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## Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders

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# HUMAN SECURITY AND THE RIGHTS OF REFUGEES: TRANSCENDING TERRITORIAL AND DISCIPLINARY BORDERS

*Alice Edwards\**

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The notion of security has been subject to serious rethinking by international relations scholars and foreign policy advisors since at least the 1980s, but increasingly since the end of the Cold War.<sup>1</sup> This is because the realist paradigms of territorial sovereignty, national interest, and military force that dominated Cold War discourse are no longer considered as well suited to the transnational character of many of the new challenges of the post-Cold War era. In fact, it has been claimed that the impetus to this radical reappraisal of security discourse was “the very

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1. BILL MCSWEENEY, *SECURITY, IDENTITY AND INTERESTS: A SOCIOLOGY OF INTERNATIONAL RELATIONS* 1–2 (1999).

novelty of peace” between the Communist bloc and the West at the end of the Cold War.<sup>2</sup> Arguably, the most important attempt to reconceptualize security has been the introduction of the concept of “human security.”

Emerging from within development circles, rather than security circles, the United Nations Development Programme (UNDP) stated in its 1994 annual report that the concept of security has been too narrowly construed for too long “as security of territory from external aggression, or as protection of national interest in foreign policy, or as global security from the threat of a nuclear holocaust.”<sup>3</sup> Arguing that it is time to move beyond the narrow concept of “national security” or “territorial integrity” to “an all-encompassing [trans-boundary] concept of human security,”<sup>4</sup> the UNDP identified two main components of this new approach:

It means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life.<sup>5</sup>

The UNDP predicted that the “idea of human security . . . is likely to revolutionize society in the 21st century.”<sup>6</sup> This prediction has not been born out, however, not least due to the post September 11 reassertion of conventional national security agendas. Nonetheless, the new human security paradigm is growing in influence. At a minimum, it is an important conceptual shift and complementary policy objective on the international agenda.

Accordingly, a U.N. Commission on Human Security (CHS) was established in 2000, cochaired by Amartya Sen and Sadako Ogata. In 2003, the CHS issued its final report, in which it concluded that human security means protecting “vital freedoms.” It means protecting people from critical and pervasive threats and situations, building on their strengths and aspirations. It also means creating systems that give people the building blocks of survival, dignity, and livelihood. Human security connects different types of freedoms—freedom from want, freedom from fear, and freedom to take action on one’s own behalf. To achieve

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2. *Id.* at 2.

3. UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 22 (1994).

4. *Id.* at 24.

5. *Id.* at 23.

6. *Id.* at 22.

human security, it offers two general strategies: protection and empowerment.<sup>7</sup>

The human security paradigm focuses directly and specifically on *people* and their right to live in safety and dignity and to earn a livelihood, rather than on the State and its security and sovereignty. Human security treats security, rights, and development as mutually reinforcing goals and is oriented as much toward the protection of individuals as toward their empowerment. It also reinforces the view that no matter how vigorously a State defends its national borders, today's global threats, such as environmental degradation, international terrorism, poverty, and infectious diseases do not respect them. It also challenges us to revisit notions of territory and sovereignty as far as they inhibit global action in the face of transnational threats to our shared security and humanity.<sup>8</sup> However, the idea of human security has met considerable criticism.

One of the main concerns of the human security framework is that it may undermine hard-won human rights guarantees or otherwise displace law-based systems of protection. This concern has raised many questions about the discourse on human security. Is it intended to or likely to replace or undermine human rights? Does it threaten these hard-won legal gains? These questions are addressed in this Essay. A second level of inquiry in this Essay interrogates what the "human security/human rights" dialogue means for the protection of refugees, who have typically been outside the remit of States' national interests, except insofar as they are seen as threats to a State's security or some geopolitical pawns in the realist security paradigms of the Cold War and its bipolar politics. As non-citizens who are on the perimeters of the citizen-state protection system, refugees have been reliant largely on specific legal regimes, supported by humanitarian goodwill, for their protection. However, these legal regimes have been increasingly eroded by state noncompliance and exploitation of legal loopholes. This Essay asks whether the framework of human security may offer a complementary source of protection in the face of eroding refugee rights.

In the background to these debates lie disciplinary boundaries between scholars of international relations and international law respectively. These boundaries can, to an extent, determine whether the human security framework is accepted or rejected. Any attempt at evalu-

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7. COMM'N ON HUMAN SECURITY [CHS], *HUMAN SECURITY NOW* iv–v (2003), available at <http://www.humansecurity-chs.org/finalreport/English/FinalReport.pdf> (last visited May 27, 2009).

8. For more on the changing nature of territoriality and sovereignty, see Saskia Sassen, *Bordering Capabilities Versus Borders: Implications for National Borders*, 30 *MICH. J. INT'L L.* 567 (2009).

ating the usefulness of the human security framework must therefore be cognizant of the disciplinary tradition from which one starts.

Security and human rights have been concurrent aims of the United Nations since its inception in 1945.<sup>9</sup> Under the traditional realist view of international relations, despite the proliferation of international human rights instruments, international legal obligations have been regarded at best as “a significant brake on the pursuit of [national] interests”<sup>10</sup> and have been pursued as far as they satisfy or further state interests.<sup>11</sup> Lassa Oppenheim, for example, invokes the idea of state interests to explain the construction of the rules of international law.<sup>12</sup> In contrast, many international lawyers do not generally examine *why* States follow or violate human rights obligations. Rather, they seek instead to articulate ways to strengthen or to improve the law.<sup>13</sup>

These same divisions are also being played out in the context of the human security framework. International relations theorists have either rejected the framework because it downplays State interests to individual needs (the realist and neo-realist schools of thought<sup>14</sup>), or have found it appealing as a new method of conceptualizing international relations and security discourse because of its broader view of reality (for example, liberalism,<sup>15</sup> constructivism,<sup>16</sup> or critical security studies<sup>17</sup>). Meanwhile, some international lawyers are skeptical of it either because of its lack of

9. U.N. Charter arts. 1(1)-1(3), 2(3), 2(4), 2(6), 13, 55(c), 62(2), 68, 76(c), chs. VI-VII.

10. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 15 (2005).

11. *Id.*

12. See 1 LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* (2d ed. 1912).

13. See GOLDSMITH & POSNER, *supra* note 10, at 15; see also DAVID ARMSTRONG ET AL., *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* (2007).

14. KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979). For an overview of traditional security discourse, see ARNOLD WOLFERS, *DISCORD AND COLLABORATION: ESSAYS IN INTERNATIONAL POLITICS* (1962); see also Alice Edwards & Carla Ferstman, *Humanising Non-Citizens: The Convergence of Human Rights and Human Security*, in *HUMAN SECURITY AND NON-CITIZENS*, *supra* note \*, ch. 1.

15. For a discussion on liberalism, see generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (2005); BRUCE RUSSETT & JOHN R. ONEAL, *TRIANGULATING PEACE: DEMOCRACY, INTERDEPENDENCE, AND INTERNATIONAL ORGANIZATION* (2001).

16. For discussions on constructivism, see generally ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999); Ted Hopf, *The Promise of Constructivism in IR Theory*, 23 *INT'L SEC.* 171 (1997); Edward Newman, *Human Security and Constructivism*, 2 *INT'L STUD. PERSP.* 239 (2001).

17. Critical Security Studies provide the theoretical underpinning to the human security approach. See generally MCSWEENEY, *supra* note 1; *NEW THINKING ABOUT STRATEGY AND INTERNATIONAL SECURITY* (Ken Booth ed., 1991).

enforceability, its alleged conceptual “fuzziness,” or the fact that it may threaten or undermine binding human rights norms.<sup>18</sup>

As an international lawyer, I have much sympathy for the concerns raised by international lawyers about the non-legal nature of the human security framework and all that this entails. However, I am also cognizant of the fact that, as lawyers, we sometimes overstate the effect of the legal system on state behavior, agenda setting, and the protection and empowerment of individuals (particularly refugees and other non-citizens). I posit that, notwithstanding our present attachment to disciplinary boundaries, international law cannot and should not be divorced from international relations.

At best, States acknowledge the importance of an effective international legal system,<sup>19</sup> as the law regulates many areas of international life. In particular, it “provides for stability in international relations.”<sup>20</sup> However, international human rights and refugee laws contain only a minimum set of standards. These standards are selectively and poorly enforced, usually relying on their coinciding with the political objectives of States to achieve their aims. This is not to suggest in any way that persuasive arguments cannot be made to States that they must observe their internationally agreed obligations under international law. However, attributing such compliance to non-instrumentalist reasons<sup>21</sup> is only one theory of why States respect international law. A second school of thought holds that States comply for instrumentalist reasons, such as for fear of retaliation for noncompliance, for reasons of future cooperation, for national interests, or for reasons of reputation.<sup>22</sup> This latter theory explains why recourse to rights-based language has been met with, in some cases, limited success or even resistance.<sup>23</sup> It is at this juncture between rights and security that human security—as a transboundary and cross-disciplinary concept—can potentially step in to bolster, strengthen, and support the law. For States, it may permit the reconciliation of instrumentalist and non-instrumentalist goals. At the same time, however, it may be applied to further political objectives rather than as a set of

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18. See *infra* Part III.A.

19. Arthur Watts, *The Importance of International Law*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 5, 7 (Michael Byers ed., 2000).

20. *Id.*

21. An example of such a non-instrumentalist reason is that a State may comply because it is the right thing to do, or because its citizens believe it is the right thing to do.

22. See GOLDSMITH & POSNER, *supra* note 10, at 100–04 (discussing theories of state compliance with international law).

23. See, for example, the U.N. Convention on the Prevention and Punishment of Genocide, whose obligations to act failed to stop the genocide in Rwanda or in the former Yugoslavia in the 1990s. G.A. Res. 96 (I), art. 1, U.N. Doc. A/RES/1/96 (Nov. 11, 1946).

guiding principles and must be carefully monitored to ensure that States do not appropriate it entirely for their own ends.

I examine the concept of human security through the lens of refugee protection. In particular, I ask whether the concept of human security could add anything to the international protection regime for refugees and asylum seekers under international law. Before international lawyers can reject the notion of human security on the basis of its non-legal, and therefore nonbinding, character, it is necessary to examine the gaps in the existing legal framework, into which policy discourse, including security discourse, may step in as an important player.

I start by providing a summary of the origins and development of the human security framework, how it has been defined, and what have been identified as its main shortcomings. I then provide an overview of how refugees and asylum seekers have been featured in this security discourse. I follow this overview with an analysis of the legal protection regime relating to refugees, including recourse to human rights standards to fill some of the legal gaps in that regime. Finally, I ask whether the human security framework is in any way beneficial to refugees.

## I. ORIGINS AND DEVELOPMENT OF HUMAN SECURITY

As noted above, Cold War security discourse was dominated by State borders, national interests, and the arms race. This traditional view of security explains the underlying principles of the U.N. Charter of 1945, namely the sovereign equality of States, mutual coexistence, the maintenance of international peace and security through collective action, and non-interference in the internal affairs of other States.<sup>24</sup>

However, this realist political agenda has failed to solve the majority of the world's security concerns, including many non-military threats, such as those arising from globalization, poverty, and environmental issues.<sup>25</sup> This agenda also ignores the fact that human rights, including economic and social rights, non-discrimination, and international cooperation are also central features of the U.N. Charter.<sup>26</sup>

In the post-Cold War context, non-military threats have been increasingly recognized as being of equal seriousness as military threats; at a

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24. See U.N. Charter arts. 1–2 (discussing sovereign equality, international cooperation, harmonization, and maintenance of international peace and security); see also *id.* chs. VI–VII (discussing prohibition on use of force, subject to individual or collective self defense or Security Council action).

25. See Barry Buzan, *Rethinking Security After the Cold War*, 32 COOPERATION & CONFLICT 5, 5–10 (1997).

26. U.N. Charter arts. 1(3), 13, 55 (discussing human rights); *id.* arts. 1(1), chs. VI, VII (discussing collective measures and cooperation).

minimum, they have gained some international attention. This shift in security discourse mainly “proceeds from the assumption that defining national security merely (or even primarily) in military terms conveys a profoundly false image of reality.”<sup>27</sup> This false image gives rise to two problems:

First, it causes [S]tates to concentrate on military threats and to ignore other and perhaps even more harmful dangers. Thus it reduces their total security. And second, it contributes to a pervasive militarization of international relations that in the long run can only increase global insecurity.<sup>28</sup>

It further “presupposes that threats arising from outside a [S]tate are somehow more dangerous to its security than threats that arise within it,”<sup>29</sup> and overlooks the fact that state protection is often pursued at the expense of individuals’ personal security.<sup>30</sup> A call was thus made to conceive of many of these non-military issues as security concerns<sup>31</sup> in order to put them on the international agenda.

The 1994 UNDP report was lauded as groundbreaking and innovative, although, as has been noted by some academics, the ideas behind human security had been around for some time.<sup>32</sup> It has been further ob-

27. See, e.g., Richard H. Ullman, *Redefining Security*, 8 INT’L SEC. 129, 129 (1983).

28. *Id.* at 129.

29. *Id.* at 133.

30. See BARRY BUZAN, *PEOPLE, STATES AND FEAR: AN AGENDA FOR INTERNATIONAL SECURITY STUDIES IN THE POST-COLD WAR ERA* 22, 37–38 (2d ed. 1991); BARBARA VON TIGERSTROM, *HUMAN SECURITY AND INTERNATIONAL LAW: PROSPECTS AND PROBLEMS* 12 (2007) (citing MICHAEL SHEEHAN, *INTERNATIONAL SECURITY: AN ANALYTICAL SURVEY* 11 n.7 (2005)).

31. Ullman, *supra* note 27, at 129. See generally Jessica Tuchman Mathews, *Redefining Security*, 68 FOREIGN AFF. 162 (1989); *The Environment and International Security*, in *WORLD SECURITY: CHALLENGES FOR A NEW CENTURY* (Jessica Tuchman Mathews et al. eds., 2d ed. 1994).

32. Already, in 1980, reports of the Brandt Commission stressed that:

security must be reconceived with people foremost in mind. The purely defensive concept of security should be enlarged to include hunger, disease, poverty, environmental stress, repression, and terrorism, all of which endanger human security as much as any military provocation. To that end, the international community has the responsibility to eliminate any social conditions that pose threats to the protection and dignity of people, before they erupt into armed conflict.

JAMES BERNARD QUILLIGAN, *THE BRANDT EQUATION: 21ST CENTURY BLUEPRINT FOR THE NEW GLOBAL ECONOMY* 13 (2002). In 1987, the Brundtland Commission report noted that a “comprehensive approach to international and national security must transcend the traditional emphasis on military power and armed competition. The real sources of insecurity also encompass unsustainable development, and its effects can become intertwined with traditional forms of conflict in a manner that can extend and deepen the latter.” World Comm’n on Environment & Development, *Report of the World Commission on Environment and Development: Our Common Future*, ¶ 4, U.N. Doc. A/RES/42/187/Annex (Aug. 2, 1987). For antecedents in



served that transnational threats could not properly be dealt with unilaterally, but required collective action and international cooperation and multilateralism.<sup>33</sup> In this new security environment, a one-dimensional focus on the nation-state is less relevant. Military threats that did exist have largely shifted from being international to internal in character. For example, individuals in the post-Cold War era face a greater risk of human rights violations at the hands of their own governments than of external aggression.<sup>34</sup> Realist approaches have also failed to respond adequately to such issues as international terrorism.<sup>35</sup>

In 1992, the U.N. Security Council formally recognized that “non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.”<sup>36</sup> Superpower rivalry and bipolar politics had ended, and the world was entering a period of globalization and increased cross-border flows of capital, goods, and people.<sup>37</sup> Within this context, national borders were increasingly seen as less important, although they remained and were strengthened in relation to preventing, among other things, irregular migration. This has included efforts to deter the movement of asylum-seekers and refugees from the global South to the global North.

Since the release of the UNDP report, the human security concept has featured variously within the U.N. system.<sup>38</sup> In 1999, a Trust Fund

international relations theory, see Shahrbanou Tadjbakhsh, *Human Security in International Relations: Blessing or Scourge*, 4 HUMAN SECURITY, 9 (2007). Tadjbakhsh stated:

[The] idea [of human security] had been part of academic debates since the early [1980s], where expanding and deepening security studies revolved around Barry Buzan and others' Copenhagen School scholars in international relations theories. If Buzan's movement emphasized on the social aspects of security, the constructivist, critical and feminist theories in international relations had further brought the unit of analysis, and the referent object and subject of “security” down to the level of individuals.

*Id.*

33. CHS, *supra* note 7. *passim*

34. See GIL LOESCHER, *THE UNHCR AND WORLD POLITICS: A PERILOUS PATH* (2006).

35. See generally National Security and the “War on Terror”, in HUMAN SECURITY AND NON-CITIZENS, *supra* note \*, at pt. IV.

36. U.N. SCOR, 47th Sess., 3046th mtg. at 142, U.N. Doc. S/PV.3046 (Jan. 31, 1992).

37. SHAHRBANOU TADJBAKHSH & ANURADHA M. CHENOY, *HUMAN SECURITY: CONCEPTS AND IMPLICATIONS I* (2007).

38. See, e.g., The Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century: Millennium Report of the Secretary-General, delivered to the General Assembly*, U.N. Doc. A/54/2000 (Mar. 27, 2000); World Summit for Social Development, Copenhagen, Den., Mar. 6–12, 1995, *Copenhagen Declaration on Social Development and Programme of Action for the World Summit for Social Development*, ¶¶ 2, 5, 8, 20, U.N. Doc. A/CONF.166/9 (Apr. 19, 1995); THE COMM’N ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBORHOOD* (1995); see also VON TIGERSTROM, *supra* note 30; G8 Foreign Ministers’ Meeting, Cologne, 10 June 1999, Conclusions, <http://www.dfait-maeci.gc.ca/g8fmm->

for Human Security was established that finances projects carried out by organizations in the U.N. system, and when appropriate, in partnership with non-U.N. entities, to advance the operational impact of the human security concept.<sup>39</sup> This Trust Fund is managed by the Human Security Unit, a body that works to integrate human security into all U.N. activities and now operates as a formal structure within the U.N. system.<sup>40</sup> In 1999, the Human Security Network, a high-level group of likeminded countries, was established to maintain dialogue on human security issues.<sup>41</sup> Human security was also prominently highlighted in the U.N. Secretary General's Millennium Report, in which former Secretary General Kofi Annan noted that:

In the wake of these [internal rather than international] conflicts, a new understanding of the concept of security is evolving. Once synonymous with the defense of territory from external attack, the requirements of security today have come to embrace the protection of communities and individuals from internal violence.

The need for a more human-centered approach to security is reinforced by the continuing dangers that weapons of mass destruction, most notably nuclear weapons, pose to humanity: their very name reveals their scope and their intended objective, if they were ever used.<sup>42</sup>

At the 2005 World Summit, the human security concept was recognized and the Peacebuilding Commission established:

We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end,

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g8rmae/concl-en.asp (last visited June 18, 2009) (discussing human security in the conclusions).

39. An initial contribution of 500 million yen was donated by the Government of Japan to set up the Trust Fund. For further information on the Trust Fund, see United Nations Trust Fund for Human Security, <http://ochaonline.un.org/TrustFund/tabid/2107/Default.aspx> (last visited June 18, 2009).

40. See U.N. Trust Fund for Human Security, Human Security Unit (2007), <http://ochaonline.un.org/HumanSecurityUnit/tabid/2212/language/en-US/Default.aspx> (last visited June 18, 2009).

41. See The Human Security Network, [www.humansecuritynetwork.org/network-e.php](http://www.humansecuritynetwork.org/network-e.php) (last visited June 18, 2009).

42. The Secretary-General, *supra* note 38, ¶¶ 194–95.

we commit ourselves to discussing and defining the notion of human security in the General Assembly.<sup>43</sup>

Following up on this commitment, the U.N. General Assembly held its first thematic debate on human security in March 2008, in recognition of the growing number of States using or referring to the concept.<sup>44</sup> At this meeting, human security was characterized as a framework to further the principles of the U.N. Charter of 1945.<sup>45</sup>

Human security has further featured in the foreign policies of a number of governments, most notably those of Canada and Japan.<sup>46</sup> In 1998, Norway and Canada formed a partnership<sup>47</sup> that subsequently evolved into the Human Security Network mentioned above. As of September 2008, members of the Network included Austria, Canada, Chile, Costa Rica, Greece, Ireland, Jordan, Mali, the Netherlands, Norway, Slovenia, Switzerland, and Thailand (South Africa participates as an observer).<sup>48</sup> In addition, Friends of Human Security was established by Japan as an unofficial, open-ended forum at the United Nations for governments to discuss human security from all angles.<sup>49</sup> It held its first meeting in October 2006.<sup>50</sup> Among the successes attributed to the human security agenda by these governments include the creation of the Inter-

43. 2005 World Summit, Sept. 14–16, 2005, *2005 World Summit Outcome*, ¶ 143, U.N. Doc. A/60/L.1 (Sept. 20, 2005).

44. Srgjian Kerim, President, U.N. General Assembly, Opening Remarks at the Thematic Debate on Human Security (May 22, 2008), available at <http://www.un.org/ga/president/62/statements/humansecurity220508.shtml> (last visited June 18, 2009).

45. Srgjian Kerim, President, U.N. General Assembly, Concluding Remarks at the Thematic Debate on Human Security (May 22, 2008), available at <http://www.un.org/ga/president/62/statements/crhumansecurity220508.shtml> (last visited June 18, 2009).

46. See DEP'T OF FOREIGN AFF. & TRADE, FREEDOM FROM FEAR: CANADA'S FOREIGN POLICY FOR HUMAN SECURITY (2000), available at [http://pubx.dfait-maeci.gc.ca/00\\_global/Pubs\\_Cat2.nsf/56153893FF8DFDA285256BC700653B9F/\\$file/Freedom\\_from\\_Fear-e.pdf](http://pubx.dfait-maeci.gc.ca/00_global/Pubs_Cat2.nsf/56153893FF8DFDA285256BC700653B9F/$file/Freedom_from_Fear-e.pdf) (last visited June 18, 2009); MINISTRY OF FOREIGN AFFAIRS OF JAPAN, THE TRUST FUND FOR HUMAN SECURITY: FOR THE "HUMAN-CENTERED" 21ST CENTURY (2006), available at [http://www.mofa.go.jp/policy/human\\_secu/t\\_fund21.pdf](http://www.mofa.go.jp/policy/human_secu/t_fund21.pdf) (last visited June 18, 2009).

47. Press Release, Dep't of Foreign Aff. & Trade, Canada and Norway Form New Partnership on Human Security (May 11, 1998), available at [http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication\\_id=375251&Language=E&docnumber=117](http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=375251&Language=E&docnumber=117) (last visited June 18, 2009).

48. See VON TIGERSTROM, *supra* note 30, at 22 (citing Paul M. Evans, *Human Security and East Asia: In the Beginning*, 4 J. E. ASIAN STUD. 263 (2004)).

49. Ministry of Foreign Affairs of Japan, Friends of Human Security, [http://www.mofa.go.jp/policy/human\\_secu/friends/index.html](http://www.mofa.go.jp/policy/human_secu/friends/index.html) (last visited June 18, 2009).

50. *Id.*

national Criminal Court<sup>51</sup> and the agreement of the antipersonnel land mine ban treaty.<sup>52</sup>

A large number of academic institutions and centers have been established to address human security issues,<sup>53</sup> and academic publications and journals on the subject have proliferated.<sup>54</sup>

Although the human security framework has gained considerable momentum and remains firmly on the international security agenda, it arguably suffered a setback in the aftermath of the terrorist attacks on the United States on September 11, 2001. The CHS was established prior to these attacks, yet operated within a rapidly changing security environment in which state security, militarization, and unilateralism again rose to the forefront of national security agendas under U.S. foreign policy, as evidenced by the U.S.-led invasions of Afghanistan and Iraq and subsequent responses adopted in the name of countering terrorism.<sup>55</sup> The CHS report was issued in the same year that the United States and its allies went to war in Iraq, without a U.N. mandate. At a minimum, the human security concept is now a part of the peace and security, as well as the humanitarian, agendas of the United Nations and is likely to become of increasing importance. However, at a practical level, the framework has not displaced traditional notions of security, and the two policy discourses are likely to operate alongside one another.

A number of recent events have provided some impetus toward a new multi-polar re-configuration of international relations, one in which the fundamentals of the human security framework may become more rather than less important. These include the world financial crisis triggered in large measure by U.S. lending practices and with worldwide

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51. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

52. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 241.

53. See, e.g., Liu Institute for Global Issues, Human Security Centre, <http://www.ligi.ubc.ca/page165.htm> (last visited June 18, 2009); Institute for Human Security, The Fletcher School, Tufts University, <http://fletcher.tufts.edu/humansecurity/> (last visited June 18, 2009); Ford Institute for Human Security, University of Pittsburgh, <http://www.fordinstitute.pitt.edu> (last visited June 18, 2009); Centre for Peace and Human Security, Sciences Po, <http://www.peacecenter.sciences-po.fr> (last visited June 18, 2009).

54. See, e.g., RMIT Publishing, *Journal of Human Security*, <http://www.rmitpublishing.com.au/jhs.html> (last visited June 18, 2009); CERJ Program for Peace and Human Security, Sciences Po, *Human Security Journal/Revue de la sécurité humaine*, <http://www.peacecenter.sciences-po.fr/journal/> (last visited June 18, 2009); The Fletcher School, Tufts University, *The Fletcher Journal of Human Security*, <http://fletcher.tufts.edu/praxis> (last visited May 27, 2009).

55. See Carla Ferstman, *The Human Security Framework and Counter Terrorism: Examining the Rhetoric Relating to "Extraordinary Renditions"*, in HUMAN SECURITY AND NON-CITIZENS, *supra* note \*, ch. 15.

reverberations,<sup>56</sup> which reminds us of our interdependence in the face of globalization, as well as the international condemnation of U.S. unilateralism in the so-called “war on terror.” The latter has been epitomized by the “kidnap[ping]” and “rendition” of individuals without regard to rules of international law. The “war on terror” is also epitomized by the United States detention facility at Guantanamo Bay and the resulting legal vacuum in which many terror suspects have found themselves.<sup>57</sup> Arguably of most significance is the election of Barack Obama, a liberal-minded lawyer/academic whose early policy statements have focused on reexamining U.S. foreign policy, as President of the United States. His vision of leadership in this new era begins with the recognition that “the security and well being of each and every American is tied to the security and well-being of those who live beyond [its] borders.”<sup>58</sup> He has indicated that the role of the U.S. is to provide global leadership “grounded in the understanding that the world shares a common security and a common humanity.”<sup>59</sup> Although not directly quoting the language of human security, his early foreign policy statements share many of its central tenets.

## II. SECURITY DISCOURSE AND REFUGEES

Refugees and asylum seekers are never far from international and domestic security discussions. Whether they are viewed as victims of security deficits or as potential threats to national or international security, security is a defining element in the refugee protection landscape. There is, therefore, no option but to participate in security debates when discussing refugee protection.

The international refugee protection regime, founded on the 1951 Convention Relating to the Status of Refugees (1951 Convention)<sup>60</sup> and the humanitarian efforts that followed the mass atrocities of World War

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56. One particularly negative aspect of the financial crisis is that States may turn inward, which may constrain the ability of States to implement the vision of human security beyond their borders in the face of other global crises. See Roger C. Altman, *The Great Crash, 2008: A Geopolitical Setback for the West*, FOREIGN AFF., Jan.-Feb. 2009, at 2, 9.

57. See Ferstman, *supra* note 55.

58. OBAMA FOR AMERICA, STRENGTHENING OUR COMMON SECURITY BY INVESTING IN OUR COMMON HUMANITY 1 (2008), available at [http://www.cgdev.org/doc/blog/obama\\_strengthen\\_security.pdf](http://www.cgdev.org/doc/blog/obama_strengthen_security.pdf) (last visited June 18, 2008); see also Barack Obama, Remarks of Senator Barack Obama: A World that Stands as One (June 18, 2008), available at [http://www.barackobama.com/2008/07/24/remarks\\_of\\_senator\\_barack\\_obam\\_97.php](http://www.barackobama.com/2008/07/24/remarks_of_senator_barack_obam_97.php) (last visited May 27, 2009).

59. See Obama, *supra* note 58.

60. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 134, 150 (entered into force Apr. 22, 1954) [hereinafter 1951 Convention].

II, has faced some of its greatest challenges in the post-Cold War environment. Throughout the Cold War, security terminology was applied in favor of refugees. Although the modern refugee protection regime was built on the compassion evoked by World War II, it was clear by 1950 that refugees had also become important figures in the geopolitical interests of States and were viewed as being legitimately in flight from belligerent and politically unfriendly States.<sup>61</sup> In addition, as Guy Goodwin-Gill observes, “in drafting the various treaties covering the field, States have never been blind to the need to protect essential interests . . . ,”<sup>62</sup> including security interests.

With the growth in international migration and the shift from international to internal conflicts in the 1990s, refugees have been viewed as threats to national borders and security, perceived as criminals and terrorists, and, collectively, as threats to international peace and security.<sup>63</sup> Refugees no longer offer the same geopolitical benefits to state interests as they did in the bipolar politics of the Cold War. The Declaration of States Parties to the 1951 Convention, issued at the conclusion of the Global Consultations on International Protection held in the fiftieth anniversary year of the 1951 Convention, recognized:

[The] complex features of the evolving environment in which refugee protection has to be provided, including the nature of armed conflict, ongoing violations of human rights and international humanitarian law, current patterns of displacement, mixed population flows, the high costs of hosting large numbers of refugees and asylum-seekers and of maintaining asylum systems, the growth of associated trafficking and smuggling of persons, the problems of safeguarding asylum systems against abuse and of excluding and returning those not entitled to or in need of international protection, as well as the lack of resolution of long-standing refugee situations.<sup>64</sup>

In fact, some refugees arguably fared better under a bipolar nation-state system, in which they were of use within the superpower rivalry

61. See GIL LOESCHER, *BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS* 32–55 (1993); LOESCHER, *supra* note 34.

62. See Guy Goodwin-Gill, *Refugees, Rights and Security*, in *FORCED MIGRATION, HUMAN RIGHTS AND SECURITY* 1, 3 (Jane McAdam ed., 2008).

63. This latter characterization has some beneficial impact in terms of Security Council action, but has otherwise been a negative portrayal. See *infra* Part III.D.

64. Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Geneva, Switz., Sept. 12–13, 2001, *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶¶ 2, 6, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002) [hereinafter *Declaration of States Parties*].

that characterized the Cold War. Ironically, the Cold War was responsible in part for the very refugeehood of these individuals.<sup>65</sup> Of course, this system did not accommodate all those in need of protection. At that time, border controls prevented departures where today they prohibit entry.

The United Nations High Commissioner for Refugees (UNHCR) noted that, during the 1990s, the problem of forced displacement had become larger, more complex, and geographically more widespread.<sup>66</sup> Refugee movements and other forms of population displacement had also assumed a new degree of political importance, largely because of their impact on national and regional stability. Noting that “[t]he security of people and the security of [S]tates are in that sense intimately linked,” the UNHCR recognized the limitations of its “humanitarian agenda.”<sup>67</sup> The nation-state system in this latter context has witnessed the overall diminution of asylum space due to the erection of toughened border controls and other deterrence measures such as carrier sanctions, administrative detention and reductions in economic and social rights, extraterritorial processing and “safe third country” arrangements, restrictive definition of the term “refugee,” and the establishment of lesser protection statuses in replacement of asylum.<sup>68</sup> It has also been argued that the notion of borders for the purposes of immigration regulations has shifted beyond the territory of the nation-state (off-shore) and further inside it (internal immigration zones),<sup>69</sup> the effect being the creation of rights-free zones.<sup>70</sup>

Refugees and asylum seekers have also figured prominently in security debates in the post-September 11 era. For example, there are references to refugees and asylum seekers in most of the U.N. resolutions on terrorism.<sup>71</sup> Additionally, the perceived link between the individual refugee and the threat of terrorism has influenced much the

65. See LOESCHER, *supra* note 61, at 32–55; LOESCHER, *supra* note 34.

66. U.N. HIGH COMM’R FOR REFUGEES [UNHCR], *THE STATE OF THE WORLD’S REFUGEES 1997: A HUMANITARIAN AGENDA* ch. 1 (1997), available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ?id=3f098b4d4>.

67. *Id.*

68. On lesser statuses, see Erik Roxström & Mark Gibney, *The Legal and Ethical Obligations of UNHCR: The Case of Temporary Protection in Western Europe*, in *PROBLEMS OF PROTECTION: THE UNHCR, REFUGEES, AND HUMAN RIGHTS* 37 (Niklaus Steiner et al. eds., 2003).

69. See Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 *STAN. J. C.R. & C.L.* 165 (2007), reprinted in 30 *MICH. J. INT’L L.* 809.

70. See Alice Edwards, *Tampering with Refugee Protection: The Case of Australia*, 15 *INT’L J. REFUGEE L.* 192 (2003) (arguing that Australia’s attempt to excise territory from the application of its migration laws is a legal fiction and does not diminish its obligations under international law).

71. See Goodwin-Gill, *supra* note 62, at 1 (tracing the United Nations’ approach to security and its many references to refugees and asylum seekers).

treatment of refugees by States in the post-September 11 era. As Goodwin-Gill observes:

[T]he already restrictive, hostile and generally repressive measures which States were already taking towards refugees and asylum-seekers—such as mandatory detention, denial of support, denial of access to procedures, to legal advice and representation and to appeals, and government-to-government agreements on removals—have been given spurious justification by the terrorism agenda. For some States (or rather, for some governments), that has been the opportunity to introduce yet more stringent laws and policies, often in the aftermath of a terrorist incident, but also generally under a carefully constructed cloud of fear.<sup>72</sup>

Today, the largest single group of refugees is the Iraqi caseload, having fled amidst the unilateral invasion, and subsequent occupation, of Iraq by the United States and its allies, which was justified in part on antiterrorism grounds.<sup>73</sup>

According to Fitzpatrick, “[a] crisis exists [today] not because the [1951] Convention fails to meet the needs of asylum-seekers, but because it meets them so well as to impose burdens that are no longer politically tolerable to the States [P]arties involved.”<sup>74</sup>

I submit that States exploit a combination of gaps and limitations in the legal protection framework, as well as the changed political landscape, to avoid responding to refugee crises. The “exceptionalism” of the so-called “war on terror” has, for example, seen governments pursue politically justifiable policies and laws which undermine some fundamental human rights guarantees, including through the use of legal arguments to support their political stance.<sup>75</sup> Refugees are relabeled from being allies in the Cold War to “queue jumpers,” “bogus refugees,” or “terrorists.”

With the post-Cold War era (and increasingly the post-September 11 era) giving rise to attempts to question the durability of the 1951 Con-

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72. *Id.* at 7.

73. The UNHCR estimates that 4.7 million persons have been displaced as a result of the Iraq conflict (2.7 million internally, 2 million externally). See UNHCR Iraq, <http://www.unhcr.org/cgi-bin/texis/vtx/iraq?page=briefing&id=4816ef534> (last visited June 4, 2009).

74. Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 231 (1996).

75. See, e.g., *A and others v. Sec’y of State for the Home Dep’t.*, [2005] 2 A.C. 68 (H.L.) (the Belmarsh Detainees case) (holding that the indefinite detention of nine foreign citizens suspected of being involved in terrorist activities was unlawful as both a disproportionate measure and on the basis of discrimination).



vention, the human security framework, with its emphasis on the individual and away from the “high politics” of the State, may reinvigorate the waning refugee protection regime. It may at least be a supplementary defense in its armor. This is explored further below. But, first, what are its main critiques?

### III. CRITIQUING HUMAN SECURITY

Human security is a contested concept. Its main opponents criticize it for its vagueness; at the same time, it has been praised for its breadth. The framework has been particularly challenging for some international lawyers, keen to promote instead a concrete rules-based system and eager to draw up neat definitions and criteria. Four of the most commonly mentioned criticisms—lack of a precise definition, lack of a legal framework, “securitization” problems, and enforceability—are addressed in this section.

#### A. *Lack of a Precise Definition*

The main limiting factor to the usefulness of the concept of human security is said to be the lack of a precise definition. It has been claimed that “[h]uman security is like ‘sustainable development’—everyone is for it, but few people have a clear idea of what it means.”<sup>76</sup> Gerd Oberleitner has identified three “rough categories” from the range of definitions of human security available:

[A] narrow approach that relies on natural rights and the rule of law anchored in basic human rights; a humanitarian approach that understands human security as a tool for deepening and strengthening efforts to tackle issues such as war crimes or genocide and finally preparing the ground for humanitarian intervention; and a broad approach that links human security with the state of the global economy, development, and globalization.<sup>77</sup>

At a minimum, human security means security of persons from threats to life, freedom, and dignity. At its broadest, it includes humanitarian imperatives for joint action on a wide range of issues based on understandings of shared humanity.

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76. Roland Paris, *Human Security: Paradigm Shift or Hot Air?*, 26 INT’L SEC. 87, 88 (2001).

77. Gerd Oberleitner, *Human Security: A Challenge to International Law?*, 11 GLOBAL GOVERNANCE 185, 187–88 (2005).

Of the two main state proponents of the human security framework, Canada and Japan offer different definitions of human security, supporting realist claims that national interests are still paramount. Canada, for instance, has defined human security as “freedom from *pervasive* threats to people’s rights, safety or lives.”<sup>78</sup> Canada has limited its dialogue on human security to the most serious security threats.<sup>79</sup> Canada asserts that its view of human security is complementary to prevailing efforts that are focused on national security as well as international efforts to protect human rights and to promote human development.<sup>80</sup> “A human security perspective asserts that the security of the [S]tate is not an end in itself. Rather it is a means of ensuring security [and therefore rights] for its people . . . .”<sup>81</sup>

Japan, on the other hand, adopts the broader, all encompassing approach of the CHS. Japan has stated that the concept of human security “comprehensively covers all the menaces that threaten human survival, daily life and dignity—for example, environmental degradation, violations of human rights, transnational organized crime, illicit drugs, refugees, poverty, anti-personnel landmines and . . . infectious diseases such as AIDS—and strengthens efforts to confront these threats.”<sup>82</sup>

The mainstay of critiques of the concept revolves around the absence of a concise definition. These critics argue that the concept is so ambiguous as to be analytically and practically useless.<sup>83</sup> However, these same critics concede that “one can support the political goals of human security . . . while recognising that the idea of human security is a muddle.”<sup>84</sup> Roland Paris, for example, asserts that it may be an effective campaign slogan, even if it is not so useful as a guide to either research or policymaking.<sup>85</sup> Interestingly, the term “security” itself has been said

78. DEP’T OF FOREIGN AFF. & TRADE, *supra* note 46, at 3 (emphasis added).

79. *Id.* (identifying these main threats as including public safety from transnational threats such as terrorism, drug trafficking, and organized crime; protection of civilians in armed conflict; conflict prevention; governance and accountability; and peace support operations).

80. *Id.*

81. DEP’T OF FOREIGN AFF. & INT’L TRADE, HUMAN SECURITY: SAFETY FOR PEOPLE IN A CHANGING WORLD 6 (1999) (Can.).

82. MOFA, Diplomatic Bluebook 1999, ch. II, Section 3, <http://www.mofa.go.jp/policy/other/bluebook/1999/II-3-a.html> (last visited June 18, 2009); *see also* Yuko Takasu, Dir.-Gen., MOFA of Japan, Statement at the International Conference on Human Security in a Globalized World (May 8, 2000), *available at* [http://www.mofa.go.jp/policy/human\\_security/speech0005.html](http://www.mofa.go.jp/policy/human_security/speech0005.html) (last visited June 18, 2009).

83. *See, e.g.*, Jane McAdam & Ben Saul, *An Insecure Climate for Human Security? Climate-Induced Displacement and International Law*, in HUMAN SECURITY AND NON-CITIZENS, *supra* note \*, ch. 10; Astri Suhrke, *Human Security and the Protection of Refugees*, in REFUGEES AND FORCED DISPLACEMENT: INTERNATIONAL SECURITY, HUMAN VULNERABILITY, AND THE STATE 93, 101 (Edward Newman & Joanne van Selms eds., 2003).

84. Paris, *supra* note 76, at 91–92.

85. *Id.* at 88.

to be “an elusive term. Like peace, honour, justice, it denotes a quality of relationship which resists definition.”<sup>86</sup>

A number of academics have offered definitions of human security.<sup>87</sup> At least one author has suggested that it is a new way to describe the work of the United Nations.<sup>88</sup> Similarly, then-U.N. Secretary-General Kofi Annan stated that “[e]nsuring human security is, in the broadest sense, the United Nations’ cardinal mission.”<sup>89</sup> Given the fact that the traditional security emphasis of the U.N. Charter was seen as the security of States, this new shift to human security language must be said to elevate the human rights aims of the U.N. Charter to a new level.

Moreover, the drafters of the UNDP and CHS reports regard the “all-encompassing” nature of human security as one of its strengths. Placing a broad umbrella over issues of human security allows proper consideration of the inter-sectionality of various threats and corresponding responses. The drafters argue that a broad approach is better suited to reflecting reality, and that this, in turn, offers space to develop and re-imagine new solutions. The broad view allows analysis of the inter-linkages between, for example, environmental degradation and conflict, between under-development and displacement, or between racism and terrorism.<sup>90</sup> Although undefined, the 1994 UNDP report offers four fundamental characteristics of human security:

1. “Human security is a *universal* concern”<sup>91</sup> relevant to people in all nations;
2. Human security is transnational in character and interdependent, that is, threats to human security in one part of the world affect persons in other parts regardless of state borders;<sup>92</sup>
3. “Human security is “easier to *ensure through early prevention than later intervention*”;<sup>93</sup> and
4. “Human security is *people-centred*.”<sup>94</sup>

86. MCSWEENEY, *supra* note 1, at 13.

87. See Paris, *supra* note 76, at 91–92.

88. Dwight Newman, *A Human Security Council? Applying a “Human Security” Agenda to Security Council Reform*, 31 OTTAWA L. REV. 213 (2000).

89. Kofi Annan, *From the Secretary-General: Nothing Lost, Nothing Conceded, Nothing Given Away*, 35 U.N. CHRON. ONLINE ED. 3, 3 (1998), available at <http://www.un.org/Pubs/chronicle/1998/issue1/0198p3.html> (addressing the Foreign Affairs Committee of the Chinese People’s Political Consultative Conference of April 1998).

90. See Oberleitner, *supra* note 77, at 188.

91. UNDP, *supra* note 3, at 22.

92. *Id.*

93. *Id.*

94. *Id.* at 23.

For international lawyers, accustomed to neatly articulating the criteria for particular international crimes or human rights violations, the broad view may appear intangible and difficult to grasp. But this should not be seen solely as a problem of the human security framework. It is also a question of how we “do law” at an international level.

The disciplines of international law and international relations have long been criticized for being too exclusive, ignoring the rights and interests of women, refugees, and other marginalized groups.<sup>95</sup> Narrow definitions rarely take account of the full picture of reality or the interests of all groups.

David Turton has stated that it is important to understand how we conceive of issues or particular factual scenarios because “we are to some extent constrained, even imprisoned, by our conceptual maps.”<sup>96</sup> He argues that “[w]e need concepts in order to think about the world, to make sense of it, to interpret it and to act in relation to it.”<sup>97</sup> Resisting the need to pin down the notion of human security into narrow legal language opens up possibilities for transformative solutions, and for broad thinking and negotiations not already circumscribed by fixed criteria.

It is worth noting that the concept of human security has faced many criticisms similar to those leveled against “humanitarianism,” a term widely used in the late 1990s but of narrower ambit. B.S. Chimni, for example, criticized the language of “humanitarianism” along many of the same lines as critics of human security:

[T]he word “humanitarian” is omnifarious and lacks rigid conceptual boundaries. It has not been defined in international law . . . . It is therefore not captive to any specialized legal vocabulary and tends to transcend the differences between human rights law, refugee law and humanitarian law. A wide range of acts can therefore be classified as “humanitarian.” Its extendibility facilitates ambiguous and manipulative uses and allows the practices thus classified to escape critique through shifting the ground of justification from legal rules to the logic of situations.<sup>98</sup>

The concept of national security is also undefined, or at least it is subject to varying definitions depending on the interests at issue. It too

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95. See, e.g., *ENGENDERING HUMAN SECURITY: FEMINIST PERSPECTIVES* (Tranh-Dam Truong et al. eds., 2006).

96. David Turton, *Conceptualising Forced Migration 2* (Refugee Studies Centre, Working Paper No. 12, 2003).

97. *Id.*

98. B.S. Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13 J. REFUGEE STUD. 243, 244 (2000).

can be charged with arbitrariness and of being self-serving. The human security framework does not escape similar and other charges.

From an international law perspective, these outstanding questions give pause for concern. Without legal rules, the system of international relations can dissolve into selectivity, unilateralism, and non-legal justifications for acts or omissions. Paradoxically, the international legal system is similarly selective, multilateral only to the extent that it is in the national interests of States to act collectively, and permits justifications for acts or omissions that are *ipso facto* contrary to human rights based on unclear criteria, such as public order (*ordre public*),<sup>99</sup> national security, health of others, or even morality. The human rights-human security debate is dealt with further below. Despite these shared shortcomings, it is possible to characterize human security as the goal and human rights as a means for its achievement.

### B. Lack of a Legal Framework

Similar to lack of a definition, the second main critique of the human security framework is that the lack of law or its nonbinding nature may undermine legal guarantees that are already in place, in particular, human rights norms. This is tied to the vagueness of the concept, which is said to provide scope to States to avoid any legal imperatives to act. In 1998, UNHCR's Division of International Protection shared some of these concerns, suggesting for example that references to UNHCR's role in safeguarding or reinforcing human security represented "a distraction from and a dilution of UNHCR's statutory function of providing international protection to and solutions for refugees" and that the concept constituted "a misguided attempt to use the language of security in UNHCR's dialogue with [S]tates, at a time when the organization should be speaking unequivocally in terms of refugee protection and the defence of human rights."<sup>100</sup>

This concern over legality should be taken seriously. However, it can be overstated by those who assume that it is the *legal character* of human rights that brings about their implementation and ensures the protection and security of individuals. This is certainly one component

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99. For an overview of the difficulties of defining and applying concepts such as "public order" under international law, see Alice Edwards, *Refugee Status Determination in Africa*, 14 AFR. J. INT'L & COMP. L. 204 (2006).

100. Frances Nicholson, *Protection and Empowerment: Strategies to Strengthen Refugees' Human Security*, in HUMAN SECURITY AND NON-CITIZENS, *supra* note \*, ch. 3 (citing UNHCR Memorandum from Soren Jessen-Petersen to Abu Zayd et al.; UNHCR Policy Committee Meeting on August 3, 1998, Draft Paper by Centre for Documentation and Research, *The Concept of Human Security and its Relevance to UNHCR*, U.N. Doc. AHC/98/219 (July 28, 1998)).

of state compliance, not least because the state-based system of international law is consent based. It has been argued that States, having already opted into specific legal regimes and obligations, have therefore more reason to adhere to their terms. However, many States sidestep even their existing legal obligations. Many international lawyers are unconcerned with questions of *why* States implement their human rights obligations (rather, they are concerned about whether they have done so or are in breach of their obligations). This can also mean that they may overlook or consider irrelevant the view that human rights are politically conceived and endorsed, and their implementation driven by a wide range of non-law-based influences.

Legal norms developed at the level of international law begin in the corridors of power and politics before garnering sufficient support to emerge as law. International law cannot claim to cover the entire range of human rights and needs or to regulate all issues adequately and in isolation. Even the Declaration of States Parties to the 1951 Convention acknowledges that this instrument, “as the primary refugee protection instrument . . . , as amended by its 1967 Protocol, sets out rights, including human rights, and *minimum standards* of treatment that apply to persons falling within its scope.”<sup>101</sup> That is, both human rights and refugee law offer *minimum*, not maximum, standards. These standards are those that have been achievable at the time of drafting as influenced by, *inter alia*, national interests and international relations. Achieving maximum human rights protection is as reliant on national interests and humanitarian goodwill as on legal considerations. International law in this way is seen as “little more than handmaiden to the powerful. States, it is argued, employ international law when it suits their interests and simply disregard it when it does not.”<sup>102</sup>

But what the above critics ignore is that the human security framework, as elaborated by the United Nations or by state proponents, is not intended to replace or usurp existing legal frameworks, but rather to support and to strengthen them. Sadako Ogata and Johan Cels argue that human security embraces both legal duties and obligations while also recognizing their ethical and political implications.<sup>103</sup> Human security in this sense refers to the rights, “well being, safety, and dignity—of individual human beings.”<sup>104</sup> In this way, the human security framework may be a useful tool to rethink and reconceptualize security issues as well as

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101. Declaration of States Parties, *supra* note 64, ¶ 2 (emphasis added).

102. David Cox & Andrew O’Neill, *The Unhappy Marriage Between International Relations Theory and International Law*, 20 GLOBAL CHANGE, PEACE & SEC. 201, 201 (2001).

103. Sadako Ogata & Johan Cels, *Human Security—Protecting and Empowering the People*, 9 GLOBAL GOVERNANCE 273, 275 (2003).

104. Oberleitner, *supra* note 77, at 190.

to deal with those issues that fall outside existing legal parameters, with a view to moving toward accepted standards and consensus.

It has also been argued that the human security framework draws on and is linked to the international right to liberty and security of person contained in a range of international and regional human rights instruments.<sup>105</sup> However, this right has primarily been used in the narrow context of arbitrary arrest and detention.<sup>106</sup> That is, it has been posited that there is an emerging right to human security.<sup>107</sup> At a minimum, the language of rights should be used as the floor but not the ceiling for what is possible under a re-imagined system of security and international relations.

### C. "Securitization" Problems

The third main criticism of the human security paradigm is that it can result in putting all issues under a "security" canopy, the aim of which is to elevate attention to the particular issue. The negative effect of this "securitization" is that it can label the subjects of security discourse as threats to security, rather than victims or persons at risk of insecurity. This is not an uncommon response to refugees and other migrants. Chimni has argued, for example, that this process of "normalizing" the language of security has hidden from view the real agendas at play. He states:

The language of burden sharing has today been transformed into a language of threats to the security of [S]tates. Refugees are now seen as threatening a host country's security by increasing demands on its scarce resources or threatening the security of regions by their mere presence. The fact that the perceptions can often be attributed to a policy of containment or to the absence of burden sharing is veiled by the language of security.<sup>108</sup>

The end result, he suggests, is the erosion of fundamental principles, such as *non-refoulement*, as States feel justified closing their borders or

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105. See, e.g., African Union, African (BANJUL) Charter on Human and Peoples' Rights art. 6, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev.5, reprinted in 21 I.L.M. 58 (1982); American Convention on Human Rights art. 7, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 23; International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

106. See SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY (2d ed. 2004).

107. See Lois E. Fielding, *Taking a Closer Look at Threats to Peace: The Power of the Security Council to Address Humanitarian Crises*, 73 U. DET. MERCY L. REV. 551, 568 (1996); Newman, *supra* note 88, at 213, 215.

108. Chimni, *supra* note 98, at 252.

returning individuals to less than ideal circumstances.<sup>109</sup> Gregor Noll makes similar observations in finding that labels do matter and that “security” is not a neutral label.<sup>110</sup> Rather, “security” has predominantly collective connotations in the discourse of international law,<sup>111</sup> “whereby the collective interest permits the sacrifice of the interests of the individual.”<sup>112</sup> “In Noll’s view, the individual becomes voiceless in security discourse.”<sup>113</sup> As he observes:

A further characteristic of the security concept is its trump function: Invoking security concerns seemingly reduces the legal constraints put on actors and increases the leeway for discretion. Thus, “securitizing” the discourse on flight and protection means introducing a bias that ultimately works against the individual.<sup>114</sup>

Likewise, Astri Suhrke fears “the misappropriation and misuse of the term to justify [s]tate-centric responses to the movement of people.”<sup>115</sup> In her examination of its application to refugees, she says:

Applying a “security” perspective to examine the needs of “outsiders” and their relationship to the community typically involves assumptions of antagonistic relations and non-tradable interests. In other words, the negative effects often assumed to follow the “securitization” of the discourse on refugee movements that was associated with “societal security” in the 1990s are likely to occur even when the adjective is “human” rather than “societal.”<sup>116</sup>

“All these fear-driven responses play into the racialised and/or xenophobic ‘othering’ of individuals and populations on the move that is replete with paternalistic connotation.”<sup>117</sup> While these concerns should not be dismissed, they tend to treat all security discourse as one and the

109. *Id.*

110. Gregor Noll, *Securitizing Sovereignty? States, Refugees and the Regionalization of International Law*, in REFUGEES AND FORCED DISPLACEMENT: INTERNATIONAL SECURITY, HUMAN VULNERABILITY, AND THE STATE, *supra* note 83, at 277, 280.

111. *Id.*

112. Eve Lester, *Socio-Economic Rights, Human Security, and Survival Migrants: Whose Rights? Whose Security?*, in HUMAN SECURITY AND NON-CITIZENS, *supra* note \*, ch. 9.

113. *Id.*

114. Noll, *supra* note 110, at 280.

115. Lester, *supra* note 112; see, e.g., Maggie Ibrahim, *The Securitization of Migration: A Racial Discourse*, 43 INT’L MIGRATION, 163, 173–78 (2005).

116. Suhrke, *supra* note 83, at 106–07.

117. Lester, *supra* note 112 (citing EDWARD SAID, *ORIENTALISM* (1979)); Noll, *supra* note 110, at 281.



same. They rest upon an assumption that security is a negative force, rather than a condition under which human rights can flourish. Although acknowledging the validity of these arguments, Eve Lester reminds us of the “risk in failing to engage in either the definitional or operational debate that surrounds the notion of ‘human security.’”<sup>118</sup> She urges us to attempt to explore what possibilities there might be for applying the human security concept in a manner that yields constructive and protective outcomes.<sup>119</sup> If the concept of human security can be brought to bear on a refugee or migration “problem” normatively, she asserts, it may have the effect of bringing the legal frameworks of international refugee and human rights law, and indeed humanitarian law where relevant, into sharper focus. In this way, she argues that “it may serve a constructive purpose that cannot be achieved by resort to existing legal frameworks alone.”<sup>120</sup>

It has also been argued that the consistency between *human* rights and *human* security “provides a potentially valuable language for human rights advocates to enter into the security sphere and to seek reform of institutions in that security sphere.”<sup>121</sup> That is, in order for human rights concerns to be more prolific within security discourse, the pathway might be through the language of *human* security.<sup>122</sup> Shahrbanou Tadjbakhsh and Anuradha Chenoy argue that the added value of the concept lies in the new questions it poses regarding security: “security of whom?,” “security from what?,” and “security by what means?”<sup>123</sup> It has also been suggested that

[s]ecuritization can also be performed with an emancipatory interest. Given the capacity of security language to prioritize questions and to mobilize people, one may employ it as a tactical device to give human rights questions a higher visibility, for example.<sup>124</sup>

An alternative put forward by Suhrke, is that the term “vulnerability” should be applied ahead of “human security.”<sup>125</sup> Noll too has noted that

118. Lester, *supra* note 112.

119. *Id.*

120. *Id.*

121. Newman, *supra* note 88, at 215.

122. Paris, *supra* note 76, at 94–95 nn.26, 31 (citing Gary King & Christopher Murray, *Rethinking Human Security*, 116 *POL. SCI. Q.* 585 (2002)); Emma Rothschild, *What Is Security?*, 124 *DAEDALUS* 53, 58–59 (1995).

123. TADJBAKSH & CHENOY, *supra* note 37, at 13.

124. Savitri Taylor, *Migration and Human Security in the Asia-Pacific Region*, 19 *GLOBAL CHANGE, PEACE & SEC.* 171, 172 (2007) (quoting Jef Huysmans, *Defining Social Constructivism in Security Studies: The Normative Dilemma of Writing Security*, 27 *ALTERNATIVES: GLOBAL, LOCAL, POL.* 41, 59 (2002)).

125. Suhrke, *supra* note 83, at 105.

“vulnerability” is “not burdened with the military heritage and the collectivist bias of the security concept.”<sup>126</sup>

However, the concept of “vulnerability” attracts its own complexities, “connoting disempowerment and loss of agency.”<sup>127</sup> Frances Nicholson challenges us to move away from an emphasis on the “vulnerability” of refugees to recognition of “refugees as rights-holders and as agents of their own security and future, an approach very much envisaged by the CHS’s focus on empowerment.”<sup>128</sup>

Ultimately, the language of security—whether “national” or “human”—is not necessarily antithetical to either the aims and purposes of the United Nations, or to those of human rights. Although security terminology is open to manipulation by States and can be a central tool in efforts to undermine or avoid legal obligations, security discourse and security needs are not new to international or foreign policy agendas, or to the frameworks of international law.<sup>129</sup> Security concerns are evident in the language of a number of key provisions on refugee protection.<sup>130</sup>

The human security discourse, with its focus on the individual, requires States to consider the impact of security measures on individuals. This is not required by the realist approaches to national security, in which the interests of the State are paramount. Although the protection of persons *qua* citizens is not irrelevant to States under the national security paradigm, they are not the primary referent objects of security. Security under the human security concept transcends territorial borders. Refugees as victims of human insecurity in the form of human rights violations, persecution, and armed conflict stand to gain under the human security concept if it is conceptualized and implemented in the

126. Noll, *supra* note 110, at 282.

127. Lester, *supra* note 112.

128. Nicholson, *supra* note 100.

129. See Goodwin-Gill, *supra* note 62, at 1.

130. The “right to seek and enjoy in other countries asylum from persecution” in the Universal Declaration of Human Rights (UDHR) “may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.” Universal Declaration of Human Rights, G.A. Res. 217A, art. 74, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]. Similarly, the prohibition on *refoulement* or return to threats to life of freedom in the 1951 Convention is qualified by Article 33(2), which provides that such protection will not apply to “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” 1951 Convention, *supra* note 60, art. 33; see also Organization of African Unity [OAU], Convention Governing the Specific Aspects of Refugee Problems in Africa art. 3, Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter OAU Convention] (containing provisions in which the Organization for African Unity (now African Union) outlawed political and subversive activities by refugees). These provisions were approved in light of concerns by host States of the impact of these political activities on state security. *Id.* pmb1. ¶¶ 4–5.

manner intended. After all, human security is a prerequisite to the enjoyment of rights. Likewise, the lack of security is the greatest threat to human rights and the key motivating cause of human displacement and migration. To adopt an absolutist view that we should not engage in security discourse is, in my view, to isolate artificially and unhelpfully international law from the realities of international relations.

#### D. Enforceability

The fourth critique of relevance to this Essay is that the human security framework is weakly institutionalized and has poor enforcement powers. This may be in part a temporal problem given the fact that the framework has yet to be taken up fully by the United Nations, or individually by a majority of Member States. Paradoxically, the same charges can be made against human rights law with its system of enforcement that revolves around quasi-judicial decisionmaking on individual petitions and monitoring through State Party reporting, which have been heavily criticized by many international lawyers.<sup>131</sup> However, the use of the language of security is not just rhetorical. One significant consequence of identifying a range of threats to human life and dignity—such as environmental disasters, poverty and under-development, major health risks, and irregular migration—as issues of security is the implicit potential for activating the enforcement powers of the U.N. Security Council under Chapter VII of the U.N. Charter.<sup>132</sup>

In the 1990s, the U.N. Security Council was willing to characterize some widespread human rights violations and mass human displacement as threats to international peace and security, thereby putting them within the purview of the United Nations' enforcement powers.<sup>133</sup> The problem with doing so was the gap that developed between theory and practice, and the related selectivity of operations. Serious questions also arose surrounding their effectiveness. According to the International Commission on Intervention and State Sovereignty (ICISS),

[t]he debate on military intervention for human protection purposes was ignited in the international community essentially

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131. The human rights system is, however, being strengthened all the time, through effort such as through fact-finding and inquiry procedures and regional courts with the power to issue binding decisions. See, e.g., Alice Edwards, *The Optional Protocol to the Convention Against Torture and the Detention of Refugees*, 57 INT'L & COMP. L.Q. 789 (2008).

132. See also McAdam & Saul, *supra* note 83, ch. 10.

133. See, e.g., S.C. Res. 1199, at 2-4, U.N. Doc. S/RES/1199 (Sept. 23, 1998) (calling for actions to resolve the crisis in Kosovo); S.C. Res. 841, at 2-3, U.N. Doc. S/RES/841 (June 16, 1993) (endorsing an embargo against Haiti in response to the ouster of Jean-Bertrand Aristide); S.C. Res. 688, at 31, U.N. Doc. S/RES/688 (Apr. 5, 1991) (condemning actions taken against the Iraqi civilian population).

because of the critical gap between, on the one hand, the needs and distress being felt, and seen to be felt, in the real world, and on the other hand the codified instruments and modalities for managing world order.<sup>134</sup>

The notion of “responsibility to protect” (R2P), which the human security concept entails or supports (it is not clear which) is a move away from a right of military intervention on humanitarian grounds to a three-tiered responsibility framework encompassing a responsibility to prevent, a responsibility to react, and a responsibility to rebuild. The ICISS identified two basic principles of R2P as follows:

- A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the [S]tate itself.
- B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the [S]tate in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.<sup>135</sup>

The ICISS formulated three elements of R2P: prevention, reaction (which includes military force but is meant to be an “exceptional and extraordinary measure”<sup>136</sup>), and rebuilding.<sup>137</sup> The main emphasis, however, is on prevention.<sup>138</sup> The R2P doctrine is broader than the concept of humanitarian intervention, which implies primarily military intervention. The ICISS limited the exercise of military intervention to cases of “large scale loss of life, actual or apprehended” or “large scale ‘ethnic cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.”<sup>139</sup> Other qualifying criteria were also elaborated in some detail.<sup>140</sup> Military intervention is therefore limited to only the most severe forms of human insecurity. The World Summit Outcome document clarified that these severe forms of human insecurity referred to the four international crimes of genocide, “ethnic cleansing,”

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134. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY (ICISS), *THE RESPONSIBILITY TO PROTECT* ¶ 2.24 (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (last visited May 27, 2009).

135. *Id.* at XI.

136. *Id.* at XII.

137. *Id.* at XI.

138. *Id.*

139. *Id.*

140. *Id.*

crimes against humanity and war crimes.<sup>141</sup> Options under R2P may include “humanitarian operations, monitoring missions and diplomatic pressure and . . . force [as a last resort].”<sup>142</sup> For refugees and asylum seekers, it has been proposed that R2P could include the responsibility to grant asylum and to open borders for those fleeing from one or more of the four crimes listed above.<sup>143</sup>

The UNHCR has expressed its acceptance of R2P as one way of alleviating some of the root causes of forced displacement, subject to working out its modalities relating to “eligibility, legitimacy, state sovereignty, political will, mandates, and operational effectiveness.”<sup>144</sup> However, it is unclear how humanitarian intervention and responsibility to protect in terms of military intervention will really differ in any actual situation, given that the players and legal frameworks remain the same. The politics behind the exercise of enforcement powers under the U.N. Charter and the veto power of the permanent members of the Security Council will also remain, even if the human security concept acts to expand the range of issues that are seen as threats to international peace and security. The operationalization of human security would appear to be its greatest challenge.

#### IV. HUMAN SECURITY AND THE RIGHTS OF REFUGEES

So what does or could human security offer refugee protection? This section adopts a three-tiered approach to this question. First, I briefly outline the refugee-specific legal regime and identify its gaps, into which human rights law (and international humanitarian law, as relevant, although the latter is not dealt with in this Essay<sup>145</sup>) has stepped to

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141. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

142. Erika Feller, Dir., Dep’t of Int’l Prot., UNHCR, *The Responsibility to Protect—Closing the Gaps in the International Protection Regime and the New EXCOM Conclusion on Complementary Forms of Protection*, Address to “Moving On: Forced Migration and Human Rights” (Nov. 22, 2005), available at <http://www.unhcr.org/cgi-bin/texis/vtx/admin/opendoc.htm?tbl=ADMIN&id=43a692122> (last visited June 2, 2009).

143. See, e.g., Brian Barbour & Brian Gorlick, *Embracing the “Responsibility to Protect”: A Repertoire of Measures Including Asylum for Potential Victims*, 20 INT’L J. REFUGEE L. 533, 561 (2008).

144. Erika Feller, Dir., Dep’t of Int’l Prot., UNHCR, *Migrants and Refugees: The Challenge of Identity and Integration*, Address to the 10th Annual Humanitarian Conference of Webster University (Feb. 17–18, 2005), available at <http://www.unhcr.org/refworld/docid/42b96a3d2.html> (last visited June 4, 2009).

145. For more on the inter-linkages between international humanitarian law and refugees, see Alice Edwards, *Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the “International Protection” of Refugees*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER

supplement the rights contained in the 1951 Convention. Second, I consider the role of human rights in the refugee protection regime, identifying in the process some of its own weaknesses. I conclude that even with these two legal frameworks operating in favor of the protection of refugees, many of the problems facing refugees, particularly their security, remain unaddressed or unresolved. I then turn to ask what the human security framework could offer this reasonably robust, albeit imperfect, legal system.

### A. The Refugee Protection Framework

Refugees are the recognized beneficiaries of internationally endorsed rights. Centered on the *non-refoulement* guarantee in the 1951 Convention, which prohibits States from returning individuals to the frontiers of territories where they may face threats to their life or freedom,<sup>146</sup> the international refugee protection regime provides a definition of who qualifies as a refugee (and therefore who does not) in recognition of entitlement to special protection, which includes a series of rights relevant to the specific situation of refugees. Refugees are a specific category of non-citizens who are considered deserving of a specific set of rights, ultimately because they lack the protection of their own governments. At the time of this writing, there were 147 States Parties to either or both the 1951 Convention and/or 1967 Protocol.<sup>147</sup> The international instruments are reinforced by regional ones, which expand the category of those entitled to special protection as well as the rights to which they are entitled in some limited ways.<sup>148</sup>

Institutionally, refugees are served by the UNHCR.<sup>149</sup> Although the UNHCR is not a substitute for state protection, it is a leading humanitarian organization with a specific mandate to protect and represent the rights and interests of refugees. It is, therefore, an important player in

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IN INTERNATIONAL LAW 421 (Roberta Arnold & Noëlle Quénivet eds., 2008); see also 843 INT'L REV. RED CROSS *passim* (2001) (special edition on the interface between international humanitarian law and international refugee law).

146. For an overview of the principle of *non-refoulement* under the 1951 Convention, see Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 87, 98–164 (Erika Feller et al. eds., 2003).

147. UNHCR, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 1 (2008), available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (last visited May 28, 2009).

148. For example, the explicit reminder that *non-refoulement* includes non-rejection at the frontier and the principle of voluntary repatriation is endorsed as a right in the OAU Convention. See OAU Convention, *supra* note 130, arts. 2(3), 5.

149. See Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428, at 46, U.N. GAOR, 5th Sess., 325th plen. mtg., U.N. Doc. A/RES/428 (Dec. 14, 1950).

ensuring the human security of refugees. As of this writing, it operates in 116 countries and has over 6,000 staff.<sup>150</sup> Nonetheless, in order to fulfill its mandate, the UNHCR relies on the assistance and support of States, including non-States Parties to the 1951 Convention, many of whom are host to major refugee populations.<sup>151</sup>

Despite enumerating a range of rights for refugees in Articles 3 through 34, the 1951 Convention is not without its gaps. In the post-Cold War period, in which the nature and scale of displacement has changed, the 1951 Convention has been criticized as being virtually redundant, or “functionally inefficient, overly legalistic, complex, and difficult to apply in a world of competing [and changing] priorities.”<sup>152</sup> With such claims, driven by state interests and serving to undermine the legal and humanitarian value of the 1951 Convention, it is at this juncture that human rights law has stepped in to fill in the “grey areas.”<sup>153</sup>

First, the rights enumerated in the 1951 Convention are limited guarantees for refugees and asylum seekers and are not the entire range of rights available to them under international human rights law as a whole.<sup>154</sup> For example, there is no entrenched right to family life contained in either the 1951 Convention or the 1950 Statute of the UNHCR;<sup>155</sup> nor is there a right to liberty and security of person. Although the fundamental principle of refugee law is the protection from return or *refoulement* to threats to life or freedom, the guarantee under the 1951 Convention can be lifted if a refugee poses a threat to national security or, having been convicted by final judgment of a particularly serious crime, is considered to be a danger to the community.<sup>156</sup> The *non-refoulement* guarantee in the 1951 Convention is not an absolute protection against *refoulement* to threats to life or freedom, and thus can play

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150. See The UN Refugee Agency, UNHCR, Basic Facts, <http://ewww.unhcr.org/basics.html> (last visited June 4, 2009).

151. According to the UNHCR, among the major refugee hosting countries are Pakistan (2 million), the Syrian Arab Republic (1.5 million), and Jordan (500,300), none of which are parties to the 1951 Convention. UNHCR, 2007 GLOBAL TRENDS: REFUGEES, ASYLUM-SEEKERS, RETURNNEES, INTERNALLY DISPLACED AND STATELESS PERSONS 8 (2008).

152. Guy S. Goodwin-Gill, *Asylum 2001—A Convention and a Purpose*, 13 INT’L J. REFUGEE L. 1, 1–2 (2001).

153. See Alice Edwards, *Human Rights, Refugees and the Right to “Enjoy” Asylum*, 17 INT’L J. REFUGEE L. 293, 295 (2005).

154. *Id.* at 303.

155. However, the Final Act of the 1951 U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons also recommended that governments “take the necessary measures for the protection of the refugee’s family.” See *id.* at 309. For an overview of protections of family life under international human rights law versus international refugee law, see *id.* at 308–19.

156. 1951 Convention, *supra* note 60, art. 33(2).

into the national security agendas of States.<sup>157</sup> Likewise, protection against expulsion can be lifted on grounds of national security or public order, subject to a number of legal safeguards.<sup>158</sup>

Second, the rights listed in the 1951 Convention are subject to, in the words of James Hathaway, a complex “structure of entitlement” that provides for “enhanced rights as the bond strengthens between a particular refugee and the State Party in which he or she is present.”<sup>159</sup> That is, not all rights contained in the 1951 Convention apply to recognized refugees immediately upon recognition, and only a few overtly apply to asylum seekers.<sup>160</sup> In contrast, international human rights law is in principle applicable to all persons on the basis of their shared humanity (with limited exceptions<sup>161</sup>) and must be applied according to principles of non-discrimination.<sup>162</sup> In this way, human rights is not based on nationality or territory, but on jurisdiction. In contrast, Article 3 of the 1951 Convention provides that States Parties must apply the Convention pro-

157. Notably, restrictive applications of the refugee definition is a more effective means of excluding an individual from refugee protection than recourse to the *non-refoulement* guarantee, which has arguably attained the status of customary international law.

158. 1951 Convention, *supra* note 60, art. 32.

159. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 154 (2005); *see also* GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 305–07 (3d ed. 2008) (distinguishing four general categories on which the extent of a refugee’s rights may depend, namely “simple presence,” “lawful presence,” “lawful residence,” and “habitual residence”).

160. These include non-discrimination, non-penalization for illegal entry or stay in cases of threat to life or freedom, and *non-refoulement*. *See* 1951 Convention, *supra* note 60, arts. 3, 31, 33.

161. *See, e.g.*, ICCPR, *supra* note 105, art. 25 (applying the right to participate in public affairs only to citizens); *id.* art. 13 (applying the protection against arbitrary expulsion only to aliens); *see also* International Covenant on Economic, Social and Cultural Rights art. 2(3), Dec. 16, 1966, 993 U.N.T.S. 23 [hereinafter ICESCR] (allowing for discretion by developing countries in guaranteeing economic rights to non-nationals).

162. *See* Hum. Rts. Comm., *General Comment No. 15 on “The Position of Aliens Under the Covenant”*, U.N. Doc. HRI/GEN/I/Rev.1 (Apr. 11, 1986), [hereinafter Gen. Comment No. 15] (“Thus the general rule is that each one of the rights of the [ICCPR and the ICESCR] must be guaranteed without discrimination between citizens and aliens.”); *see also* Loizidou v. Turkey, App. No. 15318/8923, 23 Eur. H.R. Rep. 513, ¶ 52 (Dec. 18, 1996) (“The obligation to secure . . . the rights and freedoms set out in the Convention, derives from the fact of control [of territory.]”); Hum. Rts. Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) [hereinafter Gen. Comment No. 31]; Comm. on the Elimination of Racial Discrimination, *General Recommendation XI on Non-Citizens*, U.N. Doc. A/46/18 (Mar. 19, 1993) [hereinafter Gen. Recommendation No. XI]. In relation to expanded understandings of state responsibility in recent case law, *see* Guy Goodwin-Gill, Keynote Address, Extra-Territorial Processing of Asylum Claims from a General International Law Perspective, Refugee Studies Centre International Conference on Refugees and International Law: Challenges to Protection, University of Oxford (Dec. 15–16, 2006).



visions without discrimination only as to “race, religion or country of origin.”<sup>163</sup>

The third advantage of having recourse to human rights law is that should a State fail to respect its human rights obligations, appropriate redress mechanisms may be available.<sup>164</sup> Apart from writing a letter of complaint to the UNHCR or exercising rights under domestic law, no such mechanisms exist under the 1951 Convention.

Fourth, international human rights law “is especially relevant with respect to non-State parties to the 1951 Convention and/or 1967 Protocol that are otherwise parties to various human rights instruments, as well as its role in developing international customary rules that apply to all States.”<sup>165</sup> Of all of the rights contained in the 1951 Convention, only the race component of the prohibition on discrimination and the principle of *non-refoulement* have attained the status of customary international law.<sup>166</sup>

Fifth, “[t]he discrepancies between [the treatment of] refugees recognized under the 1951 Convention and the wider group of persons in need of international protection”<sup>167</sup> reinforce the relevance and importance of human rights instruments.<sup>168</sup> Many victims of human insecurity, for instance, would fall within this latter category but may not qualify as refugees.<sup>169</sup>

Finally, international human rights law applies to individuals within the jurisdiction of the State,<sup>170</sup> and it can, therefore, apply on both sides of the border. The operation of international refugee law, on the other hand, usually starts with the act of seeking admission to the territory of

163. 1951 Convention, *supra* note 60, art. 3.

164. Individual petition mechanisms are available under several international treaties. *See e.g.*, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women arts. 1–2, G.A. Res. 54/4, U.N. Doc. A/RES/54/4 (Oct. 15, 1999); Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment art. 22, G.A. Res. 39/45, U.N. GAOR 39th Sess., 93d plen. mtg., U.N. Doc. A/RES/39/45/Annex (Dec. 10, 1984); Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 (entered into force March 23, 1976). For further discussion, see *infra* Part III.B.2.

165. Edwards, *supra* note 153, at 299.

166. *See* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18/03, ¶¶ 100–01 (Sept. 17, 2003) (on discrimination as *jus cogens*); Declaration of States Parties, *supra* note 64, pmb. ¶ 4.

167. *See* UNHCR, Exec. Comm. High Comm’r Programme, *Note on International Protection*, ¶ 21, U.N. Doc. A/AC.96/830 (Sept. 7, 1994).

168. Oldrich Andrysek, *Gaps in International Protection and the Potential for Redress Through Individual Complaints Procedures*, 9 INT’L J. REFUGEE L. 392, 393–94 (1997).

169. *See* Andrew Shacknove, *Who Is a Refugee?*, 95 ETHICS 274, 278 (1985) (questioning whether there is any real reason to treat individuals displaced by persecution differently from those displaced by economic causes or other calamities).

170. This, of course, depends on whether the State has ratified or acceded to the relevant human rights treaty and/or whether the right has attained the status of custom.

an asylum State, but more usually after crossing an international border. An important exception to this rule is the prohibition on *refoulement*, which is accepted as applying “at the frontier” or arguably whenever “effective control” is exercised.<sup>171</sup> Without international human rights law, many individuals would remain in a legal vacuum until they managed to escape the persecutory conduct and reach safety in another country.

International human rights law is, therefore, another legal system available to strengthen and enhance existing protection standards for refugees.<sup>172</sup> Neither body of law renders the other redundant or secondary, but it is clear that in some instances human rights law is needed to fill some gaps in the 1951 Convention. It is not, though, the panacea to all the problems in the refugee protection framework, suffering from many of its own weaknesses. In addition, law alone is unable to resolve distinct and evolving refugee crises that demand immediate political attention (especially in an international system in which politics run alongside rights). Law, as far as it applies, can and should guide the responses taken by the international community to such crises, but ultimately many other non-legal factors and non-legal solutions are involved. Erika Feller, then-Director of UNHCR’s Department of International Protection (and now Assistant High Commissioner for Protection), has characterized the interlinkages pragmatically: “To put it simplistically, to see the refugee problem as an issue of human rights law creates protection space.”<sup>173</sup> Could further space be created if refugee protection is also seen as an issue of human security?

According to Joan Fitzpatrick the main weaknesses in the refugee protection framework can be categorized as follows:

- (1) the vagueness and manipulability of one of its key provisions, the refugee definition;
- (2) the lack of an agreed framework for refugee determination and the risks involved in harmonization efforts that attempt to fill this vacuum [as now being played out in the context of the European Union<sup>174</sup>];

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171. See Lauterpacht & Bethlehem, *supra* note 146, at 87 (referring to EXCOM Conclusions that support this position).

172. Edwards, *supra* note 153, at 296, 298–99.

173. Feller, *supra* note 142.

174. See European Commission, The European Union Policy Towards a Common European Asylum System, available at [http://ec.europa.eu/justice\\_home/fsj/asylum/fsj\\_asylum\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/asylum/fsj_asylum_intro_en.htm) (last visited June 18, 2009); see also Council Directive 2004/83/EC, Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12–23 (establishing uniform standards for the European

- (3) crucial substantive lacunae or ambiguities, particularly the right to receive asylum, the right of admission, the rights of asylum-seekers interdicted at sea, and the right of temporary refuge for forced migrants who do not qualify as Convention refugees; and
- (4) key gaps in inter-state obligations, especially burden sharing through admission of refugees, security issues relating to refugee encampments and dependable financing of refugee prevention and relief strategies.<sup>175</sup>

To her listing, one ought also to add strategies for dealing with mass influxes of refugees, the question of how to protect refugees and asylum-seekers within mixed migration flows, and the issue of protracted refugee situations and the quest for durable solutions.<sup>176</sup> Solutions to these issues are not found within the terms of the 1951 Convention, although its principles, such as non-discrimination, *non-refoulement*, and non-penalization, should guide the approach taken.<sup>177</sup> In addition, questions continue to be posed about how to strengthen the supervisory mandate of the UNHCR, which highlights the problem of the enforceability of refugee rights.

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Community Member States, with the exception of the United Kingdom, Ireland, and Denmark); UNHCR, Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4200d8354> (last visited June 18, 2009).

175. Fitzpatrick, *supra* note 74, at 232.

176. Each of these issues was discussed during the Global Consultations on International Protection and readdressed by the Convention Plus Initiative and the High Commissioner's Dialogues on Protection in 2007 and 2008. See, e.g., UNHCR, *Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations*, U.N. Doc. EC/GC/01/7 (Feb. 19, 2007), available at <http://unhcr.org/3ae68f3cc.html> (last visited June 18, 2009); UNHCR, *Complementary Forms of Protection*, U.N. Doc. EC/GC/01/18 (Sept. 4, 2001), available at <http://www.unhcr.org/refworld/docid/3bfa84345.html> (last visited June 18, 2009); UNHCR, *Asylum Processes: Fair and Efficient Asylum Procedures*, U.N. Doc. EC/GC/01/12 (May 31, 2001), available at <http://www.unhcr.org/refworld/docid/3b36f2fca.html> (last visited June 18, 2009); UNHCR, *Practical Aspects of Physical and Legal Protection with Regard to Registration*, U.N. Doc. EC/GC/01/6\* (Feb. 19, 2001), available at <http://www.unhcr.org/refworld/docid/3bfa82464.html> (last visited June 18, 2009); UNHCR, *The Civilian Character of Asylum: Separating Armed Elements from Refugees*, U.N. Doc. EC/GC/01/5 (Feb. 19, 2001), available at <http://unhcr.org/3ae68f3c18.html> (last visited June 18, 2009).

177. See 1951 Convention, *supra* note 60; Volker Türk, *New Issues in Refugee Research: UNHCR's Supervisory Responsibility 1* (UNHCR, Dep't of Int'l Prot., Working Paper No. 67, 2002), available at <http://www.unhcr.org/research/RESEARCH/3dae74b74.pdf> (last visited June 18, 2009).

### B. The Complementary Human Rights System

As noted above, international human rights law has increasingly become an important supplement to refugee protection. For example, it has been used to expand the definition of a refugee in the 1951 Convention,<sup>178</sup> to complement rights available, and to provide the basis for complementary or subsidiary forms of protection for individuals who need protection and who would not otherwise meet the persecutory or other components of the refugee definition.<sup>179</sup> This is because, under international human rights law, States are in principle obligated to afford rights to all persons, citizens, and non-citizens alike, who are under their jurisdiction—territorially or otherwise.<sup>180</sup>

Nonetheless, this general position is subject to a number of legal exceptions, especially in relation to political and economic rights.<sup>181</sup>

During the drafting negotiations of the two main human rights treaties—the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)<sup>182</sup>—the divisive politics of the Cold War were evident. The human rights regime that resulted has arguably been weakened by these political influences. The division of rights into three so-called “generations”<sup>183</sup> reminds us of the East-West politics that influenced the elaboration of the two main separate treaties making up the so-called International Bill of Rights. Under this division, civil and political rights (first generation rights) are seen to have greater value than economic, social, and cultural rights (second generation rights), as well as other purported rights revolving around group rights, such as those to development, peace, or water (third generation rights). Despite state-

178. See, e.g., Alice Edwards, *Age and Gender Dimensions in International Refugee Law*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW*, *supra* note 146, at 46–48 (discussing how human rights standards relevant to women have been transposed to ensure that the experiences of refugee women are given full consideration during refugee status determination).

179. See, e.g., JANE MCADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL LAW* (2007).

180. See *supra* note 178. On the question of the extraterritorial application of human rights norms, see generally Michael Gondek, *Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?*, 52 *NETHS. INT'L L. REV.* 349 (2005).

181. See e.g., ICCPR, *supra* note 105, art. 25 (extending only to citizens the right to participate in public affairs); see also Edwards, *supra* note 153, at 320–28 (discussing the fact that refugees are often not given an equal right to work as citizens).

182. ICCPR, *supra* note 105; ICESCR, *supra* note 161.

183. The “generations” metaphor is problematic for a number of reasons, not least of which is that it can work to overstate some of the differences between different types of rights. It is used here simply as an organizing tool. On the “generations” metaphor, see Karel Vasak, *Pour une troisième génération des droits de l'homme*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET* (C. Swinarski ed., 1984); Karel Vasak, *Les différentes catégories des droits de l'homme*, in *I LES DIMENSIONS UNIVERSELLES DES DROITS DE L'HOMME* (A. Lapeyre et al. eds., 1991).

ments to the contrary by the United Nations that human rights are universal, indivisible, and non-hierarchical,<sup>184</sup> the legal reality does not always match the political rhetoric.<sup>185</sup>

Rights have been ranked in importance, evidenced by the idea of derogability of some rights in times of public emergency,<sup>186</sup> the failure to recognize the justiciability of specific types of rights,<sup>187</sup> ideas of immediate versus progressive implementation,<sup>188</sup> and the qualified or limited nature of many fundamental freedoms.<sup>189</sup> States have often employed some of these legal ambiguities to limit the enjoyment of rights to non-nationals.<sup>190</sup>

However, such limitations should not be read as suggesting that the human rights system is worthless, or that States are free to disregard their human rights obligations without consequences. There are many

184. See, e.g., World Conference on Human Rights, June 14–25, 1993, Vienna, Austria, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 25, 1993) (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”).

185. See Theodor C. van Boven, *Distinguishing Criteria of Human Rights*, in THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS (Karel Vasak & Philip Alston eds., 1982) (discussing the distinction between fundamental human rights and other human rights).

186. See, e.g., ICCPR, *supra* note 105, art. 4. Very few rights are of a non-derogable and absolute nature, and even these have been subject to challenges by States Parties. See *Saadi v. Italy*, App. No. 37201/06, ¶¶ 102–14 (Feb. 28, 2008), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Saadi v. Italy” in “Case Title”) (last visited June 2, 2009) (challenging the idea of an absolute prohibition on deportation where the deportee faces risk of torture); *Ramzy v. The Netherlands*, App. No. 25424/05 (Eur. Ct. H.R.) (pending before the Grand Chamber). The right to be protected from arbitrary detention and the right to security and liberty of person are not part of the privileged group of absolute rights. See ICCPR, *supra* note 105, arts. 4, 9.

187. For example, the initial failure to agree to an Optional Protocol to the ICESCR was based on the belief that economic, social, and cultural rights are nonjusticiable. The draft Optional Protocol to the ICESCR includes an individual communications procedure and was adopted by the General Assembly on Dec. 10, 2008. G.A. Res. 63/117, art. 2, U.N. Doc. A/RES/63/117 (Dec. 10, 2008).

188. Early views of States Parties and the treaty bodies are that ICCPR rights are “immediately enforceable” and that ICESCR rights are “to be realized progressively.” It is now clear that some rights of the ICESCR are “immediately enforceable,” such as nondiscrimination. See U.N. Econ. & Soc. Council [ECOSOC], *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 16, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005).

189. The latter is “particularly true for the so-called fundamental freedoms, that is, the freedoms of religion or belief, expression and speech, and association and assembly, as well as the freedom of movement.” Nigel S. Rodley, *International Human Rights Law and Machinery for Monitoring its Implementation in Situations of Acute Crisis*, in CONFERENCE ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN ACUTE CRISIS 51, 52 (Dep’t for Int’l Dev. & Human Rights Centre, Univ. of Essex eds., 1998).

190. See DANIEL MOECKLI, HUMAN RIGHTS AND NON-DISCRIMINATION IN THE “WAR ON TERROR” (2008).

legal checks on the actions of governments in their attempts to restrict human rights. Suspension of rights in a state of emergency, for example, must threaten the life of the nation, be officially proclaimed, and the measures taken must be strictly required by the exigencies of the situation and must not be inconsistent with the State's other obligations under international law.<sup>191</sup> Appealing to national security arguments to limit fundamental freedoms is judged according to legal criteria of strict legality, necessity, reasonableness, and proportionality.<sup>192</sup> Moreover, reservations made by a State must be compatible with the object and purpose of the treaty,<sup>193</sup> and international obligations must be interpreted and applied in good faith.<sup>194</sup>

A further consequence of a human rights system built on dialogue, consensus, and compromise is that it is often selectively and inconsistently applied. States opt in to the various human rights treaties, and the associated litigation processes may also require further consent by States Parties in order to be bound. Apart from the International Court of Justice and some regional human rights courts, very few mechanisms have the capacity to issue binding judgments. Many States Parties to various treaties have also not incorporated the terms into their domestic laws, making access to justice for human rights ineffective at the local level. Thus, in international relations terms, international human rights law, like all international law, is reliant on the convergence or "coincidence of interests,"<sup>195</sup> or some other political impetus to act.

In the context of averting or resolving a refugee crisis, the legal framework can be used to persuade governments to stop human rights violations, to agree to or to implement a cease-fire arrangement, or to allow safe passage for humanitarian organizations or refugees. However, many other considerations are also at play, including what would be at stake if a State failed to comply. These considerations may include trade relations, foreign aid, or membership in a regional or international community of likeminded States (that is, reputational considerations). With the proliferation of international courts and tribunals, the possibility of prosecution can act as a deterrent to governments and other violators of

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191. See Rodley, *supra* note 189, at 53.

192. See Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Convention of Human Rights*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS*, 125, 125–37 (R. St. J. MacDonald, F. Matscher & H. Petzold eds., 1993).

193. Vienna Convention on the Law of Treaties art. 19(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

194. *Id.* arts. 26, 31.

195. GOLDSMITH & POSNER, *supra* note 10, at 111 (2005) (attributing compliance with international law prohibitions on genocide and crimes against humanity as a "coincidence of interests").

human rights; not least because “unlawful deportation or transfer” is a recognized war crime.<sup>196</sup>

Refugees are typically, but not always, the products of collapsed, weak, or unstable States, in which internal strife and human rights abuses are evident. As noted by the UNHCR in 1997, “[r]efugee movements and other forms of forced displacement provide a useful (if imprecise) barometer of human security and insecurity.”<sup>197</sup> In many situations, refugees originate not only from unstable States but also unstable regions. “[F]orced displacement of people is a clear indication that the web of rights and obligations which links the citizen to the [S]tate has broken down.”<sup>198</sup> “By and large neither the law of human rights nor the notion of human rights is well adapted to dealing with the anarchy attendant on the generally collapsed [S]tate.”<sup>199</sup> In fact, international human rights law “presupposes the existence of a relatively stable government.”<sup>200</sup> Respect for human rights in many regions in which refugees find themselves is characterized more by breach than by adherence. Host States, too, suffer from many of the same or similar shortcomings as those States from which the refugees fled, causing difficulties with implementing refugee protection standards there.<sup>201</sup>

Realist language of the sanctity of borders and sovereignty is widely used by States to prevent international action and serves to reinforce the ineffectiveness of international human rights law without an intervention capacity. Security Council interventions for threats or violations of human rights remain a controversial issue and have been constrained to the most egregious of cases.<sup>202</sup> Furthermore, judicial systems tend to operate as an *ex post facto* exercise in seeking reparations or redress for harms done, and this limits their capacity to prevent refugee crises occurring in the first place, or to prevent their escalation.<sup>203</sup> That is, human rights legal

196. Rome Statute of the International Criminal Court art. 8(2)(a)(vii), July 17, 1998, 2187 U.N.T.S. 90.

197. UNHCR, *supra* note 66.

198. *Id.*

199. Rodley, *supra* note 189, at 51.

200. *Id.*

201. See UNCHR, Exec. Comm. of the High Comm’r Programme, *Note on International Protection*, U.N. Doc. A/AC.96/1039 (June 29, 2007); UNHCR, *THE STATE OF THE WORLD’S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM* (2006), available at <http://www.unhcr.org/static/publ/sowr2006/toceng.htm> (last visited June 18, 2009).

202. See *supra* Part III.

203. There are some preventive mechanisms, such as the Convention on the Elimination of All Forms of Discrimination (CERD), which has developed an ad hoc early warning or urgent procedure in order to prevent the escalation of situations into conflict or to prevent resumption of hostilities. CERD, *Report of the Committee on the Elimination of Racial Discrimination*, ¶¶ 15–19, Annex III, U.N. Doc. A/48/18 (Sept. 15, 1993).

mechanisms are generally reactive in nature, whereas their use as a tool to reinforce political pressure on States can be preventive.<sup>204</sup>

In practice, refugees rarely enjoy the same full entitlements to human rights that citizens do, whether in Europe, the Americas, Asia, or Africa. The experience of refugees, and asylum seekers is frequently characterized by discrimination, xenophobia, criminalization, poverty, humanitarian fatigue, lack of empowerment, dependency, and uncertainty. Often fuelled by governments for political purposes, anti-refugee sentiment—an increasing phenomenon worldwide—provides domestic public support for the failure of governments to implement rights for this group of “outsiders.” In international relations terms, it may not be in a State’s interests to ensure rights-protection, and in some cases, it may be in their interests to violate international treaties for political gain.<sup>205</sup> Apart from enjoying lesser rights, asylum seekers, refugees, and other non-citizens have frequently been the targets of national security initiatives. In the so called “war on terror,” non-citizens, including refugees and asylum seekers, have been on the frontline of media and policy attacks, being viewed with suspicion as threats to national security.<sup>206</sup>

### C. Why Talk Human Security?

Why talk human security when refugees are the subject and beneficiaries of a wide-ranging, albeit imperfect, legal protection system?

The above section has detailed a specifically tailored protection system for refugees, one which is increasingly supplemented by international human rights law in order to keep it relevant to today’s displacement challenges. Despite the legal gaps in this protection system, including particularly its enforcement weaknesses, it nonetheless provides, at a minimum, benchmark standards against which the actions of States can be judged and to which refugees and their advocates can appeal. There is no doubt that refugees, compared with other non-nationals and migrants, are in a privileged legal position.<sup>207</sup> Yet, the deprivations of refugee rights is an ongoing concern, if not an increasing one, in part

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204. Some regional legal systems do work effectively to prevent governments from returning non-citizens to their countries of origin if they face a serious threat of torture or other cruel or inhuman treatment, including where they are suspected of engagement in terrorist activities. See generally *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1997); *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989) (relating to *non-refoulement* to torture).

205. For example, the 2001 Australian federal election was widely recognized as having been won by using the “trump card” of anti-refugee sentiment.

206. See, e.g., Ferstman, *supra* note 55, ch. 15; Craig Forcese, *A Distinction with a Legal Difference: The Consequence of Non-Citizenship in the “War on Terror”*, in HUMAN SECURITY AND NON-CITIZENS, *supra* note \*, ch. 12; Daniel Moeckli, *Immigration Enforcement After 9/11 and Human Rights*, in HUMAN SECURITY AND NON-CITIZENS, *supra* note \*, ch. 13.

207. Shacknove, *supra* note 169, at 276.



because of the limited reach of human rights and refugee law and in part because of wider political factors. Reconciling the rights of refugees and asylum seekers with the interests of States in managing migration, for example, has required the UNHCR to engage in policy discussions on migration management, an area of state interest that largely falls outside existing protection frameworks.<sup>208</sup> So, what could human security add to this mix?

### 1. People-Centered

The *people-centered* focus of human security, irrespective of one's attachment or allegiance to the State, is conceptually powerful for refugees and other non-citizens. By definition, non-citizens are generally outside the remit of a State's national interests. Under the border- and sovereignty-oriented national security paradigm, the non-citizen is usually the first to be excluded, neglected, or treated with suspicion as threats to the security of the State emerge. They are rarely able to exercise a political voice or to have access to litigation procedures to secure their rights. Human rights as a basis for activation of the United Nations' enforcement powers have also proven inadequate. Moreover, and perhaps most tellingly, there remain gaps in the international legal framework for the protection of refugees.

The *people-centered* approach shares its focus with development discourse, which has adopted a people-centered or human-development agenda,<sup>209</sup> and the "people-oriented planning" policies of the UNHCR in relation to refugee and humanitarian protection.<sup>210</sup> Like human rights, it prioritizes dialogue around *people* and their *rights* and their *needs*. While notions of territory, borders, and citizenship have not disappeared from this discourse, they are downplayed in favor of a human-centric view of security.

Feminist scholars have long questioned the focus of international relations on state security. They claim that this approach is problematic on a number of levels. First, the idea "that [S]tates represent a unified community"<sup>211</sup> is questionable. This is especially problematic for women, but also for other marginalized groups such as refugees, who have generally been excluded from full citizenship within borders. Second, it assumes

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208. See UNHCR, NOTE ON INTERNATIONAL PROTECTION (2008).

209. UNDP, HUMAN DEVELOPMENT REPORT 1993, at 2 (1993) (listing human security as one of "five pillars of people-centred world order").

210. See, e.g., MARY B. ANDERSON ET AL., A FRAMEWORK FOR PEOPLE-ORIENTED PLANNING IN REFUGEE SITUATIONS TAKING ACCOUNT OF WOMEN, MEN AND CHILDREN: A PRACTICAL PLANNING TOOL FOR REFUGEE WORKERS 13 (1992).

211. Anne Orford, *The Politics of Collective Security*, 17 MICH. J. INT'L L. 373, 395 (1996).

that protecting state security results in more secure conditions for citizens, and this fails to take account of the many people living in conditions of insecurity within sovereign State's borders.<sup>212</sup> For example, the actual numbers of individuals internally displaced by reason of conflict was estimated to be 26 million at the end of 2007, and far exceeded those seeking international protection as refugees (16 million).<sup>213</sup> Although the State remains one of the main instruments of security, individuals instead of borders become the objects of that security.<sup>214</sup>

Although most threats to human security can be formulated as human rights violations, the added value of the language of security is that it "can be used in social [and political] contexts where the language of human rights would meet entrenched opposition."<sup>215</sup> That is, the language of human security can be useful in situations in which human rights language fails; additionally, the "humanization" of security discourse can provide entry points for human rights advocates to enter the debate.<sup>216</sup> As Bertrand Ramcharan has noted, "international human rights norms are crucial to the definition of human security and . . . human rights strategies are essential for its realization."<sup>217</sup> Conversely, strategies to bring about secure conditions within countries of origin and asylum are also essential for the realization of human rights. It is a symbiotic, rather than an antagonistic, relationship.

Concerns that States may manipulate or appropriate the language of security for their own political purposes, which could lead to the further "securitization" of refugee issues, should not be blamed on the concept of human security itself. Rather, it reflects the *realpolitik* of its application.

## 2. Multilateralism, International Cooperation, and Interdependence

The human security framework further embraces *multilateralism*, *international cooperation*, and *interdependence*, recognizing rightly that threats to human security in one part of the world affect persons in other parts and that this needs to be taken into account in designing solutions

212. *See id.* at 396.

213. UNHCR, *supra* note 151, at 2. These sixteen million are made up of 11.4 million refugees of concern to UNHCR and 4.6 million Palestinian refugees under the mandate of U.N. Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA). *Id.* Statistics for 2008 were not available as this Essay went to press.

214. Ken Booth, *Security and Emancipation*, 17 *REV. INT'L STUD.* 313, 318 (1991).

215. Sabina Alkire, *A Conceptual Framework for Human Security* 39 (Ctr. Research on Inequality, Hum. Sec. & Ethnicity, Working Paper No. 2, 2003), available at <http://www.crise.ox.ac.uk/pubs/workingpaper2.pdf> (last visited June 18, 2009); *see also* VON TIGERSTROM, *supra* note 30, at 40.

216. Alkire, *supra* note 215, at 39.

217. BERTRAND G. RAMCHARAN, *HUMAN RIGHTS AND HUMAN SECURITY* 231 (2002).

and responses.<sup>218</sup> That is, one of its strengths is its recognition of the transboundary or transnational nature of today's threats to human security. Today's internally displaced persons can quickly become tomorrow's refugees if the factors causing their human insecurity are not resolved. Today's refugees living in protracted camps may become tomorrow's irregular migrants, or they may be recruited by non-state armed groups or the state military and paramilitary groups and prolong armed conflict. As noted above, refugees are a litmus test for the state of human security worldwide. Causes of displacement are no longer limited to persecution or international conflicts, but include, *inter alia*, human rights violations, civil conflicts, environmental degradation, international terrorism, poverty, and underdevelopment. Situations of displacement, in turn, can foster other issues of insecurity—for national borders as well as individuals—including drug and people trafficking and smuggling, and irregular migration.<sup>219</sup> The human security framework acknowledges these interlinkages and thereby expands the ways in which displacement can be addressed.<sup>220</sup>

### 3. Prevention

As already noted, the system of international legal protection is generally reactive in nature rather than *preventive*. The human security framework, in contrast, is oriented toward early action and response. It acknowledges that the failure to deal with the human security issues of individuals and refugees can have an impact on national, regional, or global security, and hence should be framed as a universal concern requiring early intervention.

Alongside the human security framework is the emerging doctrine of R2P, which has as its central tenet that the primary responsibility to protect one's citizens lies with the State but if the State is unable or unwilling to do so, the responsibility must be borne by the broader community of States. National borders are increasingly irrelevant in the face of transnational threats. Theoretically, R2P offers some potential for enforcement action in the face of serious threats to human insecurity. As António Guterres, U.N. High Commissioner for Refugees, stated in his address to the U.N. Security Council in January 2009,

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218. CHS, *supra* note 7, at 12.

219. *Id.*

220. It is also noted that the UNHCR has been increasingly linking issues of displacement with development. See UNHCR, CORE GROUP ON DURABLE SOLUTIONS, FRAMEWORK FOR DURABLE SOLUTIONS FOR REFUGEES AND PERSONS OF CONCERN 3–6 (2003), available at <http://www.unhcr.org/partners/PARTNERS/3f1408764.pdf> (last visited May 28, 2009).

[e]ffective prevention [of displacement] will require a carefully balanced, coordinated and targeted combination of measures in the political, diplomatic, developmental, environmental and humanitarian domains. Effective prevention will require action to be taken by a wide range of different stakeholders, including [S]tates, [U.N.] entities, regional bodies, international financial organisations and non-state actors. And in our increasingly interconnected and interdependent world, effective prevention will require new networks and coalitions to be formed, linking those who are working to promote *Human Security* at the level of the local community to those who are striving to attain the same objective on a national, regional and global basis.<sup>221</sup>

#### 4. Empowerment and Protection

Finally, with its dual strategies of *protection and empowerment*, the concept of human security aims to foster long-term solutions to refugee problems. The UNHCR and States have long implemented protection strategies, viewing refugees as at-risk individuals or victims in need of immediate sanctuary and protection. However, the dignity of refugees also requires that they are respected as human beings capable of becoming active and contributing members of the communities in which they live, rather than “passive recipients of aid.”<sup>222</sup> Not only is this a conceptual shift from viewing refugees as protection seekers and, therefore, often as burdens on the host State, but equally as persons capable of contributing positively to their host communities. Protection and empowerment are dual strategies that operationalize the concept of human security; the benefits of empowerment for refugees in this sense cannot be overstated.

### CONCLUSION: MOVING TOWARD A LEGAL DISCOURSE ON HUMAN SECURITY?

It has been submitted that “international human rights norms define the meaning of human security.”<sup>223</sup> Human rights, as a concept and as a legal regime, is oriented toward securing freedom, dignity, justice, equality, and protection for all, irrespective of citizenship or nationality. It is asserted that there is, therefore, convergence, rather than divergence, be-

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221. U.N. SCOR, 64th Sess., 6062d plen. mtg. at 7, U.N. Doc. S/PV.6062 (Jan. 8, 2009) (emphasis added).

222. UNHCR, REINTEGRATION AND LOCAL SETTLEMENT DIV., SELF-RELIANCE HANDBOOK iv (2005); see also Nicholson, *supra* note 100.

223. RAMCHARAN, *supra* note 217, at 9.

tween human rights and human security. Human security can only be realized by a robust system of human rights; and similarly, human rights are meaningless without a secure environment in which to enjoy them. The same applies in relation to refugee protection. The human security framework already shares many of the central tenets of human rights and refugee protection: It is people-centered and supports principles of interdependence, multilateralism, universalism, burden and responsibility sharing, and early prevention. However, law alone, without political will, cannot solve the many and expanding causes and incidences of human displacement that exist in the world today. Human security offers space to rethink and to reconceptualize security and protection challenges; and may plug some of the protection gaps in international law on an *ad hoc* or temporary basis. Goodwin-Gill has described the challenge as follows:

The art is to translate the rhetoric of human rights protection in times of emergency into a working reality that is commensurate with human dignity, compatible with international obligations and consistent with the rule of law.<sup>224</sup>

Human security, as a fluid and broad ranging concept compatible with human rights and supplementary to international law, may be one means through which the rights, dignity, and security of refugees can be furthered. Human security speaks to state interests, while reinforcing human rights objectives. Law is the safety net for refugees, which needs to be strengthened by, in particular, improved access to judicial redress mechanisms. However, law is only one instrument in the toolbox of international relations. Human security, in contrast, offers added benefits in terms of its flexibility, conceptual appeal, and location in the political corridors of the mainstream United Nations.

Moreover, it is no longer possible for international lawyers to sit on the sidelines of security debates that touch on and impact refugee protection:

Without international law, international relations theory and practice would amount to little more than a constant reaffirmation that right is right. Without international relations, we would not be able to expose instances when international law is an instrument of might or to advocate what needs to be done to reaffirm the principle right not might. Without international relations, our ability to succeed strategically in developing new

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224. Goodwin-Gill, *supra* note 62, at 7.

international law, founded on “the principle of right not might,” would be considerably limited.<sup>225</sup>

It is possible that a legal right to human security may eventually emerge that is carefully drafted and which satisfies some of the concerns of many international lawyers. However, anyone attempting to articulate such a right would need to be aware that legalizing the concept of human security and its associated policy agenda may diminish its value and power that it enjoys as a non-legal tool of international relations.

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225. Clarence J. Dias, *International Relations and International Law: From Competition to Complementarity*, in *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE* (Thomas Biersteker et al. eds., 2007); Cox & O’Neill, *supra* note 102, at 203.