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Strategies for a Resistant World: Human Rights Initiatives and the Need for Alternatives to Refugee Interdiction

Refugee law has fallen on hard times. Germany’s political parties have agreed to restrict the unique constitutional guarantee of asylum installed in the republic’s Grundgesetz in 1949. Canada’s parliament rushed to enact new restrictions in time for Christmas, bulldozing past thoughtful objections tendered by a Senate committee. The United States Coast Guard rings Haiti, not to enforce the OAS embargo against its usurping rulers, but to keep small wooden boats bottled up lest someone claim refugee status elsewhere in the hemisphere. The Europe-without-borders supposedly created at the end of 1992 retained its external borders, of course, and the Twelve’s efforts to prevent arrivals through a common visa policy, enforced by carrier sanctions, or to avoid forum-shopping by unsuccessful asylum seekers, have come under sharp attack. Bosnian refugees, even those newly released from Serbian concentration camps, find a haven only with great difficulty. Repatriation gathers momentum in Central America, Southeast Asia, and parts of Africa—sometimes a happy result of genuine progress in ending regional conflicts, but often under conditions that raise real doubts...
about safety. Additionally, Burmese refugees, who have fled one of the most defiantly abusive regimes left in the post-Cold War world, receive only the most tenuous permission to stay in nearby countries.

A new era of refugee law and policy has broken decisively upon us. Resistance to asylum seekers, suspicion of their motives, and anxiety about the consequences of major flows will provide the dominant animating force for judges, administrators, legislators, and top political leaders for the foreseeable future. This is the grim reality.

Still, the picture is not wholly bleak. In absolute terms, record high numbers of people are being shielded from immediate return. The world community has rallied, despite the grumbling, to spend more than ever on care and maintenance of asylum seekers and refugees. And perhaps some unintended benefits are possible as an outgrowth of the new public resistance and anxiety. These public reactions might—just might—help lift refugee policy debates out of some well-worn ruts. They could force the serious consideration of novel responses to the threats and needs that uproot people from their homes. Additionally, they might expose long-submerged humanitarian weaknesses in classical refugee law, especially its "exilic bias," \(^2\) which has obscured the possibilities and responsibilities for supporting human rights improvements in the home country.

Whether a beneficial new policy can be realized depends on the response to the new resistance. The last two years have given us two examples that mark out the poles of non-"exilic" policy, two paradigms showing either creative or destructive new ways to deal with impending refugee flows, if the political climate dictates that simply welcoming the new arrivals in the haven state is not possible. In April 1991, the world community responded to a refugee crisis on the Turkish border by intervening in northern Iraq, enforcing sufficient safety to enable Kurdish refugee families to return home. At the other extreme, in May 1992, President Bush ordered the interdiction of Haitian boats and return of all passengers, with no attention whatsoever to their refugee claims. This solution to a political problem during an election year reduced public and media concerns about the issue to such a degree that American pressure for democratic restoration in Haiti dropped noticeably.

Both stories, Haiti and Kurdistan, are incomplete, and each could possibly reverse course and confound this categorization. But for now, interdiction and intervention mark out paradigmatic alternative policy

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choices. The one—interdiction—simply bottles up refugees, while the other focuses on the hard task of fostering internal change in the source country or region.\(^3\)

I. Background: The Road to Interdiction

A brief review of the development of modern international refugee law helps in understanding current challenges and alternatives.

A. From the League of Nations Through the 1967 Protocol

The League of Nations established the first High Commissioner for Refugees in 1921, in response to the uprooting of people by revolution in Russia and the collapse of the Ottoman empire. Then, as fascism took root and spread in the 1930s, various initiatives were proposed to extend a protective umbrella to new populations in desperate need. Governments responded with legalisms, however, and showed an unrelenting preoccupation with the Depression's effect on their own people. The history of refugee policy from 1930 to 1945 is a depressing tale of callousness and evasion.\(^4\)

When the full story of Nazi atrocities and genocide was revealed at the end of World War II, shame at the earlier failures spurred more enduring post-war efforts. Immigration countries, which had resisted movements in the 1930s, offered major resettlement opportunities to the displaced persons left scattered throughout Europe in the war's aftermath. The United States even bent its national origins quota scheme to resettle some 350,000 displaced persons in the late 1940s.\(^5\)

Shame also led to determined, if measured, efforts after the war to provide a better legal and institutional framework for refugee protection. The General Assembly created the office of the United Nations High Commissioner for Refugees (UNHCR) in 1950, to replace the International Refugee Organization, which had foundered on Cold War shoals.\(^6\) Then, in 1951, a United Nations-sponsored conference adopted the well-known Convention Relating to the Status of Refugees.\(^7\) It propounded a now widely used definition of "refugee," based centrally on the notion of a "well-founded fear of persecution" in the home country, and it established a strong nonrefoulement guarantee in

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3. Of course, there are many ways of doing the latter, through a host of possible human rights initiatives, short of the maximal exertion represented by armed intervention.


Article 33, applicable to all refugees present in the haven country, not just those who had achieved a fully regular legal status.

These are important advances, and one often hears high-flown rhetoric praising the 1951 Convention—calling it, for example, the Magna Carta of refugee law. If we subject the treaty to a closer look, however, we have to recognize it as a deeply cautious document. Its drafters did not want to issue a "blank cheque" (a phrase that recurs throughout the travaux préparatoires) to future refugee movements. They applied the Convention's guarantees only to those who were refugees "as a result of events" predating 1951—in principle a knowable and finite group of beneficiaries. They enabled state parties to confine their obligations to European refugees, although they did make the treaty capable of expansion, at a party's option, beyond the European continent.

Above all, the drafters expressly avoided making the document a treaty about asylum. State parties do not pledge to provide the full range of residence, employment, and other rights we would associate with a state of durable asylum, even to those aliens who demonstrate that they meet the refugee definition. Such rights and entitlements must await a further discretionary decision by the state of refuge to legalize their status. As its title reflects, the 1951 Convention is a treaty about status for persons already somehow accepted in the territory, not a treaty about asylum or admission.

Some of the caution manifested in the 1951 drafting process was gradually shed over the next two decades. As a result, legal guarantees were expanded, modestly but importantly, by the 1967 Protocol Relating to the Status of Refugees. Although the 1967 Protocol made no changes in the 1951 Convention so as to mandate full asylum for
nonregularized refugees, it did remove the 1951 dateline, which was by then obsolescent, from the definition of "refugee." It also strongly encouraged parties to opt for applying the treaty to both European and non-European refugees.  

Why the changes? Why were states sufficiently relaxed in 1967 to adopt a generalized and abstract definition of "refugee" not limited by dateline, continent, or other group designation? The relaxation resulted, I would submit, from the quieter times that prevailed on the refugee front between 1951 and 1967, at least for the North Atlantic countries that remained the leading players in deciding on legal changes. Government leaders apparently assumed that any developing refugee flows would remain numerically small and otherwise manageable. In this climate, expanding legal guarantees did not awaken the old concern about "blank cheques."

The reduced anxiety derives from two key factors. First, the numbers remained low because of certain seemingly natural barriers and deterrents to the large-scale migration of oppressed or needy people, at least to Europe or North America. Though upheavals in Asia and Africa sometimes caused significant population shifts, distance kept the refugees in the region of their origin. Air travel was too expensive to become a likely avenue toward better refuge. Equally important, the idea that haven might be possible in a distant but wealthy Western nation simply had not worked its way through, except to a tiny and usually westernized or elite minority.

Expense and distance are not the full story, of course, because some potential refugees were near the key European nations. They were indeed the very groups for whom the international refugee machinery initially had been designed: those from the Soviet Union and its satellite states in Eastern Europe. But here too, from the vantage point of the early 1960s, no major flows seemed at all likely. Home-country exit controls obligingly spared the West any major influx, and hence any need to think about the dirty business of entry controls or enforcement through deportation. Barriers were part of the natural landscape and did not have to be the result of deliberate and controversial government policy. In the middle of the Cold War, these factors combined to calm governments enough that they could drop the dateline from the 1951 Convention and apply the legal guarantees to refugees from other continents.

A second reason for the reduced anxiety by 1967 was a high validation rate, reinforcing a sense of the almost self-verifying character of refugee claims during this era. As long as numbers remained low, states felt little impetus for probing the claim deeply; as long as most claimants were refugees from Communism, the Cold War assured little disposition for doing so. If someone had risked his life to escape the East's barbed wire, or had put up with the privations of refugee camps elsewhere in the world, it seemed churlish to doubt the seriousness of the claim. Ref-

13. See 1967 Protocol, supra note 9, art. 1(8).
orical recognition rates tended to be quite high, often exceeding ninety percent. Hence there was little occasion for worrying about whether nonrefugees were trying to claim the benefits of refugee status—benefits that increasingly amounted to guaranteed asylum. Consequently, receiving states essentially ignored the adjudication difficulties that could be posed by the abstract and individualized refugee definition perfected in the 1967 Protocol. Problems in assessing the credibility of an asylum applicant or gathering information about human rights conditions in distant countries were simply obscured in an era when much of asylum law focused on a relative handful of escapees from the Soviet bloc.

B. An Assessment

After adoption of the Protocol, then, refugee law may have seemed quite robust and welcoming. The world had accepted an abstract, individualized test, based on an assessment of threatened persecution in the homeland and no longer confined by date or geography. Key states were not inclined to apply the tests too stringently to asylum seekers. In practice, those recognized as refugees received full asylum, even if they had entered irregularly, not just the minimal nonrefoulement guarantee that might have been their only clear right under the Convention. A notably high percentage of those who arrived on the territory of Western states and asked for asylum received it.

If we take a step back and examine these developments from a wider perspective, however, we should be struck (although few have been) by the moral oddity of the regime that resulted. From the standpoint of the states agreeing to these guarantees, the policy set forth in the 1967 Protocol is purely reactive. Rather than identifying persons currently suffering from persecution and then designing measures that might maximize global protection, given inevitable limits of resources, power, and diplomatic capacity, the framework is essentially nonselective. It merely requires a qualified claimant to establish physical presence in the territory of a party to the Protocol, and to show that he or


As one who has participated in the drafting of the convention, I can say that the drafters did not have specific restrictions in mind when they used this terminology. Theirs was an effort to express in legal terms what is generally considered as a political refugee. The Convention was drafted at a time when the cold war was at its height. The drafters thought mainly of the refugees from Eastern Europe and they had no doubt that these refugees fulfilled the definition they had drafted.

16. I do not exclude the possibility that the Protocol applies in some limited circumstances to state action outside the national territory. However, in this era such issues generally did not arise; the focus was on persons who reached the haven state's territory, narrowly understood.
she passes the "well-founded fear" threshold, which was not then ordi-
narily very demanding. The provision of such protection is reactive and
accidental, for the treaty is agnostic about how its beneficiaries establish
the physical presence that calls the guarantees into play. Nothing is
done about conditions that may have sent the refugees outside their bor-
ders, and nothing is done about other threatened persons who may
remain behind, facing exactly the same, or indeed worse, threats—
unless, of course, entirely on their own they find their way to the territ-
ory of the haven state.

In many ways then, the treaty is a "clean hands" document, not a
human rights instrument. It memorializes the purity of state parties, to
ensure that they will escape the taint of any responsibility so direct and
visible as that involved in sending someone back to a place where he or
she is persecuted. But in the process, it downplays responsibility for
failure to act systematically to end ongoing persecution in situ, back in
the home country. A typical account of the treaty regime describes its
effects in these words: "International protection of refugees is interna-
tional law's substitute for the protection that the refugee's country of ori-
gin cannot or will not provide."

If concerted international action is
thus mobilized, however, why simply cobble together a substitute for
what the home state should be doing? Why not act instead to reestab-
lish that state's own protection or to create a substitute protection on
the victim's home territory? Why, in any case, apply international action
only to an accidental group of beneficiaries, rather than selecting those
in greatest need?

A major part of the answer, of course, lies in a lack of the political
power or influence that would be needed to induce or support such
changes in the home country's policies. The answer in that era also
drew upon a recognition of inadequate military capacity to enforce such
changes, particularly in the polarized world of the Cold War where vari-
bious oppressive regimes found shelter under the protective wings of their
chosen superpower, while the United Nations Security Council
remained deadlocked.

Another important factor, which should not be overlooked, is the
conceptual poverty of classical international law. Even to think of set-
ting things right at home, rather than crafting substitute protections
elsewhere, collided with a bulwark concept of traditional, positivist
international law: "sovereignty." The United Nations was forbidden by
its Charter "to intervene in matters which are essentially within the
domestic jurisdiction of any state." A state's treatment of its own citi-
zens was of course viewed as a cardinal realm of that sovereign's domes-
tic jurisdiction. Although the United Nations Charter did contain some
provisions that looked toward international consideration of human

17. Barry N. Stein, The Nature of the Refugee Problem, in Human Rights and the
(emphasis added).
rights, during this era only general standard-setting, in a highly abstract fashion that pointed no fingers at violating states, was considered possible. Even the Commission on Human Rights decided at its first session that it had no right to consider individual petitions alleging abuses.\(^{19}\) Until 1970, the United Nations Economic and Social Council resolution covering such petitions provided only for their intricately ceremonious burial, including an express mandate for the Secretariat to inform the petitioners that “the Commission has no power to take any action in regard to any complaint concerning human rights.”\(^{20}\) No wonder the victims of persecution had to engage in self-help to cross a national frontier before the refugee treaties held out any hope of legitimate international assistance.

C. The 1970s and 1980s: Weaknesses Revealed

Events in the 1970s and especially the early 1980s revealed weaknesses in some of the assumptions that had eased adoption of the Protocol. Primarily, the old (seemingly natural and perpetual) barriers and deterrents diminished. Transportation became cheaper. The refugee option, including possibilities for opening up distant havens, became better known, perhaps in part because of the successful resettlement efforts adopted for those fleeing Indochina, who had attracted considerable media attention. Entrepreneurs got into the act, scouting out weaknesses in entry controls, organizing trips, and advising on how to claim asylum and so defeat quick repulse upon arrival (including the spreading practice of destroying travel documents). As the numbers of claimants rose, slowly through the 1970s, then with increasing momentum in the 1980s, public resistance grew, and suspicions about the new arrivals’ claims mounted. As a result, the old “blank cheque” concerns reappeared in a different form but with new intensity.

In principle, the legal regime offered a straightforward way to resolve these suspicions and concerns, protect those asylum seekers who deserved it, and rebuff the rest: simply adjudicate their claims to refugee status. But the old adjudication difficulties, submerged when the vast majority of the claimants were approved, suddenly became apparent to government leaders. They learned how difficult it is to assess the credibility of a claimant from another culture, especially when other witnesses to the events of which she speaks are unavailable. They learned how poorly equipped their agencies were to collect useful information about human rights abuses in the countries of origin. And they discovered that they had to become more sophisticated conceptually, in order to determine just what is “persecution” and when a fear of it is “well founded.” UNHCR responded to some of these realizations and finally promulgated a Handbook on Procedures and Criteria for Determining Refugee

Status, which is now widely used. The rather tardy appearance of this volume reveals much about the dynamics of refugee law. Though receiving states had supposedly been applying the definition since 1954, when the treaty entered into force, they apparently felt little need for detailed technical guidance from UNHCR on the standards and criteria until the 1970s, when the handbook question was first seriously taken up by the Executive Committee. This timing suggests that theretofore the states had not considered carefully the need to use the treaty to deny asylum systematically to unqualified applicants. The Handbook itself finally appeared in 1979, twenty-eight years after the criteria it explains were initially adopted.

More importantly, government leaders discovered that their adjudication procedures were poorly designed. Multiple layers of consideration and review made little difference when most people's claims were approved, and when the public cared little if the rest wound up staying. But when rejection rates rose, the inability to remove those who did not qualify fed cynicism and backlash.

Governments reacted in three ways: making incremental improvements in fact finding capacities, narrowing the de facto standards (while still formally applying the Convention definition), and proposing more streamlined procedures. The first step gained widespread support, although—or perhaps because—its impact on determinations and on the public controversy is modest. The other two, however, touched off continued battles. Restrictive application was challenged in the courts. Some judicial decisions, including the United States Supreme Court's ruling in INS v. Cardoza-Fonseca, made headway in preserving a more generous application, although the more recent judicial trend is problematic. Streamlined procedures were challenged in court on due process grounds, as well as through intense lobbying that sometimes obscured the real stakes.

These early victories fed a misguided optimism about maximalist advocacy. Governments may want to restrict, the feeling seemed to be, but courts in rights-conscious liberal societies would not let them get

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23. Some cases seem now to allow or even promote a capricious restrictiveness. The Supreme Court's latest offering, INS v. Elias-Zacarias, 112 S. Ct. 812 (1992), is typical, applying the doctrine in a wooden way that ignores the underlying purposes of refugee law.

away with it. Hard-hitting advocacy, covered intensely by the media, would force the government to back down on returning certain unsuccessful applicants. Moreover, well-targeted lobbying might force executive officials to retreat from proposals to streamline procedures.

D. The Exposed Flank of Refugee Advocacy

While advocates prevailed (unevenly) on the central front, regarding procedures and legal standards for those already in the asylum adjudication system, they neglected their flank. Indeed, their victories redoubled the incentives for government officials to target their energies on other means of reducing asylum pressures—in ways that courts were less likely to control and that were less susceptible to lobbying or media coverage. That is, governments returned to the idea of barriers and deterrents. No longer a function of natural factors like distance and expense, nor a byproduct of source-country ideologies, barriers and deterrents would now have to be recreated by deliberate government action. Governments turned to austere housing, jail-like detention, lengthy periods of enforced idleness without work authorization, and other discouragements.

Probably more devastating, and certainly less readily subject to court review, governments instituted methods that might prevent the arrival of asylum seekers. Europe has adopted American-style visa regimes, enforced by transportation companies, and the EC is now implementing a coordinated visa policy. In a new policy invention, both Europe and the United States have persuaded countries further south to prevent the onward migration of illegal migrants or to return those who do get through. Mexico has performed this role for several years and now receives express U.S. funding for the function. Morocco is a more recent participant, but it expects improved relations with the EC in return. Although both efforts are described as programs to halt illegal migrants, it is obvious that both are fueled by worry about new arrivals.


28. William Drozdiak, Morocco Bars Smugglers' Gate to Europe, WASH. POST, Jan. 24, 1993, at A20. One Spanish official described Morocco's "surprisingly good" cooperation: "The Moroccans now take back anybody who crosses to our side without proper papers, and they assume responsibility for sending them back to their native country." Id. at A24.
who would clog the target states' ineffective and overburdened asylum adjudication systems.

The ultimate barrier is the interdiction policy first introduced by the Reagan administration in 1981, which then escalated to its most destructive form by President Bush in May 1992. Under the Bush order, Haitian boats were stopped on the high seas, and all passengers were returned to Haiti, with no effort whatever to assess whether any might have reason to fear persecution upon return. President Clinton properly leveled sharp criticism at this order during the campaign, calling the return program "appalling." But if proof were needed of the unreliability of our ordinary asylum system—the alternative that in principle is available as a more humane way to handle claimants from Haiti—Clinton provided it on January 14, 1993. That day, after a full staff review of policy options, he surprisingly announced that he would extend the Bush policy, at least on a temporary basis. It is still possible, though unlikely, that the Supreme Court will declare the 1992 version of interdiction unlawful; the case was argued March 2, 1993. But whatever the Court's judgment, the overall picture for refugee law in the West is not encouraging, precisely because of the new prominence given to strategies of deterrence and repulse.

II. Alternatives that May Still Help Limit the Outflow
These troubles on the refugee law landscape appeared to reduce the possibilities for using relocation to a foreign land—exile—as a solution to problems of persecution or other forms of oppression or deprivation. Reducing the "exilic bias" is not necessarily a bad thing, however, if other means open up to address the underlying evils. Some such means have appeared on the horizon, quite unexpectedly.

A. Humanitarian Intervention
In the late 1980s, as governments were refining their barriers and deterrents, a funny thing happened. The Cold War ended. Hopes began to reemerge for the kinds of global action against aggression and oppression that the United Nations had been designed to undertake. In the midst of this new and hazy dawn of awareness of a new potential for the UN, Saddam Hussein helped clear the clouds away. He presented the world with a provocation so flagrant that leaders could scarcely avoid

dusting off the Security Council's little used powers under Chapter VII of the UN Charter to respond to the invasion of Kuwait. 33

Although President Bush sometimes showcased Iraqi human rights abuses in Kuwait as a reason to support the military effort there, the Gulf War might have served, in precedential terms, only as a classic defense of the nation-state system, a reinforcement of the usual understanding of sovereignty. After all, Iraqi forces had marched across an internationally recognized boundary, and gravely intervened in domestic jurisdiction by displacing the government of Kuwait.

But the new activism, once loosed, proved to have a wider reach. Shortly after the Gulf War's end, Saddam's efforts to crush internal rebellion touched off such an outpouring of global sympathy for his victims, particularly the Kurds in the north, that global action was demanded. Few of the usual legal objections were heard when the coalition forces joined in creating a safe haven in northern Iraq in April 1991. More objections surfaced recently when the United States sought to use the arguable authority of the earlier Security Council resolutions to enforce a no-fly zone in the south of Iraq. 34 Nevertheless, the whole experience has transformed "humanitarian intervention" from an obscure and rather wistful topic for professors of international human rights into a buzzword for the op-ed pages.

World action of this sort is now an available option for responding to a host of troubling post-Cold War international crises. President Bush, of all people, helped prove that humanitarian intervention has wider application than simply in circumstances where the target nation once committed classic cross-border aggression. Bush was an unlikely candidate for this role; his great reluctance to aid the Kurds through any use of U.S. military power had been obvious in the bitter spring of 1991. Nevertheless, in his final major foreign initiative, Bush proposed a surprising humanitarian foray into Somalia in December 1992, to end starvation and restore a modicum of order. Significantly, he worked this time to assure that the action received express UN sanction under the Security Council's Chapter VII powers. 35

B. Other Human Rights Initiatives

These events of the 1990s merely provided a capstone to a decades-long effort to legitimize international human rights initiatives. We therefore now inhabit a world of international law where the conceptual structure has been significantly revised, as compared with 1951. The domain of


matters "essentially within the domestic jurisdiction of any state," to use the terminology of Article 2(7) of the Charter, has been sharply diminished. Now the UN as a whole, as well as separate states, regional organizations, and international institutions, may discuss a wider range of formerly internal matters, and use various instruments of diplomacy, persuasion, and overt pressure to serve humanitarian ends. "Sovereignty" no longer holds as much power, especially when it is deployed to shield a state's mistreatment or abysmal neglect of its own citizens. To be sure, sovereignty will still be invoked and discussed, but it has become more of a ritualistic incantation, not necessarily expected to have operative force, rather than the winning trump played in previous decades.

With the conceptual barriers lowered, the world community is gradually gaining experience with novel techniques meant to improve the situation at home. For example, international election observers are now routinely deployed to help monitor, and perhaps ultimately to help legitimize, election contests in countries where democracy is new or newly restored. This precedent has now been expanded to include sending teams of international human rights monitors even when no election is in the offing. And some are beginning to recognize the potential for human rights protection that may go hand-in-hand with a more traditional humanitarian assistance presence.

C. Further Legal Implications

Practice now establishes that the UN Security Council may choose to use its maximum authority under Chapter VII of the Charter for candid humanitarian ends, rather than solely for classic reasons of collective security. Refugee flows played a crucial role in that legal evolution, for they were the obvious foundation for the Security Council's pivotal deci-
sion to condemn Iraq’s repression of the Kurds in terms that ostensibly fit the entire humanitarian endeavor within the framework of Chapter VII. Under Article 39, the coercive Chapter VII powers of the Security Council may be used only when the Council finds a "threat to the peace, breach of the peace, or act of aggression." This catalogue seems to address only hard-eyed security concerns; human rights abuses and other humanitarian aims are mentioned only in other parts of the Charter, in noncoercive contexts.40 Some weighty contenders in earlier battles over the reach of Chapter VII powers (particularly when they were used to impose an embargo on Britain’s breakaway Rhodesian colony) had forcefully challenged the legitimacy of considering any humanitarian factors under this provision.41

Against this background, the first operative paragraph in the key Security Council resolution (Resolution 688) on treatment of the Kurds is of crucial importance: "[The Security Council] Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in the Kurdish populated areas, the consequences of which threaten international peace and security in the region."42 The emphasized phrase plainly refers to the massive refugee flows Iraq had triggered (to both Turkey, which resisted, and Iran, which generally permitted entry).43 After Resolution 688, Security Council practice makes clear that Article 39’s formula can be invoked in settings far different from the acts or threats of aggression classically understood. And although Resolution 688 is somewhat elliptic (it never expressly states that the Security Council is acting under Chapter VII), it has served as the foundation for the coalition forces’ legal justification of their role in Operation Provide Comfort and its aftermath.44

Having leapt the conceptual divide from classic cross-border aggression to more humanitarian grounds for finding a "threat to the peace" in April 1991, the UN later has found use of coercive authority for human rights or humanitarian reasons far easier. Security Council

40. See Tom J. Farer, An Inquiry into the Legitimacy of Humanitarian Intervention, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185, 190 (L. Damrosch & D. Scheffer eds., 1991). Farer provides an illuminating, concise account of the ongoing debate between "classicists" and "realists" over whether Chapter VII may be used for wider purposes. On this point I side with the so-called realists in supporting a greater weight for subsequent practice.
43. This point is made even clearer in the debates that preceded adoption. See United Nations Security Council, Provisional Verbatim Record of the Two Thousand Nine Hundred and Eighty-Second Meeting, U.N. Doc. S/PV. 2982 (1991).
44. See, e.g., 2 U.S. DEP’T OF STATE DISPATCH 273 (1991) (statement of President Bush); id. at 275-76 (statement of Princeton Lyman, Director, Bureau of Refugee Programs).
Resolution 794, which authorized Operation Restore Hope in Somalia, is emblematic of the new situation. The preamble approves “the Secretary General’s assessment that the situation in Somalia is intolerable,” and goes on to announce the Security Council’s formal determination that “the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.” On this groundwork, and this time expressly “acting under Chapter VII of the Charter,” the resolution then authorizes the Secretary-General and member states to “use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”

Today the world is certainly in the business of intervening, under UN authority, for humanitarian reasons. The debate has largely shifted from the legal question of legitimacy to operational questions about the likely effectiveness of various forms of international presence, their respective costs, and the prospects for ultimate disengagement. The old reticence has not completely departed, nor should it, for some invocations of “sovereignty” are clumsy proxies for a justifiable notion of national self-determination. Obviously the world community should not override local authority except for powerful reasons. But at least now the weight of those reasons, including purely humanitarian reasons, can be discussed candidly and then balanced against local interests in light of limits on effective power and diplomacy.

These are hopeful developments, for they may, at least in some circumstances, offset the hardships created or perpetuated by the barriers and deterrents that states are erecting toward refugee claimants. If western nations will not provide a solution through exile, then perhaps they will seize these other options. Receiving states who feel

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45. S.C. Res. 794, 47th Sess., 3145th mtg. at 17, U.N. Doc. S/RES/794 (1992). Although refugee flows are not expressly mentioned in this Resolution providing Chapter VII authority for the U.S. intervention in Somalia, the resolution was adopted at a time when cross-border refugee flows to Kenya had reached major proportions, increasing resistance on the part of the host population. See Kenya Refugee Population Reaches 400,000 with No End in Sight, Refugee Reports, Oct. 30, 1992, at 15.

46. S.C. Res 794, supra note 45, at 17.

47. Id.


49. All these considerations are subject, of course, to one ultimate constraint; a proposed Chapter VII action must always stay within the tolerances imposed by the interests of the five permanent members of the Security Council, each of which retains a veto power. (In the activist period we are now experiencing, China is generally regarded as the most skeptical power—the one most likely to wield a veto if intervention strays too far.) Nevertheless, the UN has managed to be active on an unprecedented scale and has not encountered a veto since June 1, 1990.
overburdened by refugee flows can use that precise transnational impact as one basis for legitimizing their efforts to go to the source, to encourage (through human rights diplomacy) or sometimes require (through humanitarian intervention when the case is extreme) an end to repression in the source country. And they need not wait until people are on the move. International action on behalf of persecuted individuals is now clearly legitimate, even before they manage, through some unspoken form of self-help, to escape across an international frontier. Some of the energy and resources that once went into battles over a haven state's effort to provide for refugees can now be harnessed for more systematic and well-thought-out efforts to maximize protection for threatened people, whether or not they have yet crossed a border.

D. The Continuing Risks from a Regime of Barriers: An End to Signalling and Inducement

What I have just sketched is the hopeful way of portraying future reactions to refugee flows. But here optimism and pessimism are in a close race, for barriers to refugee flows may have a more insidious impact on the future use of vigorous human rights initiatives.

Refugee flows have been important not only because of the way they have triggered a conceptual breakthrough, breaching the artificial walls of sovereignty that once pretended that oppression inside a country was no one else's business. They have been important for another, far more pragmatic reason. Asylum seekers, even if their claims ultimately fall short of the legal standards for winning full political asylum, have served a vital signalling function. Their arrival in significant numbers forces the media, the public, and the political elite in the receiving state to take notice of the poverty or abuses in the home state that may have triggered the flow. Beyond this, a desire to reduce the burdens and expenses associated with asylum claims—including adjudication costs, care and maintenance, and friction with the local population—can feed into efforts to bring relief or find solutions in the home country. The objective is to reduce future migration, or to encourage voluntary returns, or perhaps only to make more palatable the forced return of those whose claims are rejected by the asylum adjudication system, because the home state's situation is becoming demonstrably better. All these factors amount to "'selfish' national interest reasons" for human rights policy, to use a phrase introduced by Richard Bilder in 1974.\textsuperscript{50} Selfish reasons may be troubling, but they are better than no reasons at all, and they are probably more effective than reasons built solely on altruistic appeals.

In the 1980s, these processes were evident in the United States regarding Central American asylum seekers, and in Europe for Sri Lankan Tamils. Human rights abuses in the home countries stayed on
the policy agenda, in major part because of the receiving states’ struggles with the challenges posed by large numbers of asylum seekers. This effect occurred even though most of those claimants were ultimately deemed not to fit the Convention refugee definition. A similar process also unfolded for Haitians from the time of the first post-coup outflow in October 1991 until May 1992, when President Bush’s order brought an abrupt and near-total halt to further outflows. The Supreme Court’s preliminary approval of Bush’s harsh action, however (when it stayed the Second Circuit’s injunction), dropped Haiti to a low-priority issue—a status it maintained throughout the presidential election campaign. If inertia pulls President Clinton into keeping Haitian interdiction in place indefinitely, we may well see a similar draining of interest and priority from efforts to reinstate a democratic government in Haiti.

Here is where the increasingly sophisticated proliferation of barriers to the arrival of asylum seekers may pose its greatest threat. If U.S. interdiction teaches the world that insulation from a refugee flow can be achieved unilaterally without having to address the underlying causes, much of the fire may go out of humanitarian efforts and human rights diplomacy. Hence it is important to remove interdiction as a policy tool, not only because of its impact on the threatened individuals who might seek to escape—though that is clearly a worthy reason that should not be lost from view. Removing that option is also vital in order to

51. Sale v. Haitian Centers Council, Inc., 113 S. Ct. 3 (1992) (staying the injunction issued by the court of appeals at 969 F.2d 130 (2d Cir. 1992)). The Supreme Court granted certiorari shortly thereafter, 113 S.Ct. 52 (1992), and oral argument was heard on March 2, 1993.

52. I worry that this will be the lesson that the world takes from President Clinton’s perpetuation of interdiction, especially if it is sustained by the Supreme Court, even though the Clinton Administration itself may confound the analysis offered here. That is, Clinton appears to be sustaining a much more vigorous human rights diplomacy aimed at the military government in Haiti, involving the UN and not simply the Organization of American States, even without the stimulus that an ongoing mass exodus would doubtless provide. See Ben Barber, Clinton Turns Up Heat on Haiti’s Military Regime, CHRISTIAN SCI. MONITOR, Apr. 7, 1993, at 3; Howard W. French, Pact to Return Aristide to Haiti Is Called Near, N.Y. TIMES, Mar. 28, 1993, at 17.

53. In-country refugee processing, touted by the Bush Administration (and more recently by Clinton’s) as an alternative mode of protection for Haitians, is not wholly plausible as an avenue of protection, particularly for those who should be the principal objects of our concern—those who are the most clearly threatened, those who are unmistakably viewed by the regime as dangerous opponents. Even if processing expands to locations outside of Port-au-Prince, no applicant can have confidence in his or her ability to make it safely into and out of the facility, and then the country. These risks are compounded when the process is as slow and bureaucratic as the early rounds of processing in Haiti reportedly have been. See Clinton Continues Summary Return of Haitians; U.S. Lawyers Investigate In-Country Processing, REFUGEE REPORTS, Jan. 29, 1993, at 1.

This analysis also touches upon another central objection to interdiction, at least in the extreme form now applied to Haiti. Interdiction with immediate return, even when coupled with other human rights initiatives, blots out intermediate avenues of protection (those purchased by the individuals involved at the initial price of contriving a self-help escape), even for the most gravely threatened. However important human rights initiatives and in-country processing may be, they do not deal with “the
keep the pressure on neighboring countries to go to the source, so that they have immediate reasons to push for constructive change inside the country whose misgovernment, oppression, or other severe suffering sends people across the frontiers.

How can this be done? The Supreme Court could eliminate the strongest form of interdiction merely by affirming the Second Circuit. But its speedy stay of the lower court's injunction last summer leaves little room for optimism. I believe instead that refugee activists will have to adopt a longer-term strategy if interdiction is to be ended, through political pressure and the offering of credible alternatives. Maximalist advocacy will have to be curbed so that a fully functioning mainland asylum system can finally be developed. It must be a system that readily sorts meritorious claimants from those with insufficient claims. It must curb the instinct to apply unrealistically expansive substantive standards. Finally, it has to be able to deport, fairly promptly, those who do not qualify.54 Only the availability of that sort of alternative—in actual practice and not just in principle—will begin to wean politicians away from the worst forms of barriers and deterrents.

Conclusion
Such a strategy is admittedly counter-intuitive. It asks that we help give the domestic asylum system a better capacity to say "no," so that the executive branch can be coaxed into ending an interdiction policy that basically just says "no" indiscriminately, at some point far from our borders, our media, and our courts. Such a paradoxical achievement may be essential, however, if refugee flows are still to play the signalling and inducement role they have developed in recent years. Comfortable nations may need this ongoing stimulus if they are to use the new international legal regime to its maximum advantage, by pressing hard—even sometimes through multilateral intervention—for human rights improvements at the source.

meantime," as Bill Frelick so aptly phrases the matter in his contribution to this volume: "[Human rights initiatives] cannot be the sum total of a refugee policy. A refugee policy is about what to do in the meantime, how to protect and assist people outside their country while the country of origin is still dangerous." Bill Frelick, Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection, 26 CORNELL INT'L L.J. 675 (1993).

54. See generally Martin, supra note 24, at 1287-94.