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The State and the Post-Cold War
Refugee Regime:
New Models, New Questions

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Abstract

This article identifies the attributes of a shift from a Cold War refugee paradigm to a post-Cold War refugee paradigm and, within this shift, locates challenges to the status paradigm. It asks, how has the changed role of the State in today's 'globalized' society affected the refugee regime? Conversely, how does today's refugee regime re-figure the role of the State? While other observers have commented on specific changes in the refugee regime, this essay attempts to place the paradigm shift within a conceptual framework, and from this framework to pose the kind of questions which must be asked if the human rights of refugees are to be protected. The article concludes that within the refugee regime the move away from States and adherence to States are two sides of the same coin. First, the new refugee regime reflects the trend away from the State and away notions of sovereignty. At the same time, however, the new regime exposes the atavistic power of the status paradigm: The role of States has indeed been altered, but States retain their role as important and often essential actors. States still hold the key to asylum and to permanent, durable solutions and, it follows, States are most often essential actors in efforts to protect the human rights of the uprooted. Within this new paradigm, argues the author, trans-sovereign forces must find a way to address the needs of the uprooted when States fail to do so.

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Introduction

The refugee regime¹ has undergone radical transformation since the end of the Cold War, dramatically altering opportunities and challenges for the realization of human rights. Some of the changes are related to the Cold War itself. Others grow out of the contemporaneous process of globalization² and individuation,³ twin phenomena that radically transform the role of the State and the kinds of challenges encountered by those concerned with the human rights of refugees. These developments are complex. We can say that the shift from a Cold War refugee paradigm⁴ to a post-Cold War paradigm has occurred during a time of globalization and individuation. At the same time, however, globalization and individuation have accelerated as the Cold War has deflated. Delineating cause and effect and pinpointing the exact moment of intersections would be an impossible task. We can, however, identify the attributes of this

¹ The term 'refugee regime' at one time referred only to those laws, policies and practices set up to deal with 'refugees' as defined by the 1951 Convention. As explained below, the regime has become enlarged in scope to cover all those uprooted in war, including 'war victims' (all victims regardless of movement) and 'displaced people' (those who are displaced from their homes but who remain within their State of origin) and, in addition, the regime now includes many less formal systems and actors that interact with and/or complement the original systems and mechanisms. As used in this essay, 'refugee regime' refers to the second, broader definition. Unless otherwise noted, the term 'refugee' is used throughout to apply to refugees and displaced people.

² Zdravko Milnar, has identified five dimensions of globalization: (1) globalization as increasing interdependence at the world level, wherein the activities of people in specific areas have repercussions that go beyond local, regional or national borders; (2) globalization as the expansion of domination and dependence, that is 'an inter-connectedness on the global scale, in which *nada* rather than *labor* fails predominant'; (3) globalization as homogenization of the world wherein 'instead of differences among territorial units which were mutually exclusive, there is now a *uniformity*'; (4) globalization as diversification within 'territorial communities' wherein 'the level of globalization can be measured by the extent to which narrow territorial units are open and permit access to the wealth of diversity of the world as a whole'; (5) globalization as a means of surmounting temporal discontinuities through resulting from the functioning of particular services to global spaces. Zdravko Milnar, 'Individuation and globalization: the transformation of territorial social organization', in *Globalization and Territorial Identity*, (Zdravko Milnar, ed., Brookfield, VT: Avebury 1992), 15, 20-2 (1992). See also Richard Falk, *Regionalism and world order after the Cold War*, 1995, St. Louis-Warshaw Transatlantic, L. J., 71-83.

³ By individuation, I refer to 'the process of increasing the autonomy and distinctiveness of the actors at both the collective and individual levels.' Milnar, above note 2, 15. Milnar identifies the dimensions of individuation as: (1) the weakening of predetermination on the basis of origin; (2) the weakening of determination on the basis of territory; (3) increasing the diversity of 'time-space paths' (that is, not being limited to the role and position of individuals in space at a specific moment in time); (4) increasing control and decrease of (random) intrusion from the external environment (wherein actors assert greater control over the impulses from the environment); and (5) increased authenticity of the assertion of identity (more direct assertion of identity without the use of intermediaries or representatives). *Ibid.*

⁴ The Cold War paradigm is similar to but distinct from the colonialist paradigm. Given the difference — for example, the colonialist donors may be more influenced by their desire to perpetuate their culture on the other, see Cecilia Rathburn-Rutz, *Beyond Empire: The Globalization of Refugee Aid, 192-5* (1993) (discussing British and French aid to African colonies); this essay will not equate the two, but will instead leave discussion of the colonialist and post-colonialist refugee paradigms to another day.

paradigm shift and, within it, locate challenges to the statist paradigm. Through this analysis, we can better understand the field in which human rights and refugee advocates operate and fashion solutions to meet today's problems.

The statist paradigm and its critique has long been central to the agenda of many international law and human rights scholars.⁵ The dominant approach to international organization, viewing States as the primary unit of analysis and sovereignty as the primary measure safeguarding State action within its territories,⁶ has been re-examined, de-mythologized, and de-constructed.⁷ This essay adds to the debate through the examination of the refugee regime, an area in which States and notions of sovereignty have always played an important role. It asks two converse questions. First, how has the changed role of the State in today's 'globalized'⁸ society affected the refugee regime? Second, how does today's refugee regime re-figure the role of the State? The article charts the paradigm shift in the refugee regime in the context of these questions.

My thesis is that within the refugee regime the move away from States and adherence to States are two sides of the same coin. To some degree the new refugee regime reflects the trend away from the State and strict notions of sovereignty. Nonetheless, the new regime also exposes the staying power of the statist paradigm. In many respects, the role of States has indeed been altered, but States retain their role as important and often essential actors. While other observers have commented on specific geographic or thematic changes in the refugee regime,⁹ this essay attempts to place the paradigm shift within a conceptual framework, and from this framework ask new questions about the nature and future direction of refugee law and policy. These questions must be answered if we are to address protection and assistance concerns of refugees.

⁵ With respect to security issues, the State is generally viewed as central. See G. Soerensen, 'Individual Security and National Security: The State Remains the Principle Problem', *Security Dialogue*, vol. 27, no. 4 (1996).

⁶ See, for example, Kenneth N. Waltz, *Theory of International Politics*, (1979).

⁷ See, for example, Luis E. Luján, *Sovereignty at the Crossroads? Morality and International Politics in the Post-Cold War Era* (New York: Rowman & Littlefield 1996); Gene M. Lyons and Michael Mautsund, eds., *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore, MD: Johns Hopkins University Press 1995); 'Conference on Changing Notions of Sovereignty and the Role of Private Actors in International Law', 9 *Am UJ Int'l L* (Fall 1993); Christopher H. Schwert, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law', 4 *FJIL* 417 (1993); Jarrat Chopra and Thomas G. Weiss, 'Sovereignty is No Longer Sacrosanct', 6 *Ethics & Int'l Aff.* 95-117 (1992); Martti Koskenniemi, 'The Future of Statehood', 32 *Harv Int'l L J*, 397 (1991); W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *AJIL* 866 (1990); R.B.J. Walker and S.H. Mendlovitz, eds., *Globalizing Sovereignty: Redefining Political Community* (1990).

⁸ For some of the attributes of globalization, see *infra* footnote 2 and see text following note 69 below.

⁹ See, for example, UNHCR, *The State of the World's Refugees: A Humanitarian Appeal*, (Oxford University Press 1997) — hereafter *State of the World's Refugees 1997*.

1. The Post-Cold War Refugee Regime: A Shift Away from the Statist Paradigm

1.1 Outlining the Cold-War, Statist Model

The classic, Cold War refugee regime was structured along statist lines. It featured three primary types of actors: sending States, receiving States and refugees. (Figure One represents a simplified model of refugee and aid flows, and is further developed in the first column of Chart A at the end of the essay.) Under this model, State boundaries were tied to the very definition of who was worthy of aid and protection.¹⁰ Further, the doors of receiving countries were to be open to 'refugees'; those persons outside their country of nationality who have a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion, as defined by the 1951 United Nations Convention and its 1967 Protocol.¹¹ Those who did not fit the definition of persecution, who did not fall within the limited persecution grounds, and who were uprooted¹² without having crossed State boundaries — the internally displaced — had no recourse to international legal protection and, for the most part, were denied any assistance.¹³

The traditional approach to refugees was 'reactive in the sense that UN bodies, specifically UNHCR,¹⁴ became interested in a person or population only when they had become displaced, crossed a border and sought asylum in another State.'¹⁵ Action depended upon the existence of an exiled refugee population desiring resettlement in another State. Sending States were usually paired with receiving States based on ideological and geopolitical interests. Often the cause of uprootedness was linked directly or indirectly to Cold War struggles or, at the very least, political strategic concerns formed a potential State donor's response to uprootedness. In this game, the US was most concerned about its image with regard to the Soviet Union — enticing Soviet scientists and

artists to the shores of the US, for example, was intended to make Soviet officials squirm.¹⁶ Receiving States had a reason to open their doors; a desire to siphon off refugees from those States which supported the opposing ideology. Receiving countries could use population flows to discredit both the government or country of origin and to bolster the image of countries granting them asylum.¹⁷ In other situations, Cold Warriors could 'take advantage of refugee movements by arming and training some of the people concerned and using them to destabilize the government within their homeland.'¹⁸

In the Cold War era, the locus of aid to refugees was usually in the host country. There was considerable discussion of the human rights abuses and political ideology that purportedly forced the refugees to flee. Nonetheless, the 'international community'¹⁹ gave little thought to foreign aid designed to contain refugee flows, or to developing or reforming the sending country's infrastructure. Thus, the issue of the receiving government giving its 'consent' simply did not arise.²⁰ The few NGOs that did exist played a limited role in the process, apart from carrying out their own government's concerns, and very few truly non-governmental links existed between citizen's organizations and NGOs in sending and receiving States. In short, aid of any type, including asylum, was linked to Cold War foreign policy concerns.²¹

1.2 The Shift Away from the State

The post-Cold War refugee regime illustrates a complicated shift away from this State-centric model. (See Figure Two, above, and the second column on Chart A.) The clarity of Cold War rhetoric now dissolved, the regime has spun into an identity crisis. 'In the post-cold war years, as in the period after the first and second world wars, forced population

¹⁰ Boldizar Nagy, 'Changing Trends, Enduring Questions Regarding Refugee Law in Central Europe,' in *Human Rights in Eastern Europe*, 183, 191 in 17 (Bloomfield, VT: Edward Elgar Publishing, 1995) (citing 1953 National Security Council paper which stated explicitly that it was American foreign policy 'to encourage defection of all USSR nationals as well as of "key" personnel from the satellite countries' as this would inflict a 'psychological blow on Communism').

¹¹ *State of the World's Refugees 1995*, 37.

¹² *Ibid.*, citing the examples of the Nicaraguan Guardia in Honduras, the Afghan mujahideen in Pakistan and the Namibian rebels in Angola.

¹³ Throughout this essay I use 'international community' reluctantly as it has both no meaning and the most precise meaning. International community refers to whatever the reader thinks is the community that acts internationally. When speaking about the international community's concern about human rights, for example, a western reader will call to mind western powers debating western concepts.

¹⁴ See Christine Gray, 'Host State Consent and UN Peacekeeping in Yugoslavia', 7 *Duke J. Comp. Int'l L. J.* (Fall 1996).

¹⁵ A review of the aid in this era is out of the scope of this essay. For other accounts, compare Josa M. Nelson, *Aid, Influence and Foreign Policy* (New York: The MacMillan Company 1963), G. Ohlin, 'The Evolution of Aid Doctrine,' in *Foreign Aid: Selected Readings*, (Jagdish Bhagwati and Richard S. Eckaus, eds., Harmondsworth: Penguin Books 1970); Robert S. Walters, *American and Soviet Aid: A Comparative Analysis*, (Pittsburgh: University of Pittsburgh Press 1970).

¹⁶ One of the best explanations of the development of this definition is found in Ariadna R. Zollberg, Anri Sahukie and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*, 3-29 (1989).

¹⁷ United Nations Convention relating to the Status of Refugees, adopted by the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, convened under UNGA res. 428(V), 14 Dec. 1950, adopted 28 Jul. 1951, entered into force 22 Apr. 1954; 189 UNTS 137. See also, Guy S. Goodwin-Gill, 'Asylum: The Law and Politics of Change', 7 *IJRL* 1 (1995).

¹⁸ This essay uses the term 'uprooted' to refer to all people who are forced from their homes or otherwise removed or 'disrupted' during war. Thus, 'uprooted' is a more inclusive word than the legal term 'refugee.'

¹⁹ For a review of the law of refugee status, see James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths 1991). Most refugees who cross borders likely do not fall within the 1951 Convention.

²⁰ Office of the United Nations High Commissioner for Refugees.

²¹ UNHCR, *The World's Refugees: In Search of Solutions*, 30 (Oxford University Press 1993) — hereafter *State of the World's Refugees 1995*.

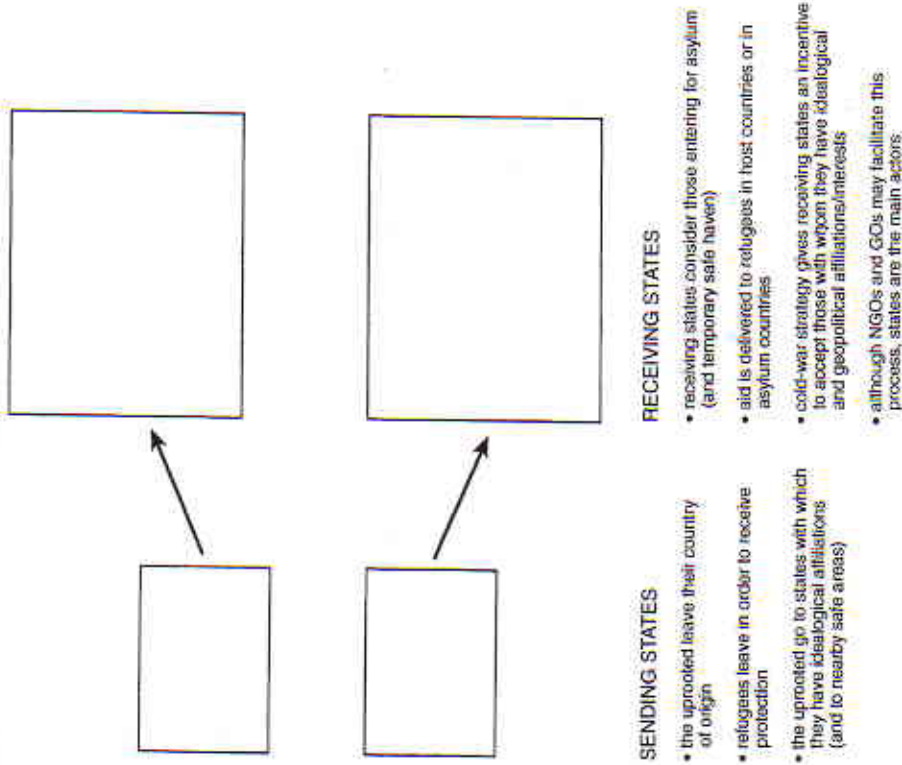


Figure 1

Cold-War paradigm

displacements have proven to be a prominent consequence of the demise of old ideologies, the collapse of existing empires and the formation of new States.²² Today, refugees are often victims of violence or natural disasters, not ideological persecution. Would-be receiving States and donors can no longer tell whom they are supposed to help based on clear-cut ideological grounds.²³ Sending and receiving States thus are no

²² *State of the World Refugee, 1997*, 1.

²³ For an examination of changes in US policy due to the end of the Cold War, see for example, Davalene Cooper, 'Promised Land or Land of Broken Promises? Political Asylum in the United States', 76 *ky. LJ* 923 (1987/88).

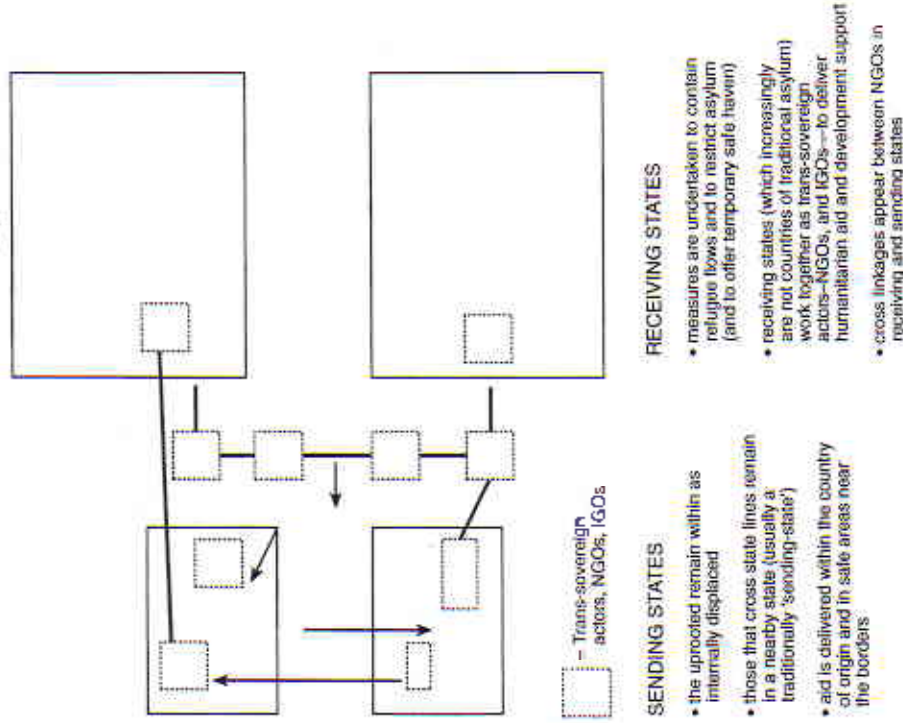


Figure 2

The new refugee regime

longer coupled together and formerly opposing Cold Warriors even find themselves on the same side of a donor equation.²⁴ Prejudice, such as racism and nativism, now factors more heavily into asylum decisions.²⁵

²⁴ See, for example: Clare Messana, 'From Migrants to Refugees: Russian, Soviet and Post-Soviet Migration', 6 *JBR* 620 (1994).

²⁵ See Bill Ong Hing, *To Be An American: Cultural Pluralism And The Race Of Assimilation*, (New York: New York University Press 1997); Juan F. Perez, ed., *Immigrants Out!: The New Nationalism And The Anti-Immigrant Impulse In The United States*, (New York: New York University Press 1997); Dale T. Kynard, *America For The Americans: The National Movement In The United States*, (New York: Twayne Publishers 1996); Walter Brunt Michaels, *Our America: Nationalism, Modernism, And Pluralism*, (Durham: Duke University Press 1995); George E. Pozzetta, ed., *Nativism, Discrimination, and Images Of Immigrants*, (New York: Garland 1991).