooted in legal fixtures may not work for others who do not have the same historical link with Austria. Even on the level of the residence document, a decree is required, and the political will to issue such a decree is thus also essential.

While the numbers of people from Bosnia Herzegovina arriving in Austria are difficult to establish, not least because of the amount of unregistered and/ or illegal entrants, it is difficult to say with any precision how many people have found some sort of protection there. However, it is estimated that between May '92 and December '94, 80,000 Bosnians received protection or assistance, and there are still 22,000 on the care and maintenance programme. Others have 'integrated' (by finding full-time employment), emigrated or returned.

Non-governmental organisations, in particular Caritas, have been involved in the care and maintenance projects. Caritas, a Catholic organisation, is involved in all provinces except Salzburg and Tyroll. The main assistance to Bosnians, including to Muslims, came from the Catholic and Protestant Churches, with no suggestion of aiming to convert them. In the beginning, Caritas encouraged people to take in Bosnians.[13] While relations between the Ministry of Interior and the NGOs seem generally to be good, the experience on these projects has not been entirely positive. The work on integration of Bosnians by the Ministry of Interior has been done in close cooperation with NGOs as well as the provinces, through contract arrangements. Rather than assistance going directly from the Ministry, much has been given via NGOs, particularly because the Aliens Police are part of the Ministry's structure, and there is concern over the confidence some displaced people might have about funds coming directly from those they often fear in case of deportation and other immigration difficulties. However, there seems to have been some disagreement over the fulfilling of the regulations regarding the payment and acknowledgement of funds. The implementation of regulations has to be correct to be legitimate and legitimised. In the implementation of this programme the

[13] A poster in the headquarters of Caritas from the early days of the influx says that Bosnians are helping themselves, and asks people to please help them.

provinces work closely with the NGOs in terms of acceptance and the paying of money - and on the question of release from the project. Regular meetings are held between the Ministry and the provinces to raise problems and collectively find solutions, and to try to keep a balance among the provinces. Some provinces are becoming reluctant to work with the NGOs because they claim the latter have misused confidence and broken contracts by, for example, trying to claim that money came from NGOs. If this was the case, then NGOs did not fulfil the obligations put on them by the government. In the light of this negative experience, changes in operating arrangements were being considered, in summer 1995, particularly regarding cooperation on access to projects, but no major changes on the implementation side were envisaged. It is a question of allotting and knowing one's place and role within evolving arrangements.

UNHCR, meanwhile, has not really influenced Austrian policies. From the Austrian point of view this is because the High Commissioner's Office is not including the activities and amount spent by the Austrian government and people in its assessment of the handling of the Yugoslav crisis to the right extent or in the right way, and because Austria has received no assistance. In addition there are difficulties over Austria's 1991 Asylum Act, as outlined above. According to UNHCR, the temporary protection scheme should apply to all Bosnians arriving in Austria. They have also been trying to help with admission or re-admission to other European countries, for example countries which had been transited. So UNHCR's role in Austria has been somewhat supportive in helping Austria search for other countries to which people may go, although the prevailing view is that if such alternative protection can not be found, the displaced who have arrived in Austria should be allowed to remain there. Essentially UNHCR is positive about the situation for people who are actually resident in Austria, but negative about the position of those who are trying to arrive. They see a need for more work permits and 'soft' measures such as training and social services, and basically, after three years would prefer to see a shift to real integration - on a big picture scale rather than in details. The major concern they have, however, is over access to protection and for 'illegal' Bosnians in detention and with families. These concerns are echoed by Caritas, which, like UNHCR sees Bosnians as in need of protection, whether or not they are 'refugees', and wishes for a step by step accordance of Convention

rights.[14]

The situation for Bosnians in Austria does seem to have become more restrictive. There are, for example, reported cases of the Bosnian Embassy in Vienna, where screening is done in order to give passports to Muslim arrivals, attempting to persuade young Muslim men to go back and fight. It is reported that if a conscription paper is not signed, a passport is not received. As a residence permit could be issued on a separate licence document as well as with a stamp in the passport, alternatives to seeking a passport from the embassy are being looked into by the Interior Ministry.

Additionally, it became difficult for Bosnians to get to Austria. The influx in early 1995 was chiefly only for family reunification, for which cross border transit from Bosnia is fully organised. Family reunification is primarily for the core family, but it is claimed that the humanitarian angle is taken to this, and older parents or other relatives who are close to the family are considered if accommodation is guaranteed and the province accepts it.[15] Croatia and Slovenia will only allow transit if people already have an Austrian residence permit. The relationship between Austria and these countries with regard to movements from and to Bosnia Herzegovina appears to have been quite good, although transit visas for return are difficult to obtain, as the Croatians in particular have not been interested in permitting return due to their own part in the conflict.

Meanwhile, the period of two weeks which officially need to have been spent in a 'safe third country' for that legislation to apply has not always been adhered to in practice. If, in theory, one could have applied for protection in a third country the application in Austria seems to be being refused. In fact it seems that even three days en route via another country disqualifies an application if no prior permission to enter was secured. Such permission is gained from the Ministry of Interior for family reunification purposes so long as support is guaranteed by the family or local authority. How permission is obtained is obscure, and even for family reunification Croatia and Slovenia have refused transit if entry to Austria could not be guaranteed.

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[14] In fact what Caritas in Austria seems to desire is something similar to the Dutch system described in Chapter 10, although they seemed not to have been informed of the details of that programme.

[15] Family reunification does of course have a strong humanitarian aspect to it, but it is also possible to consider its use as a way of bolstering statistics without adding to the numbers seeking employment etc.

So, the first problem is how to reach the border and the second is how to cross it. In addition, as of 15 April 1995 Bosnians need a visa to enter Austria.

3.a. The Particular Historic Background for Austria

On three occasions since the second world war and before the disintegration of Yugoslavia in 1991, Austria was on the 'frontline' of refugee migrations from East Europe. On each occasion appeals were made to other West European and Western states for assistance and resettlement. A brief glance at this history is very informative in the current study, not only because it gives an example of temporary 'protection'[16] in Austria and of resettlement programmes as referred to in Chapter 6, but also because over time a growing disinterest of more distant states in the plight of both the migrants and the state taking the larger part of the 'burden' can be perceived. This disinterest is expressed through progressively smaller proportions being resettled, through less action and generous talk by politicians, and can even be detected in the progressively briefer articles in the British newspapers of the periods in question. Much of this 'disinterest' can probably be put down to the phases of the Cold War which triggered a desire to assist those people voting with their feet, and the economic recovery of western Europe after the war, as prosperity did not increase humanitarian generosity to share space and protect, but domestic unemployment meant an incoming workforce became decreasingly attractive.

In November 1956, after 60,000 Hungarians had arrived in Austria, the Foreign Ministry made an appeal for help to cope with the situation.[17] It was pointed out that 60,000 people was the size of a middle-sized town, or the strength of a small country's army, and that Austria was technically incapable of coping with this influx. Dr Kreisky, the Foreign Secretary, said it was not a question of money or resources, but of "quick action which will produce a solution in a matter of hours."[18] The answer according to this appeal was for trains to be sent to the

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[16] At the time it may have been referred to more probably as temporary 'asylum' or 'refuge'.

[17] According to progressive reports in The Times, from October 29 to November 23, there were on 29 October, 10,000 refugees; on 15 November, 20,000; on 17 November, 25,000 and by 23 November 60,000.

[18] 'Appeal for Aid to Refugees', The Times, 23 November 1956, p.10.

borders, and people to be loaded on, without conditions or selection, and with a waiving of regular immigration procedures. Austria, it was said, had received 650,000 refugees from Eastern Europe since 1945, of whom 190,000 were still in Austria, and 36,000 of those were still in camps.

Other countries were on this occasion quick and generous in their response. In December 1956 the first refugees arrived in Australia[19], New Zealand raised its quota for arrivals to 1,000 and offers from West European and other Western governments exceeded 70,000 with unlimited places offered by Canada (where 6,000 had already arrived), France and the United Kingdom, while the total to have reached Austria was, according to the Inter-Governmental Committee for European Migration, 121,504.[20] The Canadian government, talking of expected labour shortages the following spring, also accepted 2,000 more refugees who had already been resettled to the Netherlands, and up to 3,000 from France, allowing further movements to those countries from Austria.

In 1968, Austria began its appeals for aid after 6,000 refugees had arrived from Czechoslovakia in just the first week after the Soviet invasion of 21 August. At that point, Austria was using the camps which since 1956 had housed Hungarian refugees to house the new Czechoslovak arrivals.[21] Austria was already preparing itself to shelter at least 20,000 refugees in public buildings, the Vienna Congress Hall and tents. Most of the arrivals, including many people who had been holidaying in Austria and Yugoslavia, were scientists, technicians and intellectuals.[22] By 1 September, 24,000 Czechoslovak refugees were thought to be in Austria (including those who were not registered or receiving state assistance, but were staying with families and friends)[23], although in the forty-eight hours from 31 August to 1 September, while 5,000 had crossed the border into Austria, 18,000

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19 'Australian welcome for first refugees', The Times, 3 December 1956, p.10. 86 Hungarian refugees arrived in Darwin.

20 The Times, 7 December 1956, p.10; 'Martial Law ordered in Hungary', The Times, 10 December 1956, p.10.

21 'Aid plea for 6,000 refugees', The Times, 30 August 1968, p.5.

22 'Austrians preparing to shelter at least 20,000 refugees', The Times, 31 August 1968, p.1.

23 'Refuge in an Austrian camp', The Times, 3 September 1968, p.4. In the 24 hours to 2 September, 7,865 Czechoslovaks entered Czechoslovakia, while 1,258 left to go to Austria. There was a flood of requests for visas to all western embassies in Vienna, but especially to Canada, Australia and Switzerland. The first refugees to be resettled to Australia travelled by organised flight on 10 September 1968. (The Times, 11 September 1968, p.7).

Czechoslovaks had made the journey in the opposite direction.[24] This situation of more people returning to Czechoslovakia than were fleeing it appears to have gone on for some time,[25] but by the end of October, 92,000 journeys had been made out of Czechoslovakia since the invasion. Those Czechoslovaks who had sought refuge were reported to be forming a new organisation called the 'Fourth Category of Czechoslovakia', in order to distinguish themselves from the other three categories (émigrés, displaced persons and refugees) and emphasise the temporary nature of their stay, as they were anxious to return as soon as the occupation would be over.[26] By December 1968, the Intergovernmental Committee for European Migration was reporting that 8,000 Czechoslovaks had moved to Canada, Australia and the United States, with Canada alone receiving 4,600 people since the invasion. An average of 1,000 people were still leaving Czechoslovakia daily, and 40,000 to 50,000 were being protected in Western Europe, although the vast majority of them had not requested asylum.[27] In the meantime, exit restrictions had been tightened by the Prague authorities, so that permits must show the destination and duration of overseas visits outside socialist countries, and how many journeys were to be permitted. In addition, private travel to seek employment, or without the agreement of the employer in Czechoslovakia, journeys for which no foreign currency had been advanced (the Czech currency was inconvertible, and the reason for the journey would have to be declared in order to obtain foreign money) and travel by people carrying such luggage as might indicate the intention of a longer term stay was not permitted. Thus Austria had no reason to fear a sustained flood of migrants, as controls on the Czechoslovak side of the border were strict enough to stop all but the most determined.

During 1981, at least 20,000 Poles entered Austria, as Martial Law was

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24 'Dubcek admits errors', The Times, 2 September 1968, p.1.

25 'More return than leave', The Times, 4 September 1968, p.4. In the 10 days following the invasion 30,000 more Czechoslovaks had entered Czechoslovakia than had left, according to the Austrian border-post count. 8,000 registered Czechoslovaks were still seeking protection in Austria.

26 'Diary', The Times, 19 November 1968, p.10. The majority of such Czechoslovaks were still in Austria, however, other countries were also receiving requests for protection, or extension of visas (including their conversion from seasonal employment to study visas etc.). In the UK for example, 1,000 extensions of stay had been granted - with employment restrictions lifted. 'Beds needed for Czechs', The Times, 12 September 1968, p.6.

27 '8,000 Czechs find new life overseas', The Times, 4 December 1968, p.4.

imposed following the rise and activities of the Solidarity movement.[28] Using the same Traiskirchen refugee camp as had been a shelter to Hungarians and Czechoslovaks, the Austrians appealed in July 1981 for American assistance in taking in some of the Polish refugees or migrants, who while claiming temporary refuge in Austria also often cited a desire to resettle to the United States, Canada and Australia. In making this appeal, Austria referred to its own acceptance of Vietnamese refugees at America's request. On this occasion, however, resettlement opportunities were less forthcoming than they had been in the two earlier cases.[29]

In these past cases, according to the Interior Ministry, the situation was relatively easy to handle, as other countries were interested in the people involved and wanted to take them in as resettlement cases. However, in the case of people from Bosnia Herzegovina, this has not been the case. It is, on a reception and integration level, difficult to compare this case in the 1990s with those previous cases. The legal situations, and acceptance levels in non-neighbouring countries seem to be entirely different. However, the acceptance of people from Bosnia Herzegovina in Austria is reported to have been high.

4. Centres, Rights and Integration

While the major problem in the view of Austrian officials and NGOs seems to have been legal restrictiveness, coupled with a lack of flexibility and the change in political climate from the earlier crises described above, public opinion is also perceived to have changed, and increasingly involves fears of immigrants, some realistic, many unrealistic. As is the case for most of western Europe in the 1990s, living standards in Austria have risen since the 1950s, and many Austrians may have an unrealistic fear of losing what they have through the arrival of aliens.[30] There

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[28] 'Walesa plea for aid to Poland', The Times, 21 November 1981, p.5. In November 1981 it was estimated, according to the same article, that 250 Poles were entering Austria each day.

[29] See The Times: 'Trickle of Polish defectors becomes a torrent', 15 June 1981 p.6; 'More refugees', 1 July 1981, p.6; 'Austrian Appeal', 14 July 1981, p.6. The Polish Foreign Minister was reported to have said that Poland would see the recognition of those fleeing as refugees as an "unfriendly act". (12 November 1981).

[30] This position, echoed throughout western Europe, seems infinitely paradoxical, most obviously because though west Europeans of the 1990s must, through the rise of prosperity, generally have more they could give than was the case in the 1950s or '60s, there is a great fear that what they have will be

is also the problem of a lack of reflective political decision making and action in other fields which do not have alien integration as their primary focus, for example housing. It seems that Austrians can have difficulty in finding housing due to cost and availability, which leads to competition. However, aliens who in fact often pay more, as they do not have the information or communication skills to find cheaper alternatives, have some accommodation reserved for them, concentrated in certain districts, leading to over concentration and ghetto-isation, which in turn contributes to racial tensions. Housing policies can therefore be said to ignore the successful integration of aliens.

Although there is no legal framework to schemes aimed at the integration of persons from Bosnia Herzegovina in Austria, the central and provincial governments have created a project for the care and maintenance of the Bosnians on the basis of two types of agreement. Firstly, for those who live in private accommodation, they are to receive 1,500AS (£100)[31] per person per month; free health care, which does not include mental health care, because the regular social security system does not.[32] For those in organised accommodation, the level of the cost of the accommodation is defined as 5,000AS, (£330) plus 10% for heating (including housing, food, hygiene, maintenance care and electricity). This category also get 100AS (£3-60) per month for pocket money. Two thirds of the cost of the programme is borne by the Interior Ministry and one third by the provinces. The military assisted in the establishment of the programme by giving thirteen camps and helping with the organisation. There are also three established refugee camps. Attempts were made in Austria to disperse people so as not to have a high concentration in any given area of the country and to keep families (including extended families) together. This latter feature of the programme included the setting up of a family reunification unit, for reunification within Austria and from Bosnia Herzegovina and Croatia, with information assistance from UNHCR.

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taken away by immigrants, whereas those who had much less in the earlier decades were prepared to accept many more new comers seeking protection, and swelling the labour markets, to create that prosperity to which attachment is now so strong.

[31] Exchange rate in July 1995.

[32] If a disease is affecting mental health then it is covered, yet that is rare. However, as many of the people concerned in these programmes will often be suffering trauma from their experiences this seems to be a deficiency of the scheme. ICMPD informed me that volunteer therapists have been working with Bosnians in Vienna.

Beyond housing and the basic needs, the feeling seems to have been that for social and material well being, people needed the chance to work and to be part of society from an economic point of view, something which would also maintain the sense of dignity and self value. In 1992-93 the labour market situation was recovering and people from Bosnia Herzegovina, with their legal status as aliens gained limited access to the labour markets. There is a priority system in Austria,[33] with jobs going first to Austrians and recognised Convention refugees, then to guest workers and labour migrants who have been in Austria for long periods and have social welfare credits, thirdly to second generation aliens (that is those born in Austria and those who have spent five years or more at school there) and finally to all other aliens. The Bosnians moved into an intermediate position between the third and fourth categories.

A second very formal limit in Austria is a quota system. This is a system for foreigners who are neither self-employed nor unemployed, under which the total number not in these categories (that is those who are employed) should not exceed 8% of the total number of people in Austria who are neither self employed nor unemployed.[34] For 1995 the maximum number of foreigners employed in Austria is to be 262,000. Some exceptions are possible: the percentage may, by a Ministerial decree, be increased to 9% to give certain groups of people the chance to get work permits if there is perceived to be a public or general economic interest in integrating them into the labour market. In 1995, the 8% figure had already been passed in January, so the Minister made a decree allowing work permits to be given to 'integrated' young foreigners, Bosnian war refugees and certain highly qualified workers.[35] The authorities were also advised to be particularly generous in giving permits to foreign school leavers, thus giving increased flexibility for the integration

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[33] Employers must ask for work permits for prospective employees, and an investigation is made to see if anyone else could take the job from higher priority categories.

[34] The minister for labour and social welfare defines annually, by decree, what the aliens employment rate should be. It used to be 10%, then in 1993 went down to 8%.

[35] On 22 April 1995 the quota was increased to 9%. 'More Foreign Residents Allowed to Work', Migration News Sheet, May 1995.

of Bosnian war refugees.[36] Of the 50,000 Bosnian *de facto* refugees in Austria in July 1995, 23,500 were said to be integrated into the labour market;[37] 12,500 have the right to claim a work permit or "Befreiungsschein" (exemption to be given after five years of employment, allowing free access to the Austrian labour market and so far only given to 1,500 refugees from Bosnia Herzegovina), 11,000 have a temporary work permit. Those who have a temporary work permit have the right to claim a permanent work permit after one year of employment, allowing them to work anywhere within a given Bundesland (federal state). Integration of other Bosnian war refugees who are old enough to work continues within extended margins - and 5,000 further employment permits are soon to be issued, so that by the end of 1995, 60% of Bosnian *de facto* refugees will be employed. Once people are employed, they are considered to be fully integrated. When making plans and projections, the Labour and Social Affairs Ministry expect that the number of foreigners in this group will reduce in time due to naturalisation or marriage with Austrian citizens.

Although these statistics seem to demonstrate a relatively high level of employment of Bosnians who fled to Austria because of the conflict, there are some limiting factors. According to a July 1995 report by the Vienna-based Institute for Higher Studies, Austrian immigration and labour laws systematically discriminate against foreigners.[38] The leader of that project, Rainer Baubock, was cited as commenting that while politicians may see barriers to integration as a success, "the lasting segregation of a part of the population creates great problems." Austria had the worst mark for security of residency, and was unique in reserving the right to expel foreigners who have an open-ended residency permit. It also, according to this report, refuses to lift employment restrictions once residency is approved. In addition, the employment legislation in Austria appears to be problematic, and in

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[36] According to ICMPD, this quota of extra places for school leavers, managers and Bosnians was made up of only 1,500 to 2,000 with so many taken by the two former categories that by July only limited places, 200 or so, were left for Bosnians. The suspicion seems to be that from the start, the aim was to give only very limited permits to Bosnians, from within or outside the programme.

[37] By "integrated into the labour market" it is meant that when Bosnians find work they can shift into the Aliens Act - and receive a longer term residence permit. They can apply for this inside Austria rather than having to fulfil the usual requirement of application from outside the country. However, if they do not have a passport it is difficult for them to receive such a longer term permit.

[38] 'Austria gets bottom marks for treatment of foreigners', The Guardian, 27 July 1995, p.11.

need of up-dating, to protect weaker groups. For example, there may be a need to address the question of the rights of dependents, usually women in immigrant cases, whose status is purely dependent on the breadwinner, and who can lose everything in cases of divorce or death.

Secondly, it seems that in spite of, or because of, this restrictiveness, the Austrian labour market has a strong tradition of black labour, which may not be a good in itself, but is useful and possibly necessary to aliens. Illegal work is not accepted, but is often ignored by the Interior Ministry, unless it wants to use the situation to move towards political solutions, in which case, like the workers, the Ministry starts looking into loopholes in the regulations. Furthermore, those who do work, be it legally or illegally, receive only very low salaries in general because it is unskilled work.

Other employment of displaced persons has, from the beginning, included Bosnian teachers being employed to teach Bosnian children in the mother tongue. However, while employing teachers was easy, employing health workers did not work out.

Training programmes have been created, but these are very expensive. One billion schillings (£6.6m) is being paid out for maintenance and language courses, and everyone has access to a German language course. There are also a lot of programmes designed to alleviate the problems of daily life and to give qualifications. Training is usually aimed both at integration and re-integration: for example, construction work; metal work and art manufacturing. In addition, programmes have been created which attempt to combine the problems of the refugees with the problems of the unemployed local people by involving the latter in the projects with the aim of promoting acceptance.

The Education Act does not distinguish between Austrians and Aliens, so it is easy to integrate the 5-15 year olds. Schools have been open to children from Bosnia Herzegovina since Autumn 1992, with free transport to and from school, and additional language support. Most university students have been able to continue their studies at Austrian universities.

Officials, NGO workers, academics and research institutes in Austria all seem to have perceived a high level of acceptance of Bosnians by the Austrian people. One reason for this may be the experience of Austria during the latter half

of the twentieth century and before, of large influxes from various central and east European states and situations. Most of those arriving in Austria come from what might be described as similar cultures, and often from states with historic links to Austria via the Austro-Hungarian Empire in particular. In the case of former Yugoslavia proximity also meant that there was initially a strong popular desire to help, and groups such as Caritas advocated taking people in until capacity was reached, while other organisations which have not been involved in protection in Austria in the years preceding this crisis also became involved (eg the Red Cross). However, the liberalness of the first years has shifted to restrictiveness through legislation, and with right wing pressure, widespread acceptance has moved to limited xenophobia. The Bosnians themselves are said to have been happy with their reception but to have problems with integration. The only way to advance in Austrian society for all immigrant groups is said to have been to integrate and assimilate.

5. Return

Some people who had received a temporary residence permit in Austria have already started to go back to Bosnia Herzegovina, either to fight or because of an apparent inability to integrate in Austria and the concerns over later re-integration. Facilities provided for those who wish to return voluntarily to Bosnia Herzegovina from Austria include information, financial support for the journey and re-establishment and keeping open the temporary residence status in case the returnee should decide to go back to Austria.[39] Ranking conditions for return, people from Mostar interviewed by ICMPD said their top priority was safety, followed by free movement in the city, restoration of their own property, provision of accommodation, communal infrastructure (health, education, telecommunications etc) and finally income possibilities.

Opinions vary over the level of desire for return. The view of UNHCR is that a high percentage of people now do not want to return to Bosnia. Caritas see that more than 50% of the displaced from Bosnia Herzegovina seem willing to

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[39] ICMPD talks of a few thousand people resettling to third countries in 1993-1994, and a few hundred returned to Bosnia Herzegovina.

return as soon as possible if the situation changes. 30% meanwhile are said to see the question as too theoretical to answer. Older people in particular seem to want to return, as do women with children. After three years, however, it appears to be becoming impossible for people to keep on thinking about return, as the need to look more realistically at the immediate future develops. Essentially, it appears to be the case that after three years, the balance point between questions of return and integration has pretty much been reached.

According to the Interior Ministry, when return becomes possible, it will be voluntary, with the ticket paid for. The view even before that moment comes is that much more information will be necessary, and tentative discussions have already been taking place with other countries via UNHCR.

After the signing of the Washington Agreement (The 'Constitution of the Federation of Bosnia and Herzegovina') on 18 March 1994, Austria, Croatia and Bosnia Herzegovina started discussions on voluntary return to free areas of BiH, according to the ICMPD Newsletter on Bosnia and Herzegovina.[40] The Austrian government invited 12 countries to a conference on return in June 1994. Delegations at that meeting felt that the time was not right for organised return movements, but expressed support for UN and EU reconstruction efforts in Sarajevo and Mostar respectively, and acknowledged the need to offer advice and assistance to those who were already spontaneously returning. Meanwhile, a bi-lateral agreement on conditions of voluntary return was signed by the Bosnian Muslim and Austrian governments in November 1994. Return facilitation would depend on the developments in the 'safe areas' as seen by the Bosnian government and Austria said it was prepared to contribute financial and material assistance, including on plans for employment possibilities and re-integration, within an established framework of regulations.

Developments in the conflict over the following year, and particularly the fall of two of the 'safe areas', Srebrenica and Zepa, which were, according to the Washington Agreement plans, to have been attached to the UN administered capital of Sarajevo, have shown any generalised notions of return programmes to be premature. However, keeping the option alive, and including the people factor is surely important. This is after all a war about people and land and no successful

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[40] ICMPD Newsletter of Bosnia and Herzegovina, Issue 1, December 1994.

conclusion for any one could be reached if it did not include the return or resettlement of the people to the resultant state(s).

6. EU: Coordination and opinion of other Member States: Burden-sharing

If one were cynical, one could say that Austria is unlikely to have had difficulties with fitting into the European Union on the migration question, as its restrictive practices as outlined by UNHCR and Amnesty International would surely be in line with pan-European trends in the 1990s. Austria was one of the first states to put forward burden-sharing proposals, prior to its entry to the EU, within the framework of the Council of Europe, and together with Germany at the UNHCR convened 'emergency conference' in Geneva in July 1992.[41] However, discussions for this thesis revealed that far from expecting burden-sharing to become an effective mechanism in the near future, Austria is becoming aware, and concerned, that active burden-sharing might, and probably will, involve the shifting of a heavier burden towards Austria in future crises, just as much as such mechanisms might benefit the country in the current case. In spite of this there is acknowledgement of some sort of burden-sharing idea as a beneficial means of cooperation on the political and practical rather then financial levels. In the meantime financial assistance to Croatia and Slovenia has been terminated.

Conclusion

An *ad hoc* programme of residence and protection for Croatians developed, in Austria, into a legislated form of temporary residence, with a continuing *ad hoc* and policy based programme of care and maintenance. Certain elements of the rights of the protected, such as access to education and employment, are based on

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[41] See Davy, Ulrike, 'Refugees from Bosnia and Herzegovina: are they genuine? A closer look at the asylum practice in Austria and Germany', Suffolk Transnational Law Review, Vol.18 No.1 (Winter 1995), p.63. Davy cites the Austrian Interior Ministry as saying "We could find room maybe for one more trainload, but what about the second, the third, and the 10th train?" Compare this with Austria's Foreign Minister's request in 1956 that other European countries dispense with immigration procedures and simply send trains to Austria's borders to be loaded with Hungarian refugees - which to some extent was indeed what happened. (See note 41 above).

residency rather than the maintenance programme, and as such offer possibilities for independence and integration in the Austrian sense of economic self-sufficiency, although the actual opportunities to legally take up employment may in practice be rather more limited than appears theoretically to be the case.

With both historic links to the peoples of former Yugoslavia and a history of immigration and integration (or maybe more accurately assimilation) during the late twentieth century and before, Austria's acceptance of this new wave of people in need of its protection appears to have been relatively high, although restrictions on admission and the chances of detention or deportation also seem quite elevated. As in the Slovene case, Austria's political handling of this situation appears to have had a Janus head - looking towards the country's own historical connections to the people who have been forced to flee, and towards its wider European partners, with the paradoxical 'humanitarian yet restrictive on admission to their own territory' type attitude they appear increasingly to have taken. There have also, of course, been Austria's domestic political concerns over the rise of the Right to take into account on formulation of policy and legislation on this matter.

Chapter 9

EXCEPTIONAL LEAVE TO REMAIN IN THE UNITED KINGDOM

1. The situation in summer 1995

In the United Kingdom there are, outside official quota schemes, two established statuses for persons whose need for protection is acknowledged. There are therefore three possible decisions to be made on claims: refugee status and Exceptional Leave to Remain (ELR) being the two statuses, and the other option being the refusal of an asylum claim.

Asylum in the United Kingdom signifies Convention status in line with the 1951 Geneva Convention and 1967 New York Protocol. ELR is a compassionate humanitarian status which, although with some history and not entirely *ad hoc*, is based on government policy of the moment, rather than any legislation. It is said to be granted for an appropriate period, if it would be unreasonable or impracticable given all the circumstances to seek to enforce the return of the person in question.

When UNHCR made requests for the temporary protection of vulnerable persons from Bosnia Herzegovina, the United Kingdom government set up a quota of 1,000 principals plus their immediate dependents, to be called the Temporary Protection Programme (TPP). Those who would arrive on the quota Programme (their transportation from former Yugoslavia being paid for by the Overseas Development Administration and organised by UNHCR/ IOM) would initially be received in a number of reception centres established by the Bosnia Project with finances from the Home Office[1]. They would be granted a slightly adapted form of ELR whereby family reunification would be instant (rather than the usual ELR four year waiting period). Other former Yugoslavs, more than 2,000 of whom arrived with small NGO convoys, would not be expected to receive refugee status and would not join the Programme, but would be likely to receive regular ELR. In fact (see Table 10.1 below) the majority of claims are still outstanding, highlighting perhaps

[1] See section 4 below.

the fact that while manifestly unfounded claims are rapidly dismissed, manifestly founded ones are not dealt with at similar speed. Furthermore, former Yugoslavia is among the top in the list of countries of origin from which applicants' appeals under the 1993 Act are being allowed.[2] The safe third country rule is almost always enforced in cases involving former Yugoslavs, as the countries transited would usually be either EU countries, or European states with which return agreements exist.

Table 10.1 ***Applications from non-programme former Yugoslavs and decisions on their cases***

	Total	At port	In country	Asylum	ELR	Refused	Outstanding
1990	15	na	na	na	na	na	na
1991	320	80	240	5	1 or 2	15	na
1992	5,635	2,180	3,455	1 or 2	1 or 2	125 (60)*	5,400
1993	1,830	260	1,565	-	55	125 (30)*	6,570
1994	1,385[3]	310	1,075	25	1,265	475 (25)*	5,990

[Source: Home Office]
(bracketed figures marked * indicate refusals due to the third safe country rulings)

2. Before November 1992, and the general situation

Between 1985 and 1994, 14,700 principals and dependents were granted asylum in the UK, 64,500 people were given ELR, an additional 5,750 South East

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[2] Research and Statistics Department, Home Office Statistical Bulletin, Issue 15/95 (30 June 1995) p.12.

[3] Totalling these application figures and adding on the 2,034 who arrived on the quota by 12 May 1995, plus the 405 applicants submitted by March 31 1995 (all statistics from Home Office bulletin) [11,634] and even allowing three additional family members for each of the principal applicants (who anyway could not be included as family reunification cases, but would have to have their own individual claim), the total number of persons would be 40,394, applicants - far below the figure of 160,000 which the Home Secretary (Michael Howard) talked of in early August 1995 (see The Guardian, 8 August 1995), when he tried to demonstrate the UK's great generosity to persons in need of protection from the former Yugoslavia. This either reiterates the scepticism to be maintained over statistical approaches to migration, or raises dubious questions over the interpretation the UK government gives to its actions on protection.

Asians were resettled under special programmes, and 85,100 people were refused protection.[4] From the mid-1980s to early 1990s, the United Kingdom had experienced massive increases in the number of asylum-seekers, from approximately 4,000 per year in 1986 to 1988, up to 11,500 in 1989, 26,000 in 1990 and 45,000 in 1991. While the slowness of procedures means that the decisions taken each year are not always directly matched to the applications made in that same year, the figures for both refugee status and the humanitarian status of Exceptional Leave to Remain had also been increasing over that period. 13% of cases decided upon in 1986 received asylum, 70% were granted ELR and 17% were refused. The figures until 1990 remained roughly within these proportions, until in 1991 a sudden reversal of the ratios is noticeable, to 9% receiving asylum, 32% ELR and 59% being refused a protected status. The figures for both refugee status and ELR continued to drop, and in 1994 5% of decisions granted full refugee status, 20% ELR and 75% of cases were refused.

Table 10.2 ***Percentages of decisions made on asylum applications, 1984 to 1994***

	'84	'85	'86	'87	'88	'89	'90	'91	'92	'93	'94
Asylum	34	24	13	13	25	32	26	9	3	8	5
ELR	40	57	70	64	59	57	60	32	37	42	20
Refusal	26	19	17	23	16	11	14	59	60	50	75

[Source: Home Office]

The position in 1995 was said by Home Office officials to be that approximately 5% were receiving asylum, 15% receiving ELR and 80% being rejected.

Two questions need to be raised here, firstly why the drops both in overall numbers of applicants after 1991 and secondly, why the drop in the percentages receiving a legitimated protected status?

The increase in asylum applicants generally from 1985 onwards is held by many to be due to large numbers of economic migrants claiming asylum, as legal entry routes for employment and self-betterment have essentially been closed. In 1991 restrictive measures were introduced in the UK, largely in terms of more

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[4] Research and Statistics Department, op.cit., p.9.

stringent identity checks to stop multiple and fraudulent applications. The numbers for both 1992 and 1993 fell, although they increased once more in 1994. Meanwhile, following the introduction in July 1993 of the Asylum and Immigration Appeals Act 1993, the granting of ELR was limited to cases where 'genuine' humanitarian factors exist and speeded up processing of so-called 'manifestly unfounded' claims was developed. This latter factor meant that people would not be stuck in the procedural system for years, a waiting period which could give rise to reasons for allowing permission to stay on humanitarian grounds.

Thus, the crisis of displacements in former Yugoslavia, and requests for protection of large numbers of the displaced, came at a time when restrictiveness in the UK had been increasing, and when the type of humanitarian status which could be accorded to such forced migrants was being limited. Although the case of persons from Bosnia Herzegovina was surely recognised as one of great humanitarian need, the response of the United Kingdom can be seen to have lain rather in developing means and notions of protection in the area of origin than in developing its own protective mechanisms and encouraging arrivals in the British Isles.

3. The origins of the extension of exceptional leave to remain, non-legislation and influences

With three basic systems in the UK, Convention, ELR and quotas, it is into the latter two categories that the majority of persons fleeing Bosnia Herzegovina and former Yugoslavia generally and arriving, or already resident, in the UK have fallen.

In November 1992, two significant events took place for persons from former Yugoslavia who might receive protection in the UK. Firstly, on 6 November, 1992, a visa restriction was placed on people from all parts of former Yugoslavia except Slovenia and Croatia.[5] Secondly, in response to calls from UNHCR for the

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[5] This restriction was announced by the Home Secretary, Kenneth Clarke, in the House of Commons, on 5 November, 1992. It following similar announcements by Germany, Sweden and Denmark, and was said to be in response to the fact that

> *we are receiving in this country an increasing number of self-selected people from the former Yugoslavia including arrivals from safer parts of the country well away from the war zone. For example in an analysis of a large sample of those from the former*

granting of temporary protection to vulnerable persons from former Yugoslavia, the government of the United Kingdom, after consideration by Foreign and Home Office officials, established a quota of 1,000 principals plus their dependents (expected to total 4,500 people, although only 1,172 dependents and 862 principals had arrived by May 12, 1995[6]) to be selected by UNHCR on the ground and evacuated to the UK. Although the decision for inclusion in the quota programme is made by UNHCR efforts were apparently made to select people with an established link to the UK, either through family already resident in the United Kingdom, or extended family members already included in the programme.[7] People on the programme may also apply for Convention status, although the numbers of applications have not been particularly high. Establishing a quota means accepting a group for protection rather than the traditional screening of individuals, In the UK, the Secretary of State has discretion to decide to look at individuals or groups. Creating the 1,000 programme meant accepting the whole group as selected by UNHCR, however people arriving alone are individually screened for asylum. There are plans to speed up the system, and it may in fact be the case that in future situations manifestly founded cases get grouped and go through.

As a quota based system, this adaptation of the ELR policy is aimed solely at persons from former Yugoslavia. The 1,000 quota was extended by an additional

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Yugoslavia who have applied fro asylum, one third are found to have come from Serbia, where many of them are seeking to escape the effects of economic sanctions.

This statement raises a series of politically sensitive questions. Firstly, a state has no right, according to the 1951 Convention, to select its refugees - by their very nature they arrive in flight from a country where they perceive themselves to be in danger, and are thus 'self-selecting'. Secondly, it is notable that the term 'safe parts of the country' is not used, but 'safer parts' - indicating an acknowledgement that all parts of former Yugoslavia, with the exception of Slovenia at that stage, were considered potential areas of conflict - and in Serbia there were gross violations of human rights taking place, reported by various international groups. Thirdly, no reference is made to the fact that many of those fleeing Serbia at that time were not only fleeing economic sanctions, if indeed their effect was part of the cause of flight at all. Many people were fleeing the Milosevic regime, and young men were fleeing military drafting into an ethnic conflict they did not sympathise with.

6 Home Office Statistics, p.5. UNHCR, which as an international organisation has to deal with evacuations to all countries, has often only let one family member on to transportation with a medical evacuation, as is the permitted procedure for most states - probably through not having the time to explain to each case going to the UK, that as they are being included in the quota they could take all immediate family dependents. The UK however has done nothing to ensure that all family members arrive, so in fact people have not always taken up family unity options.

7 Anecdotal evidence suggests that the register of persons on the quota includes only a handful of surnames and towns of Bosnia Herzegovina, as selection has meant evacuating extended families to form coherent communities once in the UK.

500 places[8] in response to UNHCR's calls for a total of 5,000 more places in August 1995 following the fall of the 'safe areas' of Srebrenica and Zepa. Other countries had, as of September 1995, committed up to the 5,000 - with the United States accepting 2,500 people. Only Italy and the US had at that point given commitments towards the further 50,000 contingency places requested. Others said they wished to wait and see.

Any other persons from former Yugoslavia seeking asylum either at ports of entry or from within the country - for those who had been there for employment or study in the past years - would have to enter the regular procedures.

The decision to adapt a specific quota within the ELR category was taken under the influence of UNHCR's requests for temporary protection, although the High Commissioner's leverage did not extend to the type of scheme to be created or its domestic operation. The creation of the quota for 'vulnerable cases' in particular, and the stress on former detainees also appears to demonstrate a certain influence from the International Committee of the Red Cross and its requests for protection for those it had discovered in camps. However, the overall influence of NGOs has to be said to be minimal, unless their initiatives happen to fit with the government's own agenda.

The programme itself has been confused and confusing for at least three reasons. Under the 1,000 programme, medevacs[9] and vulnerable cases got grouped together for practical purposes, although they are in fact two different cases and the former should not be included in the 1,000. As a result, the new 500 quota is expected to be kept completely separate from new medevacs, of which twenty new cases were agreed to in summer 1995. There is above all confusion over questions of nomination and denomination. UNHCR nominated the 1,000 plus dependents, and by summer 1995, 862 principals had arrived. While HCR could denominate the 138 who had not arrived and try to fill the places with other people, prior to the establishment of the new quota, reception facilities were being closed down,

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[8] In the second smaller quota, the number refers to the total amount of people who will be given permission to enter, and not to a number of principals with an unknown number of dependents.

[9] 'Medevacs' is the term used for medical evacuations. A series of such evacuations have taken place since Britain took pity on the child Irma, after media reports had highlighted her plight amongst those of all children in Sarajevo in 1993. In the UK quota, medevac cases have been Croat, Serb and Muslim; ex-detainees have been only Muslim; and Bosnian Serbs and Croats but especially Muslims have been involved in the programme.

meaning new arrivals on the programme would have to go straight into the community. In addition, there appears to have been no agreement that denominated cases could be re-nominated. Some nominated persons could not physically be evacuated, as they could not be found, and may in fact have died, although no-one is certain. UNHCR seems to have been unsure whether to fill their places with other people, and whether if they did that, and then discovered the original nominee, the UK would allow the denominated person to in fact take their place, pushing the quota over its original limits. Both UNHCR and the Home Office appear to say that the other wants to denominate people who are still alive, and that the other will not cooperate, or make clear what the situation could become. There is also confusion over quite what is meant by a *temporary* programme, and when and whether permanent settlement should be looked into. Finally, evidence from officials interviewed also demonstrated that some thought all former Yugoslavs were receiving equal forms of ELR whether or not they were on the programme, and that all were housed in reception facilities on first arriving, although this is not the case.

Perhaps the greatest question mark over the decision to create a limited quota programme lies in claims that without pressure for temporary schemes, the UK government would have given ELR (but not Convention status) to all arrivals from former Yugoslavia. Two developments cast doubt on this claim. Firstly, could many have realistically arrived, especially given the implementation of the safe third country rule. Secondly, if ELR would have been accorded to all, why are those who did arrive still awaiting this decision. Like many other western European countries, the UK extended the calls for protection in the region of origin made in African and Asian forced displacement situations to the case of former Yugoslavia. As well as calls for protection in Croatia and Slovenia[10], this has included the supply of humanitarian assistance to internally displaced persons, and those who have not been forced to move, but suffer hardship nonetheless, in the so-called 'safe areas' and elsewhere in Bosnia Herzegovina. The principle behind such policies has been that in west European governments' opinion, keeping people in the area of their war-torn homeland is in those people's own interests. This view was spelt out by the British Home Secretary, Kenneth Clarke, in his 5 November, 1992 speech announcing visa restrictions. He stated the opinion that

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[10] As well as Serbia - which is less frequently mentioned, and pretty much ignored.

> the objectives of international aid to the former Yugoslavia should be to provide the means and create the confidence for as many people an possible to stay as close to their homes as possible, so that their eventual return remains a clear prospect.[11]

While noting humanitarian compassion for ex-detainees, for whom this policy would "be neither practical nor humane"[12], he then went on to highlight asylum abuse by Serbians and stated the need for control and the organisation of "specific arrangements for the reception of those we most want to help" (ie the Temporary Protection Programme to assist a maximum of 4,000 people, in effect only 2,034). This statement also implicitly states the UK government's belief that those who would receive protection outside former Yugoslavia would not return. The UK's further legitimation of its own role in the establishment of the concept of safe havens and areas (British Prime Minister, John Major, took the initiative in proposing such a system for the Kurds of Northern Iraq who were refused admission to Turkey) is that while such a policy may include an element of not wishing to attract people to the UK, it at least backs up its promotion of the ideal with relatively large quantities of humanitarian aid.

The department dealing with Britain's role in humanitarian assistance is the Overseas Development Administration (ODA), a division of the Foreign Office. ODA's major work in former Yugoslavia lies in carrying out infrastructure and other repairs, so that people can live in a given place. It has its own engineers on the ground in Bosnia Herzegovina, both British and some locals. The latter include many qualified women, who have the advantage that they will not be drafted. The work they do is meant to be for emergency needs, ie they are repairs not reconstruction, and according to officials should perhaps best be described as aid to allow life to continue. This is, however, a grey area, and while reconstruction is not talked of, largely because the task ahead is so great and anything done now could so easily be destroyed, some of the repairs inevitably become movements towards re-establishing an infrastructure to allow peace to continue beyond an eventual cease fire. Efforts are made to target engineering work so that it does not directly benefit one party to the conflict in former Yugoslavia more than the others, and there are attempts to assess the needs of all sides. Engineers try to do some

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[11] Clarke, op.cit..

[12] Ibid..

work in Serb held territory, but there is, for example, none in Banja Luka or the Bihać pocket, largely because of the lack of safety. The aim is to be evenhanded and to operate according to need, while being pragmatic. There is, whether for political, pragmatic or safety reasons, however, a bias towards the Croat and Muslim sides, demonstrated in the distribution of offices. ODA's head office in former Yugoslavia is in Split, with field offices in Sarajevo; Medugorje in the Croat area; near Mostar (although this has become a seconded position since the EU took over administration of Mostar); Gornji Vakuf, where work is done on both sides; Zenica and Tuzla. Besides trying to distribute work reasonable fairly, there are also great efforts made not to duplicate work of other agencies, and not to be used by any of the combatants.

The British financial aid contribution is split roughly 50-50 between ECHO and direct ODA assistance, but the government and British civil service maintains more influence over their own actions than those of the European body. There seems to be a circular motion of contributions with ODA, keen to have an input into how the British contribution via ECHO is spent, referring its own engineers to ECHO (as well as other multi-lateral agencies) as a way of exercising an overview and recycling resources. ODA has also been eager to provide ECHO with assistance in kind, rather than financial contributions, although other Member States are not keen on this idea. It also tries to get outside money for its own projects or aspects of them - including from ECHO. Since establishing its own teams on the ground, the ODA has tended not to fund other reconstruction work (eg water projects of the Red Cross). Besides engineering work, the ODA provides some drivers for the distribution of UNHCR food aid, although the UN deals with the negotiations for safe passage and the assessment of need.[13] ODA also makes grants to the World Food Programme, and has logisticians seconded to the World Health Organisation. ODA refers smaller UK NGO attempts to take food, medicine and clothing to Bosnia Herzegovina to UNHCR and WHO. This line is generally accepted by these groups.[14] It gives some funding to medical charities, and not just UK ones, but

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[13] The division of need as assessed in Sarajevo, for example, has been 23% for Serbs and 77% for Muslims.

[14] There is said to be reasonable coordination of NGOs operating in Bosnia Herzegovina. There is, it seems, more of the disturbing in what is being done by some than in how it is being coordinated. Anecdotal evidence suggests for example that some groups, particularly American evangelicals, are

also for example American ones which cannot get money from USAID.[15] It also provides training, and has sent small teams of medics to Bosnia Herzegovina.[16]

In summary, ODA is involved in efforts on the ground aimed at sustaining life in spite of the prevailing situation, and laying the ground work for the future mammoth task of reconstruction. With regard to disaster management, however, while they do have someone working on conflict mitigation generally and on other specific situations, no one is working on former Yugoslavia in that context. They perceive a difficulty in trying to handle progress towards a solution within their administrative structure which focuses on practical assistance. However, there does seem to be a prevailing view that money spent on attempts to solve a conflict would save on the necessary disaster funds, and that therefore attempts to mediate the causes of conflict and flight could be an interesting option for exploration, both from a financial point of view in terms of *in situ* assistance, and the standpoint of limiting actual arrivals in the UK and western Europe generally.

Finally, the position of the assistance providers on the question of temporary protection in the UK is that it should be a matter of last resort. The ethos seems to be that assistance should be given to help people stay at or near their homes, rather than helping them in seeking safety slightly further afield, not least because the financial cost of protection in the UK is so much greater than the cost of 'protection' *in situ*, although the quality and viability of such protection might be questioned.

3a. Historical insight - the UK's reaction to the Hungarian mass outflow of 1956

Austria had the historical experience of receiving a number of mass influxes during the second half of the twentieth century, which gave some background to the reactions there to the influxes from former Yugoslavia in the early 1990s. During

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offering aid with religious ties attached - especially in attempts to convert Muslims without though to the offence this could cause to all sides given the religious background to the conflict.

[15] USAID is apparently concerned with reconciliation projects rather more than with on-going medical needs.

[16] Apparently the system in Yugoslav hospitals had not involved accident and emergency departments, but only direct specialisation, so the hospital staff were not used to a flood of emergencies who needed treating by the first doctors to hand.

the Hungarian crisis of 1956, the United Kingdom played a significant role in assisting Austria with the refugee inflow, and it is therefore interesting to consider the British actions in that situation as a precursor to the UK's protection role in former Yugoslavia.

On 7 November, 1956[17], the UK Government announced, in line with popular sentiment, that it would admit 2,500 of the 10,000 or so Hungarian refugees who were already in Austria, with the British Council for Aid to Refugees [BCAR] (later the British Refugee Council) to make arrangements for reception, maintenance and settlement. The first refugees, selected in Austria by Home Office Immigration officials, arrived in the UK on 17 November, with transportation arranged by the Inter-Governmental Committee for European Migration. On 23 November, in response to the urgent appeals of the Austrian Government, the British Government removed restrictions on the immigration of Hungarians, and from 17 November to 10 December, 11,500 refugees arrived with none of the regular immigration checks being made.[18] Having saturated the accommodation facilities with this large inflow, the United Kingdom, in fact, ordered a temporary halt to the inflow on 11 December 1956.[19] The non-governmental organisations of the day[20] agreed with this suspension to the unlimited influx, and the Home Secretary, Major Lloyd George, announced in Parliament that during the suspension, the British government was considering giving money to Austria for the care of those refugees who would have been resettled. He also responded to fears for security which had been raised as normal immigration and individual asylum procedures had been suspended for Hungarians. Those procedures were dispensed with, he said, to allow speedy help to the refugees and the Austrian government. He showed reluctance to discuss security because it was important that the refugees feel secure themselves, "and

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[17] Almost 36 years to the day therefore separate the announcements of the visa restrictions and 1,000 quota for former Yugoslavs and that of the 2,000 quota, followed by almost unlimited accepted migration, of Hungarians.

[18] In contrast to 11,500 arrivals in one month in 1956, 11,500 acknowledged arrivals of former Yugoslav asylum applicants occurred in the five years from 1990, and the vast majority were, by the end of those five years, still awaiting a decision on their claims.

[19] 'Temporary halt to flow of refugees', The Times, 7 December 1956, p.10. First arrivals were usually sent to army bases, where they were cared for by army staff, the soldiers' wives and the Red Cross. 'Army's welcome for refugees', The Times, 7 December 1956, p.7.

[20] The Red Cross and the British Council for Aid to Refugees.

realise that at last they had reached a free country."[21]

Meanwhile, the National Farmers Union was being used by 300 farmers to offer homes and jobs to Hungarian agricultural workers and the National Coal Board had recruited 3,561 refugees directly from Austria for mining jobs in Yorkshire.[22] An additional 630 refugees were recruited by the Coal Board (all with the government's approval) within the UK, however, due to the opposition of local branches of the National Union of Mineworkers (the National Union itself encouraged the placement of these refugee workers) only 821 of the recruits actually had jobs in the mining industry by 1958, and 3,000 of them had in fact, after receiving language and other training from the Coal Board, found employment elsewhere.[23]

In January 1957, immigration resumed - with 5,000 places offered to replace 5,000 refugees who had been resettled to Canada. Beyond April 1957 only individual cases, travelling on visas, were admitted, many for family reunification purposes. Up to December 1957, over 21,000 Hungarian refugees arrived in the UK, of whom 5,711 had been resettled and 1,161 had returned either to Austria or Hungary or other East European states.

Table 10.3 ***Hungarian Arrivals in the UK (1956-1957)***

Individual visas	National Coal Board Scheme	Bulk Schemes	TOTAL
1,242	3,561	16,648	**21,451**

Table 10.4 ***Hungarian Departures from the UK (1957)***

To Canada	To other destinations (eg Australia, US)	Return to Austria, Hungary and East Europe	TOTAL
5,178	533	1,161	**6,872**

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[21] 'Events in Hungary: MPs anxious for debate', The Times, 14 December 1956, p.4. Both speeches were reportedly met with cheers from the House, and the Home Secretary also commented that as a country, Britain had no need to be ashamed of what had been done to date. Compare this with the 1992 Home Secretary, Kenneth Clarke's words: "It is now necessary for the United Kingdom to ... control the process of admission and concentrate our efforts on the needy" (ie on the limited quota).

[22] 'Farming notes and comments: to aid refugees', The Times, 10 December 1956, p.2, and 12 December p.6.

[23] 'Refugees in Britain', PEP, (1958) pp.25-26.

Table 10.5 ***Situation of Hungarians in the UK (1957)***

Settled (Employed and Housed)	Under National Coal Board Training Scheme	Unemployed	TOTAL
13,000 - 13,500	357	617 (1,500 if include dependents and unaccompanied minors)	**14,579**

[Source: 'Refugees in Britain']

The BCAR was a voluntary organisation in which a special Hungarian Department was set up to cope with this influx. The Home Secretary had general oversight of the organisation, and acted as its liaison with Parliament. He seconded a number of civil servants to assist in staffing the Hungarian Department. The bulk of the funding for the Hungarian operation came from a Lord Mayor of London's National Hungarian and Central European Relief Fund, set up on 9 November, 1956, only two days after the initial announcement concerning refugee reception was made. The fund's target of £2 million was reached by the end of 1956, and an additional £600,000 was raised in the following year. 60% of the Fund was used in the UK and 40% for assistance in other countries, notably Austria. £1 million of it was allocated directly to BCAR for reception and maintenance purposes, and a special grant was made to allow professionals such as doctors and dentists to receive training allowing them to practice in the UK. Housing was initially offered in army barracks, and later in a single reception centre with 5,000 places at Hednesford Camp in Staffordshire. Later large buildings were used to take in several hundred refugees. Eventually, due to a "strong determination not to be left with thousands of refugees who had become used to life in hostels, and unwilling, or even psychologically unable to face life outside the sheltering walls"[24] and in spite of needing to consider the Hungarians in only second place to the British families who had been awaiting housing for years, individual housing was found, by the end of 1957, for all but the one and a half thousand most difficult cases, who remained in hostels. The BCAR's 1956-7 Annual Report said that its housing policy, in agreement with the Home Office was that refugees should be moved as quickly as

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[24] 'Refugees in Britain', op.cit., p.20.

possible into private accommodation

> where they could become part of the local community. It was felt that rapid integration of the refugees into the economy of this country could only be achieved by enabling them to start an independent new life amongst British people and by avoiding the concentration of large groups of Hungarians in any one area.[25]

This brief historical interlude has highlighted a large difference in the handling of two mass outflow situations. There are great variations in the numbers accepted or acceptable, and in financial assistance in proportional terms. The nature of the two situations must be said to be strongly influenced by non-humanitarian factors. The political, economic and employment climates in the United Kingdom of the 1950s and 1990s differ greatly, although the housing problem may have similarities. Politically, at the height of the Cold War, and following a war in which the lack of protection for refugees could be seen as a contributory factor to the high number of genocidal deaths, it is perhaps not surprising that there was an openness to refugees fleeing an Eastern Bloc state under Soviet repression. Economically, with reconstruction and rehabilitation after the Second World War under way in the UK, as in the rest of Western Europe, there was a need for a strong labour force. So the policy of admission, and permission for unlimited stay for refugees in 1956-7 is perhaps understandable, especially given the additional factor that resettlement opportunities in Canada, Australia and the US were high, and the solidarity boost given to sharing the burden of fellow Western states. The question really is why, after the lessons of the Second World War, more protection could not be offered to those facing post Cold War genocidal regimes.

4. Centres and integration

As noted above, the original quota for 1,000 cases, plus the later addition of 500 place in response to UNHCR July 1995 appeal, involves the reception of arrivals in centres. People on the Temporary Protection Programme spend their first two or three months in the UK in these establishments, which are organised by the

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[25] Cited in 'Refugees in Britain', op.cit., p.23.

British Refugee Council via its coordination body for this programme, the Bosnia Project, and funded by the Home Office.

The Bosnia Project is the lead agency for reception of Bosnians in the UK. Other agencies involved are the Red Cross, Refugee Action (Derby) and the Scottish Refugee Council. Centres were used in seven areas of the United Kingdom, some of which had been used for previous mass arrivals, in particular the Vietnamese. A centre in Derby still housed some Vietnamese before receiving new comers on the 1,000 quota. Having been the last centre to remain open from the initial programme, it was also in line to be the first to accept arrivals on the 500 quota in September 1995. Significant government funding is accorded to the project, for example in 1995 the Bosnia Project will receive £2.5 million for the new 500 quota. This will enable the Refugee Council to do things which will, it hopes, in the long term benefit other refugee categories too. On leaving centres the Bosnians are (paradoxically considering their temporary status) found permanent housing in the area around the centre, and their progress in establishing their new lives is assisted by 'Mid-Term Support Teams'. These teams consist of two development workers who liaise with national and local service providers. Their own services include a Serbo-Croat newsletter and helping in the organisation of community groups.

The establishment of the programme began with real negotiations, and the Home Office selected the agencies to be involved. It chose the British Refugee Council, the Scottish Refugee Council and surprisingly the Red Cross, which had not been involved in more recent work, although (as seen above) it was involved, together with the British Refugee Council's predecessor, BCAR, in the reception of Hungarian refugees. Suddenly there was competition for money between the agencies. There was concern, inspired by experience of the Vietnamese case, that having two agencies working on one programme would prove difficult. Eventually it was decided that the Refugee Council would coordinate the work.[26]

The Bosnia Project advocated having a quota, although it did not push for only 1,000. However, it has found one advantage of this limitation to be that reasonable housing can be provided for all. It also had no influence over the family reunification criteria, which in fact it felt were too tight to reflect the nature of the

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[26] In fact all the relationships involved between agencies and with the Home Office are said to have been good - although beyond operational terms, there is confusion and disarray perceived on the Home Office side.by NGO workers.

Bosnian family - so the quota has in practice often been used to count father, grandfather and uncle each as principals plus all their dependent, immediate families.

The idea of central management of a project coordinated by agencies and volunteers, rather than central or local government, dealing with the settlement of refugees was one of the key points advocated in a 1985 Home Office report.[27] Another conclusion of that report was that community based, clustered resettlement was one of the few widely relevant findings of the report's author's analysis of the wide but unsystematic and largely anecdotal research done in the field at that time. Creating clusters of refugees would, the report claimed, recreate the important social world lost as a result of displacement, help on the mental health level through offering culturally appropriate support, provide a framework within which refugees could help themselves, assist in adjustment, cause less need for government services and benefits in the long term, and allow cultural and religious connections to be maintained. Among other lessons of past scenarios, the findings of this report appear to have had some effects.

Where the Bosnia Project sees itself as having been successful is in its own advocacy of 'cluster areas', with post-reception housing near the reception facilities, offering mid-term support and development, and having permanent housing arranged through negotiations with housing associations, and not taking places from the homeless. With the Vietnamese, and previous refugee groups, there had been a scattering or dispersal, partly to avoid concentration, partly to encourage assimilation, with many drifting towards London or other major centres after a while, where minority communities established themselves. The Home Office found dispersal problematic for the difficulties it presented in offering effective mid-term support and interpreting facilities, and having decided on the clustering process left the agency to decide which cities would be most suitable, according to factors such as existing agency facilities and relations with local landlords. Where the project sees itself as unsuccessful is in not persuading the government to give permanent places.

The 1985 Home office report also endorsed the involvement as project

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[27] Field, Simon, 'Resettling Refugees: the lessons of research', Home Office Research Study 87: A Home Office Research and Planning Unit Report, (London: HMSO 1985).

workers of members of the same ethnic group as the refugees, who had perhaps been living in the host country for a longer period of time, and would be both bi-lingual and bi-cultural. The Bosnia Project has indeed been largely staffed by former Yugoslavs, and sees the use by other states of workers from the host community to deal with refugee issues as problematic. The British agency sees this as separatism - dividing the refugees from the wider community - whereas they see their own system as mixing groups from the grass roots level. One point on which they are adamant is that there is no national strategy of integration, nor any aim for it, and that there is no desire to make people British. They want viable Bosnian communities which can live alongside other communities - with no assimilation - and 'integration' is like a bad word.

The two stream system for former Yugoslavs in the UK means that there are differences in the rights and entitlements of those on the Temporary Protection Programme compared to those who receive regular Exceptional Leave to Remain and those who are still classed as asylum seekers while awaiting the processing of their applications. There is also the significant difference of there being reception facilities for persons arriving on the quota Programme while independent arrivals receive little or no support from the government or Refugee Council, and are scattered throughout the UK, although many do gather in London. These non-programme people from Bosnia Herzegovina can and do become very isolated and vulnerable, with no guidance and support, and no status as they wait years for their applications to be processed.[28]

The position on the Temporary Protection Programme is more favourable than traditional ELR, but does not give full Convention rights. Refugee status holders have all the employment and education rights and benefits of British citizens. Those with ELR have similar employment and education rights, but unlike refugee status holders do not have a Convention travel document. If they do not have their own passport they get a travel document from the UK which confers no status. TPP people get social security benefits, generally on the same level as UK nationals. ELR holders get only 90% of income support, but the full amount of everything else. The special arrangements are really in having reception centres and their

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[28] The Refugee Council and Bosnia Project are clearly aware of this distinction between the two categories, but unable to offer anything like the same level of assistance to non-programme arrivals due to a lack of funding. See the Bosnia Project Information Pack (London: Refugee Council) [mimeo].

support.

The biggest differences between the two strands of ELR centre on family reunification. Asylum seekers cannot be joined by their families, ELR holders can be joined by them after 4 years and TPP people have family reunification instantly. There is permission to work with no restrictions. School age children get schooling, university is possible in accordance with university regulations, which include a requirement for three years residence in the UK before fees will be reduced to Home rather than Overseas levels - a threefold difference. There is no specific targeted vocational training. On ELR after 7 years one is entitled to settlement - ie permanent residence, with no further immigration controls. (ELR is given in periods of 1 then 3 then 3 years.) The Temporary Protection Programme was originally for six months, then for a year. The intention is to give three years next time, but there is no settlement schedule.

If a person has ELR but wants recognition as a refugee, he or she can apply, but has to give up the ELR status and become an asylum-seeker. It is not possible to have one status and apply for another. Anyone can apply for asylum or ELR - it is not targeted, and thus no discrimination in having the programme is perceived. ELR is intended as a safety net for people who do not qualify for Convention status, but whose protection need is acknowledged for humanitarian reasons. However, the efficiency of this safety net - providing as it could a guarantee of security for the *de facto* refugee and an honouring of international obligations by the British government, has to be questioned in the light of the dramatic statistical changes in its according over the early 1990s as seen above.

5. Return

While some of the ODA's projects may verge on reconstruction, there is no real discussion or contingency planning on return in UK policy making circles. It was originally envisaged that people on the programme would be in the UK for only a short stay, but the general feeling of policy makers and administrators seems to be that the prospects of return are becoming more and more remote. The UK still feels committed to return, but is starting to seriously consider settlement as an eventual outcome.

IOM is responsible for assisting in the return of medevacs, which takes place on their return to good health. There are no arrangements for other categories and the prevailing view is that when the time to return comes, UNHCR must deal with it. That would also be the moment when, as in other states referred to above, the Foreign Office would once more become directly involved in negotiations and planning.

6. EU: coordination and opinion of other member states, burden sharing

Officially there is no desire in the UK to see a formally established mechanism of temporary protection, although it is privately acknowledged by people interviewed that at some point a decision on this may need to be made, although with the general climate of perceived opposition to refugee and migrant influxes, and the search for benefits from the situation rather than for awareness of human tragedy, it is unclear what the outcome of any debate on the issue may be.

The UK claims to favour a flexible approach, with new policies evolving as a crisis emerges, pragmatically responding to the particular features of a given crisis with different approaches and emphases. It sees itself as having been able to do this in the former Yugoslav case by adapting the policy of exceptional leave to remain, which being a policy rather than fixed legislation is readily adaptable. Temporary protection policies and programmes more broadly are generally held to be too new to say whether there could be a common position, and to be dealt with so differently in each Member State of the European Union that harmonisation, even if desirable, would be very difficult. The politically pragmatic position is held to be that there will not be a regionally mechanism for this type of protection. The altruistic position is rather that there should be, even if it would not happen. The position with regard to the UK's view of itself in relation to other states seems to be that it occupies a middle ground, and while intending no changes itself, it hopes others which are more restrictive might liberalise to catch up.

Meanwhile, opposed to burden-sharing programmes generally, and specifically against the German Presidency's plans at the EU in late 1994, the UK maintains a confidence at having played its part in former Yugoslavia by having

spent more than £271 million in aid there, whether bi-laterally or via the EU, and being third in the hierarchy of donors behind the US and Japan. What the British officials see as the problem is that the government chooses not the shout about what it has done. Internationally, Britain is rather more perceived to shout loudly about exaggerated claims of its great role on the refugee and protection issue.

The safe third country rule is applied by the UK, but, it is claimed, less rigorously than in other cases, especially if people have relatives already legally resident in the UK. Officials spoken to estimate that 95% of safe countries passed through are EU Member States. Before returning people to a safe third country, enquiries are made concerning refoulement etc, including taking Amnesty and UNHCR reports into account.

Having held the Presidency of the Council of Ministers in late 1992 when the Edinburgh Conclusions concerning protection for vulnerable persons from former Yugoslavia were reached, the UK claims to feel it is a shame that measures were not taken further. However, it is also felt that the UK has done what it said it would, that is to take in anyone UNHCR puts forward, consider all applications, and not return people.

Conclusion

In the UK, the entire approach to protection for people from Bosnia Herzegovina is policy based, with no legislation in place on any of the Exceptional Leave to Remain or Programme provisions.

If one takes temporary protection in the UK to mean only the two quota schemes of people on the Temporary Protection Programme, then one can see that the policy of the Home Office is certainly focused on limiting the number of arrivals. For this limited number, the reception, housing and financial benefits provisions must be said to be very reasonable by the standards of the cases under analysis here. The biggest question mark must hang over why it is that the flexibility of the ELR policy had to bend in the direction of according no credits towards eventual settlement as an outcome of this period of temporary protection, but rather focused on a return which the authorities from the beginning expressed scepticism about.

If one moves further to see short-term protection of people from Bosnia Herzegovina as including all those who arrive, then it is clear from the limited number of decisions made over claims that the real position for most is limited protection as an asylum seeker, with no actual status whatsoever. Being accorded ELR would actually give a relatively high standard of entitlements. British policy towards integrating immigrants is also clearly demonstrated, via this analysis of the position of the majority of people from Bosnia Herzegovina, to be one of individuals being left to 'sink or swim'. For a certain category of independent person this approach must surely be very effective. However, one cannot help wondering if this is a useful policy approach towards people who may very likely be deeply traumatised by the experiences of moving to a new country, climate and culture, and by the terrible events of war and ethnic cleansing in their homeland, which they may have experienced, and which they see daily on their television screens in a place they know, feel attached to, and where they have in all likelihood left relatives and friends behind.

The UK's policy in this area appears to be confusing to the implementors, and to commentators, and is probably also confusing to many of the recipients of the limited protection of asylum seekers in the UK.

Chapter 10

PROVISIONAL PROTECTION IN THE NETHERLANDS

1. The situation in summer 1995

As defined by Section 12b of the New Dutch Aliens Act of February 1994, VVTV status (*Voorwaardelijke Vergunning Tot Verblijf* - literally 'Provisional Permission to Remain') may be awarded to two categories of aliens, described as displaced persons and tolerated persons. 'Displaced persons' here referring to "persons arriving as a result of massive influx and for whom it would not be feasible to have a thorough interview"[1] covers, according to the government's use of the legislation up to July 1995, only persons from Bosnia Herzegovina. 'Tolerated persons' are generally those who have not been accepted as refugees in the first instance, and have not been given a humanitarian status, but who, nonetheless cannot be returned to their country of origin.

For the displaced persons category, which is the one of concern in this study, people are interviewed briefly to ascertain proof of nationality, and that a safe third country, in which protection was or could have been sought, was not transited.[2] VVTV is then granted instantly.[3] VVTV is renewed annually for a period of up to three years. In the meantime, a change of circumstances in the country of origin could permit the Justice Minister to decide to withdraw the status on a general basis, at which point the asylum requests which resulted in a judgement of VVTV being

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[1] UNHCR, Survey on Temporary Protection, (Geneva 18 March 1994).

[2] The Dutch Safe third countries Bill was passed on February 8 and implemented on 21 April 1995, in order to line up with the implementation of the Schengen Accords. Schengen makes it easier to implement safe third country rules among the members, and does not make movement for residence and protection easier, as the responsibility still lies with the first host state which processes the application. Until the safe third country bill came into force the application for asylum was an application for either protection as a refugee or residence on humanitarian grounds, but it was made as a single application. Since February, an application for asylum can only be made if no safe third country was visited en route. The institution of safe third country bills in most states of the EU has forced numbers down - but it is unlikely that this will be a lasting phenomenon.

[3] For tolerated persons VVTV is granted only after an asylum application has been rejected, and if no new facts or circumstances have arisen prior to the request for a review.

the appropriate level of protection, and were subsequently postponed, are reactivated, although one report suggests that a simultaneous decision could be taken on withdrawal and on the original asylum request.[4] The distinctive feature of the Dutch VVTV scheme is the gradual accumulation of rights and entitlements over the three year period. If the situation has not altered sufficiently to permit withdrawal of the status and return after three years, the status is converted to one of permanent residence for humanitarian reasons.

2. Before January 1994

It was the rise in the influx of spontaneous Bosnian arrivals in 1992 which prompted the initial political decision in the Netherlands to create an *ad hoc* regulation allowing for the admission and reception of persons from former Yugoslavia who would be permitted to remain on a temporary basis, based on the existing regulations in the old Asylum Act. In addition to the creation of an *ad hoc* regulation, the Netherlands' government sent a mission to Croatia in August 1992 to organise the transporation of groups invited to go to the Netherlands, including ex-detainees, women, children and the sick and injured.

The political thinking of that time held that planning for a period of three to six months would be sufficient, and there seems to have been a desire for experimentation to see what steps were workable in practice. So, largely with the aim of keeping the number of people entering the slow individualised procedures down, a combined scheme with a limited and provisional legal basis was set in motion. Essentially there were two short-term programmes, both known as TROO (*Tijdelijke Regeling Opvang Ontheemden* - Temporary Arrangement for Displaced Persons). The Justice Ministry was responsible for the admission arrangements which went by this name, and the Welfare Ministry for the reception arrangements. This scheme gave recipients a place in a reception centre, or funding for their hosts if they were accommodated with family members or friends. Additional centres specifically for Bosnians were established, at which costs were to be kept at below

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[4] 'The Netherlands', Country report prepared by the Secretariat of the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, (Mimeo, July 1995).

the level of those for regular asylum-seekers.[5] The deadline for the closure of the TROO scheme was originally 1 January 1994, although this was extended to 1 January 1995 when passage of the New Aliens Act, including VVTV status was delayed.

The initial schemes were a response to UNHCR's appeals in August 1992 for temporary protection of persons displaced by the conflict in former Yugoslavia, and were, until 14 April 1993, open to people from all republics, provided that they could not be returned to a safe third country, and that they did not pose a serious threat to public order, peace and national security in the Netherlands.

As the conflict in Bosnia Herzegovina continued into 1993, it was appreciated that this short-term, non-regulated policy was not satisfactory, either for the displaced persons or for the Dutch government and people. Two decisions were therefore taken: the first was to establish in law a scheme for provisional protection and the second to accord Convention or humanitarian status[6] to all those who had entered the Netherlands during 1992 and before 14 April 1993, and applied for asylum. For those who arrived after that date, people from Bosnia Herzegovina would still be covered by the TROO scheme. Other former Yugoslavs had to enter the regular procedures. The granting of 'A' status to the earlier groups was forced both by the provisions of the old Aliens Act and by a speech by the Justice Minister in Parliament announcing that the accordance of Convention Status to persons from Bosnia Herzegovina already in the Netherlands would be the most likely course. It should be noted, however, that many of those who were in Holland had not filed an application specifically because they hoped their stay would be brief, and were treating it as a brief visit to family or friends already in the Netherlands.

Later a Parliamentary decision established an invitation for 1,500 people to go to the Netherlands from Bosnia Herzegovina, with transport arranged, in partial cooperation with UNHCR.

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[5] This division of centres was one aspect of overall policy which disappeared when the scheme was abolished.

[6] The attraction of Convention Refugee status for the displaced persons would be the accompanying travel documents. For people who might wish to remain indefinitely, however, the humanitarian status would ultimately be more attractive, as it does not appear to include a cessation clause. There was a rejection rate of only 10% for asylum seekers who had been covered by TROO.

2. The origins of VVTV, initiation and influences

The creation of a temporary protection policy in the Netherlands, which on an international political level results in the ability to demonstrate a willingness to be involved in protection and to assist neighbouring states, was instigated by UNHCR's requests for such protection to be given to persons fleeing Bosnia Herzegovina. The policy behind the law was the result of the experiences of the first two years of the displacement crisis of former Yugoslavia. Meanwhile, the content of the law, and its most unique feature of graduated integration, appear to have been initially formulated by the Social Affairs Ministry, with the work of policy formulation continued by the Justice and Interior Ministries, and the final execution of the content, in terms of integration facilities and operationalisation after recognition of status is made, coming down, as of 1 July 1995, to the municipal authorities.[7] The NGOs involved in refugee work in the Netherlands had little real impact in the creation of the policy, although they are very much involved in the programmes of care and counselling concerned with its implementation.[8] The political decision to go ahead with legislation on temporary protection was taken in 1993.

The reasoning behind the creation of VVTV for these two categories seems to have been threefold. Firstly, it was felt that, as this was neither the first nor last time a mass influx situation was likely to occur there was a need for regulations. Secondly, there was a sense of needing, after all the *ad hoc* measures which had been developed, to regularise the situation of those persons currently in need of protection for these reasons. Thirdly, there was a need to clarify legal and reception procedures.

While the system of *ad hoc* measures was in place confusion reigned over who bore the major responsibility. The Welfare Ministry was responsible for asylum seekers, but as many of those who had fled Bosnia Herzegovina were not applying for asylum, that Ministry saw the financial support of displaced persons as

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[7] The municipalities are not happy with the situation, and complained particularly about the financial calculations, which in the first reading of the bill reduced their money, although it was restored to former limits later.

[8] It seems that NGOs in the Netherlands had been able to work closely with the government until three or four years ago. Then as the government got more restrictive, the NGOs became more challenging opponents. Now, the cooperation level is again rising.

part of the Social Affairs Ministry's budget. That Ministry therefore became involved in the drafting of the legislation - aiming to keep the social security costs down as it did so, and the new 'Purple Coalition' government which came to power in May 1994 handed responsibility for protection of persons with this status to the Interior Ministry. Responsibility for admission and initial reception have meanwhile been joined (perhaps with the aim of keeping procedures rapid and reception costs therefore down) and accorded to the Justice Ministry.

Although the confusion over responsibilities may have been dissipated by the creation of this law, the political execution of the law is still creating some disorder. While there appear to be no solid reasons for refusing this status to people clearly falling into the two categories defined in the legislation, in its application the government has so far chosen to be rather restrictive, largely to limit the attractiveness of the Netherlands as a haven. The restrictiveness is not so applicable to the case of persons from Bosnia Herzegovina, unless they have passed through a so-called safe third country, although only one third of applicants from Bosnia Herzegovina received VVTV in 1994, while almost half received Convention status. However, 'displaced persons' are defined not by their situation but by their number and the precise definition of how many constitutes a 'massive influx' has not been made. This means that the cases of other large groups of asylum seekers who are not classified as 'displaced persons' are becoming a matter of concern for refugee interest groups. Furthermore persons falling into the category of 'tolerated' in particular are very rarely being accorded this status. This is seen as acting as a potential deterrent to others who may try to reach the Netherlands if they hear that persons of their nationality are easily receiving even a short-term permit to stay, but it is also creating disquiet and causing more accusations of restrictiveness to be made.[9] Additionally, it is leaving people in the procedures, and the asylum policy in the Netherlands is such that after three years as an asylum seeker (itself a

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[9] Suggestions do exist that the relatively low number of persons receiving this status is in part due to lawyers advising clients to appeal against its accordance, in the belief that they could or should receive Convention status, particularly as earlier protection seekers fleeing the same situation in the same country did. These suggestions do not appear unreasonable, and could give further impetus to arguments for the creation of provisions appropriate to mass influx cases arising from particular situations in the country of origin before another crisis occurs. It might be called human nature to try to achieve the best deal possible - and while a precedent exists of the accordance of full refugee status, lawyers and non-governmental groups, as well as protection seekers themselves, may well push for this maximum, whether or not the more limited form of protection offered is in fact sufficient and suitable. This position will be elaborated in Part Four of the current thesis.

minimum level of short-term protection without the security of a residence permit) a claimant is given a humanitarian status. What is more, as applicants who are refused this status quite often also cannot be returned, they are remaining in costly asylum centres.[10]

In the Dutch social security system, no distinction is made between races and nationalities once people, including refugees and legal immigrants have officially entered the system. The difficulty when the Bosnians arrived was that they were asking to stay for only a short period of time, or at least to be able to return, so they did not really want to enter the system fully. The big question for the Social Affairs Ministry was what to do with the Bosnians as, if they allowed them into the system, they risked attracting massive numbers of refugees. But, at the same time, the Bosnians could not, at the other extreme, be put into custody until return became possible. So, it was perceived that a mix would be desirable, allowing those people who were seeking temporary protection for humanitarian reasons to receive short-term asylum, including on the level of financial and employment entitlements, and meaning they should go back once the situation was resolved. In order to limit the scope of the policy, the allowances were kept below social security standards, matching only basic minimum needs. So, for example, there is a lower level of family allowance for children than is the norm. Integration, meanwhile, is, according to the policy, a regulated and gradual process. In the first year there are language and acculturation courses, but no employment is permitted. In the second year, education in the form of vocational training is allowed (aimed more at what people will do if they stay than at what skills they can take back in the case of return), together with permission for temporary work. In the third year normal employment is allowed,[11] and after three years, when a full resident permit is received, full social assistance, and full time employment is permitted.

However, restrictions on refugees are continuing to increase, and the

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[10] Applications for asylum made by those who initially receive VVTV will be dealt with during the three year period of phased integration.

[11] The third year of the scheme has not yet been reached, so while it has, as people entered the second year, become apparent that the temporary work permitted in the second year means agricultural and seasonal employment of about twelve weeks, both the protected persons and NGOs working with them are becoming concerned that the third year full employment entitlement may not really mean an equal opportunity with all Dutch and other nationals in the Netherlands to take up whatever employment ones qualifications and experience would indicate to be possible.

acceptance of certain groups appears to be stronger than that of others because of factors such as differing behaviour, work ethics and language abilities. The basic aim of social welfare policies in the Netherlands is said to be to subdue tensions by keeping everyone on a level, while not letting anyone, Dutch or immigrant, drop into poverty, or significant inequality. In order to improve the chances of integration, there are attempts to increase the chances for employment and education. So, when this "waiting room" idea was proposed, it was broadly accepted. The notion is that asylum seekers are on the threshold; VVTV holders are in the waiting room; residence permit holders and refugees are inside. (The former two categories are not in the social security system, the latter are.) The Social Affairs ministry claims to have come up with this proposal because they were aware of the social security costs on the government. Keeping people in centres costs the central government a lot of money. As VVTV is paid for by the municipalities, through government money and local taxes, it is cheaper, and permission to work in the longer term keeps costs on the government down even more.

If the permit has not been withdrawn, by decision of the Justice Minister based on a change of situation in the country of origin and thus the strong possibility for return, then after three years a full humanitarian status is granted. The practice of phased integration is based on the idea that return will hopefully be possible. It balances the contradictory notions of integration and return, but it is increasingly acknowledged (with a large measure of realism) that for many the system will eventually lead to permanent residence. The position on return and integration is clarified to the people receiving this protection.

There were dual concerns in creating this policy. Firstly, there was an appreciation in the Social Affairs Ministry that if people were kept out of the employment market for too long, then whether they stay in the Netherlands or return to their country of origin, or indeed if they are resettled elsewhere, they may never get back into it. The second concern was of course to not create an attraction for additional large numbers. Furthermore, there was a challenge to watch over the balance in the policy content and an aim to keep the cost of the social security system down, while maintaining the perception in public opinion that welcoming refugees is a good thing. That is to say there was a desire to maintain social acceptance, by amongst other things, keeping the visible and tangible costs down.

As indicated in the preceding paragraph, the need to reduce numbers is held to be one of the main aims, and seems to be a dominant policy in all EU states. Proportionally, the Netherlands has a massive influx to population ratio, especially in cities. However, the question of whether the country is being or feeling overwhelmed is subjective. Public opinion is shifting to view the problem as overwhelming, largely due to press coverage. Articles such as one which appeared in De Volkskrant, showing a very positive example of refugees and asylum seekers living happily and harmoniously in a very upper-middle class community are the exception rather than the rule, as is indeed the Bloemendaal case it describes.[12] Opening asylum centres is becoming very difficult due to local public opposition. Opinion is, however, based on superficial information. At the same time the (right wing) Liberal Party[13] - part of the ruling Purple Coalition is restrictive on asylum policies and popular. It tends to attract headlines with its restrictive proposals and then withdraw its plans.

The political decision to create this law seems to have been both positive and humanitarian. Creating laws to regulate the positions of all concerned in a protection relationship is often seen as a necessary process. The consequences of the laws are often, however, only taken into account when the application of them becomes imminent. The momentum which existed for creating legislation can disappear when it comes to application, particularly as legislation has little or no long-term perspective, but the consequences for the long-term (in terms, for example, of an increase in numbers) frighten politicians (as in their view, the public would be frightened).

The *ad hoc* measures of the early months of the crisis, culminating in the TROO schemes appear to have been flexible, adjustable, and renewable as long as the situation permitted a strong hope for a resolution to the conflict which had caused the displacements. They were pragmatic, and controllable measures. Fixing the measures with a legal basis, with the consequences this could entail, brought about some loss in flexibility, and the scope for control being reduced. If VVTV

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[12] 'Een verdomd grappig contrast: Bloemendaal koestert zijn asielzoekers', ('A jolly good contrast: Bloemendaal appreciates its asylum seekers'), De Volkskrant, (19 April 1995).

[13] The VVD, Volkspartij voor Vrijheid en Democratie (the People's Party for Freedom and Democracy).

status is given, with its fixed programme of integration, including 410 Hfl (£170) per month exclusive of housing, then the consequence which hurts the government and public opinion most is that people can start to integrate and the likelihood of return in diminished. *However*, it is also clear that people cannot be kept in reception centres for lengthy periods. One year is really the absolute maximum, both for the refugees' own mental and physical health, and from the point of view of cost. Also, enormous centres can not be maintained: there were, even in summer 1995, 35,000 people in 80 plus centres.

4. Centres, Rights and Integration

When asylum seekers first arrive in the Netherlands, they go to reception facilities, which are usually of mixed nationalities. Once admissibility has been determined, they are housed in asylum centres, until actual status is determined, or other types of housing becomes available. In the case of persons from Bosnia Herzegovina, who receive an 'F' document,[14] they are to be housed by the municipal authorities, usually in houses rather than large centres. The aim is said to be to move all asylum-seekers and various categories of 'refugees' out of centres as soon as possible, not least because of the tensions which can arise between different national groups as some are perceived to have a greater chance of achieving recognition of their refugeehood than others. However, there are reported cases of people from Bosnia Herzegovina staying in centres for up to two years because of a shortage of housing.

A new law was passed on 1 April 1995, regulating the care provisions to be undertaken by the municipalities for VVTV holders, and this was due to come into effect in July 1995. This law obliges the municipalities to arrange housing for people with VVTV (as they must for persons with the two other statuses of recognition), which is to be offered in kind. The Interior Ministry is to give money to the municipalities to cover housing, amenities and insurance. In addition the holder of VVTV is to receive an allowance, comparable to that of asylum-seekers, which will be adjusted if there is any other source of income.

For the VVTV programme, it is the Interior Ministry which is most

[14] The identity document for VVTV status holders.

concerned with questions of integration. As stated above, the Dutch VVTV scheme has a three year phased programme of integration. It is this step by step approach to involving recipients in the host society which is most criticised by the Dutch NGOs. The major problems with the system are held to be that it does not allow people the freedom to choose where they will live; that people have only limited money[15]; that as yet the restrictions on employment in the third year of the programme have not been clarified, and in the second year it is only seasonal work[16] and that the Municipalities are opposed to the rules because of the administrative difficulties they encounter. The Dutch Refugee Council would like to see persons with VVTV being accorded the full Convention rights - only for a limited period, although that should not be defined at a three year mark, a time setting which is perceived as artificial. Meanwhile, there have been reports that due to increasing signs of 'care dependency' and the perceived risk of marginalisation of VVTV holders, there will be moves towards more rapid integration in terms of education and labour facilities. The 1 April 1995 law includes provisions for allowing twelve weeks of employment during the first year (where previously none was allowed), but it is already anticipated that further changes to the structuring of this system will be made during the months to come.[17] The cost of VVTV for 1995 was estimated to be 75m Hfl (£31.25m).

There is no right to family reunification, and none appears to be planned, in spite of this being the area of Dutch policy and legislation which remains of concern to UNHCR. Persons receiving Convention or humanitarian status do receive an entitlement to reunification for the immediate family.

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[15] Persons over eighteen years of age receive 445 Hfl (£185) per month for food and clothing. Information from persons working closely with those on the VVTV programme indicate that the recipients themselves appreciate receiving this assistance, and feel able to survive with it. The problem really seems to be one for the municipalities who must find the money.

[16] In the case of the VVTV scheme it is the Refugee Council which offers advice and assists with contact making in the search for employment. For other recognised categories it is the Arbeidsbureau (the state operated job centres) which fill this role.

[17] IGC report, op.cit., p.19.

5. Return

One of the aims of the phased integration programme is to facilitate eventual return, the idea being that with people living in regulated housing facilities, and having only limited access to social arrangements such as employment and training, they will be more likely to want to return, and easier to gather together should a repatriation programme be organised. Accounts as to the level of integration and desire to return vary depending on who one speaks to, but while it appears that the desire to return is waning over time, it seems there is still a strong willingness to go back on the part of at least half of the persons from Bosnia Herzegovina in the Netherlands. The question remains as to whether it is gradually deeper integration which is causing the motivation to return to diminish, or the knowledge that the on-going conflict has changed what once was home - meaning that return to the same house and land in the same village and even return to the same area may for many never be a possibility. The experience of the Dutch Refugee Council is that integration does not impede eventual return[18], but rather by upholding self worth, in fact allows a person a greater chance of coming to terms with the distressing circumstances which prompted movement, and potentially offers greater possibilities for successful re-integration and adaptation to the society and country of origin if return does become possible. The government view on this is, however, that if nothing else, limitations on integration at least allow for the logistical operation surrounding eventual deportations, and even basic encouragement and promotion of return, to be handled more smoothly.

As of summer 1995 the question of return for persons from Bosnia Herzegovina did not seem to have been addressed in any realistic framework, as it was seen as an entirely theoretical proposition until the conflict would appear to be nearing a certain end, although a working group of the Justice Ministry was reported to be considering the subject.[19] The general view seems to be though that if return becomes a positive option it will not be forced, will be carried out within a carefully

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[18] See also, Steen, Ann Belinda, 'Refugee Resettlement: Denmark and Britain compared', RPN: Refugee Participation Network, 14 (January 1993).

[19] IGC report, op.cit..

crafted political framework including repatriation agreements with the emerging governments of the region of origin and UNHCR, and offering some *ad hoc*, and non-precedent setting, financial allowance.

6. EU: Coordination and opinion of other Member States: Burden-sharing

The prevalent view in the various ministries seems to be that the Netherlands has, in VVTV, devised a programme which suits its immigration structures and traditions, matches most of the desires of UNHCR[20], and is something to be proud of, and which the other European states might eventually wish to imitate. However, it is generally acknowledged that, while harmonisation on this issue could only happen within the EU framework, it is highly unlikely to occur, at least on a formal basis in the near future.[21] Other states are seen to have been reluctant to move forward, or to have indulged in high profile political gestures rather than making basic policy movements towards a form of limited protection. There is an added feeling that, like themselves, other states are stuck with short-term national policy adaptations in reaction to crises rather than taking a long-term, cooperative view.[22] However, if other neighbouring states do not produce their own temporary protection schemes, the Netherlands may be presented with a situation of increasing numbers - in which case its own relatively liberal stance of the early years of the displacement crisis of former Yugoslavia may have to become more restrictive,

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[20] Family reunification is lacking, and may prove to be the sticking point for the Netherlands were harmonisation of temporary protection rules ever to be envisaged.

[21] Informal harmonisation, through for example adapting national systems in the light of experimental processes which have proved effective in other states, is constantly taking place.

[22] This short-termism also means that states are not looking very deeply at the notion of a comprehensive approach. To a policy maker dealing with on-going crises and the surrounding problems, talk of tackling the root causes of a conflict, and linking the issues of conflict prevention and resolution to the pressing needs of displaced persons arriving at the borders of a perhaps reluctant host state, probably seems rather academic and ivory tower like, with no really tangible solutions for governments to grasp at. However, indirect movements in the direction of preventing or postponing forced migration may well be the result of the increasing importance attached to development issues within Foreign Ministries.

especially as moves towards burden-sharing have so far failed.[23]

Conclusion

The establishment of a legal basis to temporary protection in the Netherlands demonstrated a level of political willingness to address the situation of both the displaced persons and the host society in the face of a mass influx of people seeking protection from a conflict, and through the scope of the law, persons fleeing generalised violence and abuse too. However, the limited implementation of the law from its adoption in January 1994 to summer 1995 shows a political unwillingness to face up to the actual large numbers of a mass influx, in a situation where surrounding states have not gone so far with their legal provisions, and where political forces still try to restrict the number of similar entrants. It might, therefore, be doubtful that the liberality and humanitarianism which led to this law being established will lead to positive policies. It is likely rather that restrictive policy application will lead to a new pragmatism of restriction.

This area of Provisional Residence Permits is the most politicised of a highly politicised field. Policies are constructed, somewhat artificially, to be restrictive, in order to keep the numbers down. There is also, of course, a conflict between domestic and foreign policies. Having a large number of Bosnians in the Netherlands does not particularly influence policies with regard to peace-keeping in Bosnia-Herzegovina. Meanwhile, neither this protection not the numbers of soldiers on the ground influence policies towards the conflict and intervention. The aims are more noble. However, in spite of taking in large numbers, and being prominent on the ground, due to its political smallness, the Netherlands' influence is minimal.[24]

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[23] This failure to agree on burden-sharing within the EU could be seen as an example of the nationalistic and short term approach to asylum questions in the EU, where the sovereignty issue has become such a significant barrier to further political harmonisation, even on issues which clearly effect the rights of all peoples and states concerned.

[24] There appear, however, to have been some tensions with the members of the Contact Group, as the Netherlands is excluded in spite of its huge commitments, both on the ground, and in terms of protection in the Netherlands. In fact it is rarely consulted or informed of developments, although notable, it was briefed on a meeting held at the French embassy in the Hague in late May, a time at which NATO ministers were convening in Nordwijk. This demonstrates the need for diplomacy surrounding every aspect of the Yugoslav crisis. There were additional difficulties over the Netherlands' role as the anger of the Serbs had been provoked in 1991, due to a perception of a pro-Croatian stance in the handling of the early stages of the crisis when the Netherlands held the Presidency of the Council of

The most notable feature of the Dutch system, beyond the fact of having legislated for future mass influx situations, lies in the progressive phasing of integration, which appears to still be the subject of adaptation as the programme evolves. This system reflects a point of view which seems to say that while return is the aim, it might not happen, but in the meantime, over a reasonable period, there is no need for either the protected or the hosts to rush in either direction, and the necessary details of integration strategies can be gradually developed. This is a system which may prove controversial for those who imagine refugees can stand up for themselves instantly, or need to be able to work fully immediately. However, it pragmatically acknowledges both the need for a period of stability and the need of the host society to feel that their own employment opportunities are not threatened through the humanitarian act of protecting those in need. As yet, such a progressive programme is untested, and the end result of the three year 'waiting room' period remains to be seen and researched at a later date.

Ministers.

CONCLUSION

As a result of calls for temporary protection for people fleeing former Yugoslavia, systems as numerous as the states of Europe have been developed, some based on evolving *ad hoc* policy arrangements, some entering into legislation as fixed regulations to be used as a basis for future similar protection if the need arises, maintaining some sense of flexibility within the apparent rigidity of legislation. There has been no pattern in this development. As this study has shown, even the dates of policy and legislative developments have varied widely.[1] Beyond the status of the regulations, the primary differences in temporary protection schemes lie in two categories: definitional and implementational. In the first category differences centre on who they are for (for example, they may be for all those who flee the crisis or only particularly vulnerable groups; only one ethnic group or all); how long they will endure; what the outcome will be; whether settlement is considered as a strong possibility and planned for or only return is considered as a viable or desirable outcome. In the second category differences centre on the desired levels of integration, practised through access to employment, housing and education, and on the level of dependent care as opposed to independence from the protecting state. All of the differences between the schemes reflect, to some extent, domestic political, cultural and societal norms. Based on the evidence of these case studies and the nature of the apparent aims of European political integration, the conclusion of this Part will be formulated in terms of how Europe could build on the various mechanisms created, in a way which would benefit Europe, the separate states and the protected individuals.

Within the wider scheme of European immigration policies and the process of harmonisation within the EU, it is perhaps natural to imagine deeper cooperation on temporary protection than has so far been the case. Further coordination would also be to the advantage of the protected, particularly if it included the extension and admission of freedom of movement within the Union to such third country nationals.

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[1] See Appendix One.

The question is, if harmonisation were to be attempted, how should it proceed? The attempted harmonisation of the understanding of Article 1a of the 1951 Convention Relating to the Status of Refugees was of long duration. Consideration should be given to finding a means to cooperate on the essential, where there is already a certain amount of agreement. Other features which, while important, can be very well dealt with at the national level could be left for later treatment. All of the states dealt with in this limited study, and others in western Europe, have some form of admission for large groups fleeing conflict as a result of their handling of the displacements in Bosnia Herzegovina. Coordination could therefore begin on the level of admission.

The nature of Europe-wide temporary protection might most successfully be found in a multi-level approach, satisfying the many facets of the protection debate. A European level policy could determine that, by agreement of the ministers responsible for immigration, the EU would acknowledge that a given conflict (in a state close to the EU) required short-term protection away from the country of origin for a number of its victims. This would allow states collectively to offer humanitarian protection in a way which acknowledges normative concerns built up in the course of the twentieth century over respect for human and minority rights. Having established that protection is necessary, each state could offer entitlements beyond the right to life in the way considered most appropriate for its own society, but meeting certain minimum requirements. Flexibility in precise implementation of the integration and day to day living aspects of temporary protection is necessary, even if a Europe-wide basis to the concept could be established. This adaptability is needed to reflect cultural and societal variations, as well as in order to be adaptable to those individuals seeking protection within the group of displaced persons. The possibility should not be excluded that smaller groupings of states might cooperate formally or informally on reception and integration facilities in the light of their own experiences and 'experimentation' to date. Leaving the details of protection to state level politics would acknowledge the debate over sovereign control of membership (in terms of quality not quantity). Finally, the ability for the protected person to move between Member States after an initial period, when the need for pure protection is overtaken by the need to live a viable existence, in order to find the culturally based system which most suits his or her needs would acknowledge the

broader interpretation of freedom of movement for all in Europe, not just citizens of the EU.

Such a system may give rise to fears of 'protection shopping'. The existence of disparate mechanisms, offering various advantages to different types of people could be said already to open up that possibility, however. Without wishing to be facetious over a very serious subject, one could imagine that presented with the 'catalogue' of temporary protection systems, a person fleeing a conflict might well choose to land in the state which suits him or her the best.[2] An active self-starting person, given a helicopter out of the besieged capital of a war-torn land, might well choose to head to the UK and use previously acquired skills to set up a business.[3] A person left alone after the deaths of family members and feeling helpless when given the same chance to escape, might well choose to head to somewhere like the Netherlands, where there would be the opportunity for initial dependency followed by a chance to stand alone when confidence had returned. Someone wishing to stay close to a central or east European state of origin to increase the chances of return, and in order to be able to take the family along might well head to Austria.

Establishing the need for protection by decision of the Council of Ministers would avoid increased attractiveness of Member States for temporary protection purposes, particularly as the people to whom such protection would be provided would be defined as a large group fleeing a particular situation. The fears of 'protection-shopping', to which freedom of movement between states beyond an initial period might give rise, could or should lead to a desire to coordinate entitlements and facilities so that in fact permitting free movement for the temporarily protected would be just like free movement of EU citizens. Some would move, some would stay, and some sort of natural balance would ensue.

In spite of acknowledgement of a need for cooperation on immigration and asylum policies, the movements from Bosnia Herzegovina have demonstrated further state-centred developments of policy and legislation with no harmonisation across the

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[2] The above four chapters formed an analysis of temporary protection mechanisms in four of the thirty states whose approach to the outflow of people from Bosnia Herzegovina are outlined in the UNHCR 'Survey on the implementation of temporary protection' of 8 March 1995. Surveys such as those produced by UNHCR, or indeed the above chapters, could almost be viewed as a catalogue of the available options, from which prospective clients might determine where their chances look best.

[3] A person fleeing in this way, even in a theoretical scenario, would need air transport to avoid the safe third country rulings.

EU. If immigration and asylum policy coordination is to be achieved, there is now another area in which work needs to be done, whereas a rapid round of crisis meetings in 1992 might have resulted in coordination of approaches to admission of certain categories of those in need of protection. Non-cooperation has resulted in an array of mechanisms, and confusion within and about domestic systems. Europe should acknowledge the need to develop temporary protection as the next phase of evolution of refugee protection, and work on the essentials of coordination within the scope of on-going work. However, there will probably be no political basis for developing the concept of temporary protection further until there is another crisis. The engine of protection developments tends only to roll at the time of instant need. In the former Yugoslav case, the engines of the European states have been travelling in different gears, going at different speeds and following different routes. If this image is combined with the notion of harmonised definitions together with nationally appropriate conditions, then the European states would be moving together, in terms of pace, along different routes, but towards a common goal.

Another mass migration provoking situation in or around Europe might not happen. Waiting until it does to develop the basics of appropriate protection mechanisms would be to negate all the work done on refugee protection and European asylum, humanitarian and human and minority rights development throughout the twentieth century. It must be hoped that further crises do not occur: in the interests of both refugees and the states concerned, Europe should not wait until it faces another regional refugee crisis to find the political will to develop its ability to protect.

CONCLUSION

CONCLUSION

The thesis of this study is that the evolution of refugee protection in Europe should continue, and that its progress should involve the search for a mechanism of short-term protection for those forced to flee conflict. As was suggested in the Introduction, many of the displacement situations of the post-Cold War period may be best dealt with by the granting of temporary protection, in line with the minimum protection guaranteed by nonrefoulement, and in keeping with the notion of burden sharing. The suggestion is also that a mechanism of short-term protection developed in Europe should take into account the cause of flight and the nature of European cooperation and coordination. Temporary protection itself was seen in the 1980s as emerging at the intersection of refugee law, human rights law and humanitarian practise.[1] As has been demonstrated in this thesis, such a protective mechanism also has the potential of mediating the claims of human rights and state sovereignty. This feature gives the development of such a mechanism in a regional context a particular edge in the sphere of international relations of the 1990s, in terms of practical decision-making and of the academic debate. In the practical field thoughts on the meaning of sovereignty are being redressed by the notions of according some traditional domestic powers to supra-national or collective bodies, primarily in the EU context. The concept of sovereignty is also being challenged by the questioning of the nature of statehood in the post Cold War world, in particular with the rise in nationalism and desires for self-determination by seemingly ever smaller units. On the academic front, more traditional theories on state power and cooperation are being challenged by critical theories, including a rise in the credence attached to notions of rights and justice.

The most prominent cause of flight for European refugees in the decade following the close of the Cold War is envisaged to be conflict brought about by ethnic tensions as the nature of statehood and the boundaries marking the entities of the continent are developed. In the conflicts and tensions which may arise some

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[1] See Perluss, Deborah and Joan F. Hartman, 'Temporary Protection: Emergence of a customary norm', Virginia Journal of International Law, (Spring 1986) p.533.

people will seek a refuge. One duty of states towards their neighbours could be said to be the protection of their citizens so that they will not choose or be force to migrate. However, one lesson of the Yugoslav conflict is that displacement may, in this process, be not only a result of conflict but the very aim of the warring parties. When people seek a refuge they will thrust themselves, or will be thrust, into the sphere of attention of international politics. In order to satisfy the political demands of domestic electorates, regional partners and international expectations and obligations the states in which refuge is sought will turn to the history of refugee protection for a basis for their actions and the development of their approach.

In Chapter 1 it was made clear that the documents defining refugees have been developed over the course of the twentieth century in a manner consistent with the circumstances of the period. There have been times when the causes of flight dictated the terms of reference, and times when internal politics and international relations held sway. There have been times of wide acceptance of the humanitarian necessity of protection and times of restrictiveness, where considerations of state interest and power have over-ridden broader humanitarianism. In the 1990s there are at least three paths which states could choose to follow. They could stick with the Convention definition, with its basis in individualised persecution, and maintain that strict interpretation, restricting entry to their territories for those in flight. They could, alternatively, adopt a liberal interpretation of the Convention definition and associated practices, and decide it was politically appropriate to accept more people as refugees and offer them the full panoply of entitlements and security of asylum. The third alternative would be to maintain a relatively strict adherence to the terms of the Convention, while adopting a more widespread practice of temporary protection and burden-sharing for regional crises based on regional concerns. Whatever the legal stance taken, from a political angle, states cannot ignore those forced to flee by war, who fall into the victim category of refugee.

In each alternative the question of what protection means has to be addressed. The first option of restricted interpretation would, for example, limit numbers, and perhaps enable governments to offer the full entitlements of their citizens to the individuals accepted into their society. The second alternative, respecting all the rights and entitlements for large numbers of refugees, would satisfy all human rights claims and create an ideal, or idealistic, situation. The third possibility would open

up the chance to protect lives, with somewhat limited possibilities for personal development beyond survival in the first instance, but allow a position of satisfaction of all claims to the protection of life, and international commitments. Chapter 2 demonstrated that the protection of life is paramount. The opportunity to survive precedes the nuancing of survival in private homes rather than a hostel or collective centre situation, with the dignity of employment opportunities contrasted to the dependency of social support and charity. Over time, however, that dignity needs to be achievable.

Whichever path European states would adopt would be largely dependent on the on-going process of regional political integration. The coordination of policies in a border-restriction free European entity has, in its early stages, demonstrated a high capacity for restrictive thinking. The opportunity to re-think asylum and protection policies in a new supra-national context could, however, provide the occasion for imaginative policy development to create protection mechanisms for those hitherto excluded or marginalised. Concurrently, the broadening of democracy, high human rights standards and the potential for a spread of security in the region in the long term could generate possibilities for wider cooperation on these issues, and as minority and ethnic tensions could with care and close attention be soothed, west European states could face a situation of reduced chances of conflict in their mist, and therefore the occasion to develop the effective protection of those who are forced to flee the exceptional crises.

Deciding on a joint path could be difficult, but the most pressing concern often seems to centre more on the terms of entry than on post-admission conditions. In the short-term, therefore, the process of collective policy formulation could focus on admission requirements. This would leave open the possibility for domestic formulation of policies concerning the constituent elements of protection, with sub-European level cooperation between immediate neighbours gradually spreading, limiting the chances of 'protection-shopping'.

In considering the type of protection to be offered by European states, the developing a regional approach must also assess a range of policy alternatives which could allow for a reduction in the possibilities of crises occurring, different protection options and must allow for a range of alternative ultimate solutions.

A wide range of alternatives for conflict prevention (as distinct from flight

prevention) could be tried. The OSCE High Commissioner on National Minorities is operating in some countries to identify potential areas of tension between state governments and minorities at an early stage (for example minority language education opportunities). Such attempts at preventing the escalation of tensions into potential conflicts, spotting tensions and dissolving them with impartiality before they become strong, and giving early warning that conflict could happen are very useful. However, such root cause measures cannot be relied upon to prevent every potential displacement provoking situation. It is therefore essential that protection options be maintained and developed. To phrase this slightly differently, a primary state interest in the context of humanitarian affairs may be to avoid and prevent armed conflict whenever possible. However, conflict between varying 'interests', for example between the desire of minorities for secession or autonomy and the will of the majority to maintain full control over a territory, as well as the breakdown of state structures, cannot be avoided on every occasion. In instances where conflict does escalate, and people do flee, it is in the interests of the states of the region to calmly deal with the human situation, maintaining the legal rights of both states and people, and enacting reasonable protection measures allowing the continuance of life, with all the rights and duties that entails.

Various means of protection within the country of origin have been considered and some attempted, in various regions of the world, during the 1980s and '90s. For those whose movement out of the country of origin is prevented, whether by the policies of neighbouring states, their own state closing its borders or due to geographical and physical considerations, there is no instrument of protection as such. Attempts at 'safe areas' have not been successful whereever they have been attempted. Without acceptable developments in the organisational approach and mandate of international refugee and humanitarian agencies and without extensive re-consideration of the implications of state sovereignty and territorial integrity, it is unlikely that any successful internal protection arrangements could be made. Protection outside the country of origin, alongside assistance for those who cannot or choose not to move therefore must be developed. This development needs to include removing the element of prevention of onward movement due to the policies of regional neighbours from the reasons for which forced migrants remain internally displaced persons and do not become refugees.

The regional development of temporary protection offers strong potential as a tool for managing conflict provoked migration scenarios. However, the enactment of such an approach, including the initial stages of policy and legislative formulation, and the faith in the ability to cope which would be necessary, require much courage by states, their policy makers and citizens. Above all, the development of short-term protection policies, with a somewhat limited focus in terms of the circumstances which call for them and the elements of protection granted, must not impinge on the accordance of asylum in the more permanent and individualised sense which it has achieved. In fact, broadening the protective approach and removing the focus on asylum for large groups should be accompanied by, or have the effect of, strengthening asylum as a full protection for those whose chance of protection in the country of origin, as an individual, is very limited unless circumstances change dramatically. Asylum should also not be excluded for those whose initial movement is part of a larger exodus.

The mistake of seeing protection as a solution should also not be made. Protection is a step leading to a solution. The nature of asylum during the Cold War developed to make it a political tool, rather than a neutral practice. Asylum also became linked to integration, particularly in western Europe. As other solutions (return and resettlement) were largely excluded, asylum came to mean integration, rather than being seen as a step on the way to integration. Temporary protection could be understood as a return to the origins of asylum. The terminology needs to change because the practice has changed. Even in the 1951 Convention refugee protection (asylum) is seen as a situation which can cease when return is possible. Instead, the political circumstances of the Cold War meant that asylum extended into integration without cessation. Temporary protection should be seen as a phase in state-individual and state-state relations which ceases once return becomes possible, once resettlement with permanent integration is offered, or once integration in the protective state becomes the only viable medium- to long-term alternative because a conflict is enduring. Many highlight return as the only successful solution to temporary protection. However, states need to have the courage and tools for practical negotiation and understanding to appreciate that permanent settlement and resettlement are not a failure of temporary protection, but rather a successful outcome of such policies. The aim of protection is to maintain the right to life. If

states aim to maintain the right to live in the country of origin then they need to formulate accompanying policies of conflict prevention and resolution. However, it is only logical to say that if people are to have the chance to live their lives in their country of origin they must be protected from death as innocent victims of a conflict, just as individuals are offered asylum as protection from persecution in their state of origin. Mechanisms of temporary protection permit the chance of return to safety. However return must not be seen as the only option, and the risk of a lack of safety must be weighed carefully if the alternative of internal protection is considered.

The alternative solution of resettlement is a decreasing option, as so few states are prepared to consider places in their immigration flow for those who had achieved safety elsewhere, even if the price of such safety is instability or hardship for the host state. This option may, however, re-emerge as part of burden-sharing arrangements accompanying temporary protection measures. The more likely burden-sharing method is, however, of a financial nature. If short-term protection when a conflict arises is to be effective it must include burden-sharing measures. One effect of assisting with the financial onus of protection is the promotion of regional stability through economic development opportunities and the reduction of the impression of refugees taking from citizens. Many frontline protection states in cases of European conflict would be east and central European states themselves only recently developing market economies and creating opportunities for national and individual prosperity. Burden-sharing of this nature between European states with longer established wealth would also be necessary to avoid difficulties in regional relations.

Essentially, what we are talking about here is who gets protection, where and when, and how such decisions on protection can be made in the context of the broader picture.

For the future, we need to find the answers to the questions raised in the Introduction. It was suggested that, in the light of the refugee crisis resulting from the conflict in Bosnia Herzegovina, Europe has a number of alternatives. It could exclude all in search of protection from ethnic conflict and forced displacement by applying a limited interpretation of the still relevant Convention definition. It could go against the notion of non-discrimination by having a dual faceted application of

the Convention, with a liberal understanding for Europeans and a more restricted one for arrivals seeking asylum from more distant states. A liberal interpretation of the definition could be generally applied, increasing the number of accepted asylum claims substantially. Finally, Europe could institute a regional protection mandate for defined groups of people within defined time frames and upholding defined rights and duties, and encourage, within the democratic and humanitarian spirit, the institution of similar systems in other regions. Concurrent to this, it would be able to maintain the asylum tradition for all who seek it.

The argument being presented in this study is that the latter alternative is one which should be explored in the light of the handling of the refugee movements from former Yugoslavia, and the general European approach to asylum and immigration and regional political cooperation on this subject and related issues. A mechanism of temporary protection would complete and link the elements of a comprehensive approach in Europe and thus permit more success in the handling of future displacement crises than could be perceived in the early 1990s.

In Part Three the differences between the temporary protection policies of four European states were explored. Some states have created new legislation for large groups forced to flee by conflict. Others have rather adapted policies to cover the group in question, but installed no longer term basis for further developments. Some states have included the care of those temporarily protected in their legislation or policies, singled out particular sub-units from the larger group for particular protection, or left all care and maintenance strategies to *ad hoc* planning. All of the states considered had included NGOs in their operations to some degree. While all states had found a means to include a certain number of victims and acknowledged the conflict in Bosnia Herzegovina as a cause for flight which made some of its victims deserving of protection, all had found different means of operating that protection in accordance with their normal processes and the facilities and assistance from NGOs and public bodies available.

The nature of temporary protection in Europe might most successfully be found in a multi-level approach, satisfying the many facets of the protection debate. The European Union is the only organisation in the continent where states demonstrate a degree of political will to cooperate on immigration matters, because the policies of one have a knock on effect on all due to decisions on the subject of

internal controls in the collective territory of the Member States. Initial development of a European policy would therefore stand most chance of success if broached in that body. A European level policy could determine that, by agreement of the ministers responsible for immigration, the EU could acknowledge a given conflict (in a state close to the EU) as requiring short term protection away from the country of origin for a number of its victims. This would allow states to collectively offer humanitarian protection in a way which acknowledges normative concerns built up over the twentieth century over respect for human and minority rights. Having established that protection is necessary, each state would offer protection beyond the right to life in the way considered most appropriate for its own society, but meeting certain minimum requirements. Leaving the details of protection to state level politics would acknowledge the debate over sovereign control of membership (in terms of the quality of membership not the quantity of new 'temporary' members). Finally, the ability for the protected person to move between Member States after an initial period, when the need for pure protection is overtaken by the need to live a viable existence, in order to find the culturally based system which most suits his or her needs would acknowledge the broader interpretation of freedom of movement for all in the EU, not just for EU citizens.

If the evolution of protection in Europe follows its historical path, there would not only be contextualisation, but it would also need a further crisis for the political basis for developing the concept of temporary protection to be found. The engine of protection policy development rolls during a time of immediate need. In the former Yugoslav case, the engines have been rolling, but European states, in spite of the enunciated desire to harmonise and coordinate, have been travelling in different gears going at different speeds and following different routes.

The lessons of this crisis point to a need for advance preparation. Politicians generally take a short-term view of immigration and asylum. Illustrations of this can be found in the fact that UNHCR's mandate is only ever for a five year period, and the terms of the original 1951 Convention, which in speaking only of events before 1950 clearly showed a belief, or naive hope, that refugee movements were a finite phenomenon. After decades of short-term vision, the chance offered by coordination discussions to take a long-term vision and create a range of flexible mechanisms, including a notion of short-term protection for certain categories should

be taken. The engines of European protection policy apparatus need to move together, at least on the determination of which approach is to be taken under which circumstances and the type of protective mechanism to be enacted, and admission procedures for mass influxes. Then, moving at the same pace, policies could be developing along different domestic protective paths towards the same goal.

There is a need to work out what temporary protection needs to do and why it needs to do it. The functions of such a mechanism for states, for the protected and for relations between states (both host-host and host-origin) need to be clear. The cases in which temporary protection is the most appropriate and the cases for which traditional asylum must be maintained need to be defined.

> No state is an island. Belatedly, but not too late, states are recognising that traditional sovereigntist reactions to immigration questions don't get you very far. Yes, in principle we decide who will and who will not be allowed to join our community, but real life and real people generally stand between the wish and the fulfilment.[2]

If one takes a pragmatic stand one sees that no amount of restrictive concepts created by those responsible for immigration policies will prevent people who feel the need to migrate from trying to do so and arriving at states of safety or the country of their dreams. The best states can hope to do is to find a way of exercising some control and enacting measures which make a certain amount of immigration acceptable. Closing asylum and protection channels to all with the aim of denying entry to illegal, or economic, immigrants solves little while causing enormous confusion and doubt. The confusion and doubt is experienced by the immigrants, the host population and other states. When imposing restrictions the greatest outcry is over the challenge to international obligations and to moral standing. Those who demand that all immigrants be accepted are also not being pragmatic, but taking an extreme opposition to the extreme position governments present. To maintain international obligations and to offer a stance morally acceptable to a concerned population, the management of immigration needs to clearly distinguish between those forced to flee and those who choose to advance their own economic well-being. Many of the restrictive measures developed during the 1980s and '90s have this as their aim. However, being created from the position

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[2] Harder, Peter, 'Migration: a new international dimension', International Journal of Refugee Law, Vol.5 No.1 (1993) p.104.

of excluding they have a negative impact, and tend to be interpreted as a manifestation of governments panicking in the face of an uncontrollable problem. A calmer and more positive approach could be developed, with policy makers developing mechanisms which include those in need, and as a result limit opportunities for those whose need is not for safety but for a better job, larger salary, in short those who seek to migrate for opportunity not for survival.

Temporary protection should, then, be a channel of inclusion for those whose immediate safety cannot be realistically foreseen in their country of origin because there is a climate of generalised violence and conflict, because groups of civilians are being targeted for 'removal', either forcibly displaced or killed, and because there is indiscriminate bombing, shelling and general warfare in much of the country. It should be employed in situations where there can be reasonable optimism for a solution in the short to medium term. However it should not be assumed, in offering protection, that a solution permitting return for all is an obvious eventuality. Temporary protection should have the function of protecting lives. It should be a guarantee of safety for the people concerned.

For the states offering protection, short-term mechanisms would function as a means of permitting them to live up to international obligations regarding refugees and human rights. Offering temporary protection in situations of mass influxes would also allow for an alleviation of procedural problems in processing claims, and give a period of reflection over the longer-term possibilities. Although states have not yet demonstrably used the giving of protection as a reason for becoming more involved in the settlement of a conflict, protection could be linked to the (non-)intervention debate. For inter-state relations the offering of temporary protection with associated burden-sharing could strengthen collaboration and understanding between host states. Between the host states and the state of origin the generosity of a protective stance during a time of need can be useful in strengthening ties once a conflict is over, and can allow the host states to play a greater role in rehabilitation. This latter role would enhance the prospects of return, as noted perhaps the most desired goal on the part of the protecting states, and promote longer-term stability.

Temporary protection offers a morally and politically justifiable means to the promotion of refugee and human rights in a world of states adhering to sovereign values of membership. It is a measure which has the potential to mediate the

conceptual poles of human rights and state sovereignty, while completing the links of a comprehensive approach ranging from resolution of the causes of flight to a breadth of ultimate solutions. The benefits of this development of protection in the regional context involve not only completing the chain of approaches, but also promoting cooperation on protection matters and enhancing collaboration for future stability. At the same time, such regional developments could strengthen universal protection principles by re-enforcing the goal of protecting all those whose survival in their country of origin is made doubtful through either individualised targeting or generalised victimisation. Further development of this approach, including an appraisal of the lessons provided by the mechanisms evolved in the context of the former Yugoslav crisis, would enhance the holistic nature of refugee protection in Europe.

Appendix One: Table of comparison of twenty key features of the schemes described in Part Three

	SLOVENIA	AUSTRIA	UNITED KINGDOM	NETHERLANDS
Status of legislation on residence	Measures still *ad hoc*, but draft legislation going through Parliament	Legislation enacted in July 1993 permitting temporary residence	Policy of Exceptional Leave to Remain	Legislation enacted in 1992
Status of legislation on care and protection	Measures still *ad hoc*, but draft legislation going through Parliament	No legislation - *ad hoc* policy measures of care and maintenance	No legislation. Policy of protection for limited Temporary Protection Programme	Legislation enacted in 1992
Date at which policy or legislative changes were made	(Draft Law), Second reading, 1995	1993	1992	*Ad hoc* policy (TROO) 1992; VVTV legislation 1994
Safe third country rule enforced?	NA	Yes	Yes	Yes
Quota in force?	No, although one may be established according to the draft law.	No	Yes, for Temporary Protection Programme. Other arrivals dealt with through regular channels	Small quota in cooperation with UNHCR, but no limit on number who can receive VVTV

Appendix One

Care organised by whom?	Government (OIR) and NGOs	Provincial governments and Caritas	Bosnia Project	Municipal governments, with assistance from the Dutch Refugee Council
Costs of care met by whom?	Government, NGOs, International Organisations and private donations	Central and Provincial governments	Home Office, plus some private donations to the Refugee Council	Municipal governments
Period of stay permitted	Unspecified	Started as six monthly, then yearly extensions	Started as six monthly followed by yearly extensions	Three years, followed by permanent status if return is not possible
Possibility to apply for Convention status	May apply, but a political decision has been taken not to grant Convention status.	May apply while retaining temporary residence status	ELR or TPP status would be withdrawn	Temporarily suspended while in receipt of VVTV
Possibilities for naturalisation/ settlement	After 10 years with a legal status (which temporary refuge is not) or one year after marriage to a Slovene citizen	Residence status is altere once employment is found	Settlement after 7 years with ELR, although the TPP does not count.	Permanent settlement after three years if, in the opinion of the Dutch government, return is not possible

Appendix One

Amount received per person	Cost of care in a centre is £90 per month.	Equivalent of £100 per month if a person lives with a family. The cost of accomodation in a centre is £330, plus they receive about £10 per month in 'pocket money'	Comparable social security benefits to those of British citizens	Equivalent of £220 per month plus housing
Family reunification possible?	Yes	Yes	Instant if on TPP, after 4 years with ELR (NB, 4 years after granting of ELR)	No
Accommodation	In centres or with family or friends.	In centres or with families and friends. Independent housing is also possible.	On TPP, in centres for approximately 4 months, then in permanent housing found by the Bosnia Project	Initially in reception centres then in selected housing within a municipality

Appendix One

Education	Yes, at all levels after the law will pass. Until then, primary only, in separate schools. After September 1995, primary and secondary education in Slovene schools.	Yes	Yes, with usual regulations, including overseas fees for University places (approx £6,000 per year for non-science courses).	Yes
Employment	Once the new law is passed, yes.	Limited quota access and according to eligilbility hierarchy.	Yes, with no restrictions for status holders.	Phased opportunities over the three year period.
Healthcare	Yes	Yes, but not mental health.	Yes	Yes
Dispersal/ concentration	Relative concentration, partly due to density.	Dispersal - although extended families are kept together.	Clustering, to form Bosnian communities.	Distribution decided on by a central authority.
Care workers	Include Bosnians, and anyway with cultural and linguistic links.	Mainly Austrians	Workers include many former Yugoslavs	Mainly Dutch volunteers

Appendix Two

Descriptions of two collective centres in Slovenia

Škofja Loka Collective Centre

480 people live in this centre about forty kilometres from Ljubljana. Half of them are children, mostly with their mothers...their fathers fight on in Bosnia Herzegovina. Very few 18-30 year old men are to be seen, mostly young women, old people and children. Older women wear headscarves - the shining 'Swatch' on the wrist of a teenage girl is, for some reason, striking.

An old army barracks, the outside walls of which are crumbling, it is a mixed centre, of Bosnian Croats and Bosnian Muslims, with the former, unusually, in a slight majority. There is tension between the two groups - less so since their 'sides' in the conflict joined together - more so when their wider ethnic groups are fighting each other. Many of the people here are described by the director as having learning difficulties - including an inability to distinguish right from wrong. The lack of employment serves to heighten the tensions: there had been a stabbing the week before my visit.

However, there are good sports facilities, and a thriving amateur dramatics group. Children especially spend hours playing football, basketball and volleyball, and riding around on bicycles, bought with earnings from the black market. The women spend time sewing and knitting - but they wish they could sell what they produce, rather than just displaying it for themselves and their few visitors.

In mid-morning, people throng in the driveway, near a postbox and telephone used to communicate with family and friends left behind. Later people collect their food - in buckets, pans, plastic bowls.

The corridors smell, damp and dirty, and there is rubbish everywhere. The bedrooms are enormous rooms, divided into three by huge curtains. Each third of a room has three double beds crammed into it - one bed per family. In one area live a couple in their 80s, another in their 60s and a wounded Muslim soldier of 22. A TV perches above one bed. In another area live a young Croat couple and two older Muslim couples.

The wash areas, communal, one for men, one for women, are flooded, as is the room with six washing machines from which suds, steam and water pour.

There are separate religious rooms for the two communities, in the basement of the building. The 'mosque' is spartan, the 'church' decorated with purple drapes and gold crucifixes. The Croats in the centre are influenced, and manipulated, by a Croatian priest, from the home town of most of them, and now in a nearby monastery. He says mass at the monastery - their 'church' is used for their own prayers. Both rooms are locked, but both are in daily use - emphasising difference and 'devoutness'.

Other basement rooms include a TV room for older people - strewn with newspapers, and a colourful kindergarten, packed with toys donated by western NGOs.

Finally, there is the school room - looking like a classroom anywhere. There is a new map of Europe, showing the former Yugoslav republics as separate states. There are the children's drawings of themselves and their families, their houses left behind, and animals. There are depictions of stone age weapons - used for history teaching, I am told. And a wall frieze depicting Walt Disney's 'Aladdin' - harmless one would think. But it is pointed out to me that this is another emphasising of Muslim culture, in a mixed centre.

Šmartinska Collective Centre

This centre, in Ljubljana, is two buildings, formerly used to house workers during the socialist period. Here, as in other centres in the capital, the directors have three basic rules: everyone must clean up; there must be no fights on the grounds of ethnicity; and noise must be kept to a minimum after 10pm.

375 people live here, and there is one room for each family of four or five. There are 135 children, 155 women, 58 men aged 25 or over, and 27 men aged 17-24.

The corridors are very dark. However a room I looked into was bright and white and clean - with many green plants, as well as two televisions, a fridge, a small cooker and a very large bed. Washing facilities were also very clean.

In Ljubljana the priority is on cases of health problems. People needing health care are moved to the capital from more rural areas. There are not many tensions in this centre - any fights are usually over the children and their behaviour, and any social problems concern mainly schooling. There are problems over the lack of work and occupation; between women who have men with them and those who don't; economic inequality problems. The majority work already (illegally) - but then the more money the refugees have the fewer problems the managers have - so they ignore it.

The complaint of the people working in the centre is that the Bosnians seem to know all about their rights - but nothing about their duties.

There are several activities - football; table tennis; painting; photography.
In the basement is an art studio with an amazing display of talent. Some pictures are of beautiful scenery, others are harrowing - a skull on a blood red background for example.
There is a need to find the right sort of leaders for these activities - finding good leaders is hard, but 'bad' leaders are many. There are attempts to encourage such trouble leaders to channel their energies into positive activities.
There are weekly meetings between the management and refugee leaders.

A man working in the art studio on a video montage of the war in Bosnia Herzegovina, and surrounded by what look like architectural plans, is about to resettle to Canada with his wife and young child. He acknowledges its a new life with many chances, but seems nervous about it. People are scared when it comes to resettling to, for example, Canada and the US.
Most refugees here still want to go back, especially as many are women alone with children. Most who leave are people from mixed-marriages.

The relations between the Slovenians and Bosnians are generally good.
Movement outside the centre is only questioned for administrative purposes - eg to cancel meals etc.

The mosque room in this centre is only used when islamic donors are around!

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