

A Brief History of the Future:
Refugee Law and Policy in 2010,*
From Containment to Cooperation**

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** It is the author's proposition that an international policy (in 2002) driven by containment, in its pure form, may have to give way to institutions of international cooperation by 2010.

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I. PROLOGUE

The following essay discusses a plausible future policy scenario, including its legal and international institutional dimensions. It addresses the question, "What would global, regional, and national refugee law and policy, including relevant institutional arrangements, look like in 2010, if the overall imperative driving policy today is containment?" This is not an exercise in prediction. Using imagination and creativity, the essay attempts to set out a chronology of plausible events and circumstances that would lead to the anticipated policy outcome. The author dares to speculate, but does so constructively.

II. POLICY SCENARIO

2010 – This is a world in which nearly a century of agonizingly mistaken conceptions of protection for refugees and internally displaced persons culminates in the informed realization that their problems demand multilateral cooperative responses and cannot be dealt with on an *ad hoc* basis.

This policy scenario anticipates that an international strategy of containment – anchored on an Internally Displaced Persons (IDP) Convention and human rights treaties – will likely fail to protect displaced persons and provide for their economic welfare. Thus, it anticipates what may eventually be an inevitable reappraisal of national, regional, and international policy, and outlines possible policy elements from such reappraisal. An implicit premise of this policy scenario is that the world community will most likely have to go through an era of containment policy before a critical mass of States will realize, after the painful suffering of hundreds of thousands, the need for more coordinated, multilateral responses to problems of displacement.¹ The containment scenario is simply the closest to the trajectory of current trends.²

1. The unmistakable signs are there. Professor Helton, describing the last decade's refugee story, writes: "The prevailing directions of international humanitarian action are well reflected in the experiences of the past decade, and even earlier. Initiatives were invented and re-invented, and policy responses reverted to a largely reactive mode. At the outset of the 21st century, the policy debate is driven by selective apathy and creeping trepidation." (ARTHUR C. HELTON, *THE PRICE OF INDIFFERENCE* 29 (2002)) Loescher also points out that debates over the refugee question will almost always be contentious and politicized, revealing problems that continue even to this day. (GIL LOESCHER, *BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS* 54 (1993)).

2. *Id.* at 267.

But the forecast proceeds ahead of itself. The study must begin at a city that is no stranger to the pains of displacement and significant to the story of the last century's refugees. The city is Hanoi, and the date is 30 April 2003.³

In the early 20th century, mass influxes threatened the security of European States, particularly when these became protracted affairs surpassing the capabilities of humanitarian agencies and States to resolve.⁴ The 1990s was likewise a decade of "extraordinary human displacement. As the relational structure imposed by the cold war waned ... refugees became an important feature in the new era."⁵

The conclusion of an International Convention on Internally Displaced Persons in the spring of 2003 was, therefore, hailed as a positive step towards the protection of human rights and the enforcement of humanitarian law. Pundits declared the Hanoi Convention and 1951 Refugee Treaty as 21st century pillars on which refugee and IDP protection may be founded.

Upon coming out of the International Conference in Hanoi, the UN Secretary-General's Special Representative for IDPs proudly declared as he waved the final draft of the Convention, "Protection for human rights, and therefore, peace in our time!"

The Convention closely adhered to the UN Guiding Principles on Internal Displacement. A central element was that protection for IDPs was the responsibility of national authorities. While it contained a provision that humanitarian assistance offers were not unfriendly acts, it did not oblige national authorities to accept such offers either. A second central element was that internal displacement did not preclude the continued application of international human rights, humanitarian and refugee laws. It was clear, however, that the Convention was not to be an instrument for the punishment of violations thereof; and neither was there any provision for compulsory monitoring and enforcement mechanisms in regard to violations of the Convention itself.⁶

The Conference also considered some countries' concerns that a treaty organization may threaten "sovereignty and impose new financial obligations."⁷ A consensus was reached, therefore, that the existing

3. 28th Anniversary of the Fall of Saigon.

4. LOESCHER, *supra* note 3, at 33.

5. HELTON, *supra* note 3, at 18.

6. The Conference also opened for signature an Optional Protocol providing for the possibility of submitting individual or country complaints to the Conference of States Parties.

7. UNHCR, *The Early Years, in THE STATE OF THE WORLD'S REFUGEES: FIFTY YEARS OF HUMANITARIAN ACTION 19 (2002).*

coordinative mechanisms like the UN Office for the Coordination of Humanitarian Affairs (OCHA) be strengthened, and the Secretary-General would report and submit recommendations to the Review Conference scheduled for the fifth year after the Convention's entry into force.

Finally, physical safety and economic well-being of IDPs were to be paramount concerns in deciding issues of internal repatriation. The Hanoi Conference was not only conscious of the possibility of persecution of returning IDPs, but also of physical danger, extreme poverty, and economic deprivation.

Despite the prevailing optimism that the Convention was to be a fundamental component of an international protection policy, unfortunately, the Convention was recklessly "driven by selective apathy and creeping trepidation."⁸ It was but the latest addition to a collection of policy instruments that seemed to be uninspired reincarnations of earlier policies that resulted in closed borders,⁹ arbitrary repatriation of refugees,¹⁰ and insensitive attitudes.¹¹

The Convention complemented a policy bias for containing the problems of refugees and displaced persons within the borders of their places of original domicile. This bias was rooted in the post-World War II forced repatriation phenomenon and the establishment of refugee camps. It probably even traced its earliest origins to the introduction of immigration controls at the end of the 19th century and the closing of borders to refugees from Italy, Spain, and Portugal in the early 20th century. Recent manifestations of this policy were found in expanded safe haven zones in northern and southern Iraq;¹² the enforced return of refugees to Rwanda in 1996;¹³ the strategy of humanitarianism in Bosnia;¹⁴ Australia's decision to fund the hosting of potential refugees in facilities on neighboring Pacific island-States; and the US programme to interdict Haitian boat people.¹⁵

The results of such an international policy were devastating. As conflicts flared out around the world and governments undertook counter-terrorism operations after September 11, people massed adjacent to borders, crammed refugee centers, and fled the scenes of fighting. And the initial reaction of

8. HELTON, *supra* note 3, at 29.

9. LOESCHER, *supra* note 3, at 36.

10. UNHCR, *supra* note 9, at 14-16.

11. LOESCHER, *supra* note 3, at 37-38.

12. HELTON, *supra* note 3, at 19.

13. *Id.* at 22.

14. *See Id.* at 36-38.

15. HELTON, *supra* note 3, at 28.

States was to reinforce border controls, turn back those who managed to cross international boundaries, provide funds for refugee camps of humanitarian agencies, and pressure origin-states to fulfill their responsibilities and obligations [on providing shelter, food, and health care] under the Hanoi Convention and relevant human rights treaties. There was agreement across the board that national interests were best-served by limiting immigration particularly of possible "public charges;" constraining humanitarian activities with the extent of available financial resources; maintaining and/or stabilizing existing social or ethnic configurations; and considering the impact of refugees on the country's economic situation.

The suffering from displacement¹⁶ was severe. Displacement extended for long periods of time, and its effects were devastating. People were left homeless; mortality rates of labor and domestic animals increased, and communities were routinely pillaged. While conflicts were sometimes confined, the human costs were always staggering. For every million displaced persons, 20% were unable to return to their homes because of physical dangers, limited housing, land mines, and the continued presence of combatants. Worse, military operations resulted in new displacements every year. International obligations to protect the safety and rights of displaced persons were openly flouted, and national authorities were often unwilling, or unable, to extend adequate protection to the lives, liberty, and properties of displaced persons. In grave situations of national emergencies, the international legal framework, including the Hanoi Convention, were bordering on being a farce in light of the complete inability of national authorities to balance the protection needs of displaced persons and the security of the State. Displacement was almost always synonymous with loss of personal productivity and economic impairment. Economic woes extended even after the crisis.

In a nutshell, the world's policy of containment plunged displaced persons into a cycle of illegal entry, clandestine existence,¹⁷ expulsion, and further illegal entry.¹⁸ But at a more important level, the policy of "keeping people home" exposed displaced persons to human rights atrocities, economic deprivation, and personal suffering. This is because their national governments were simply unable to protect them or provide for them. Violence and internal conflict, especially in less developed countries, had the tendency of taking on its own volatile dynamics, which international

16. Hence, "displacement" and "displaced persons" are used interchangeably with "refugees," as defined by the 1951 Convention, and "internally displaced persons."

17. Clandestine existence, while slightly better than being back home, or in refugee camps, nevertheless meant exploitation and abuse by employers.

18. See LOESCHER, *supra* note 3, at 36.

obligations were completely unable to tame or control, to the detriment of displaced civilians. This resulted in an international regime that placed a premium on restraining the cross-border flows of displaced persons. It became evident that physical safety was not the only need of displaced persons – they likewise needed to be given the opportunity of resuming their lives. Thus, even if they were accorded protection by national authorities, enforced safe havens or refugee camps, absent the opportunity to rebuild their lives, these individuals were bound to be displaced forever.

By 2005, there were cracks in the international solidarity for the containment of displacement to countries of origin. Before long, containment became subject to intense international political debate, as civil society and a few concerned governments questioned its wisdom. By this time, non-governmental organizations (NGOs) confirmed widespread violations of the Hanoi Convention, or at least, the inability of States to fulfill their obligations thereunder. Squabbles between factions had become common in safe havens, which remained dangerous, in places like northern Iraq¹⁹ and millions of people around the world had become completely dependent on United Nations High Commission on Refugees (UNHCR) centers for physical safety, nourishment, and health care.

Civil society, and eventually, governments,²⁰ started to realize that while containment successfully enclosed the spill-over effects of national crises around the globe, it was a policy that glossed over the painful experiences of people. To further the policy was to sacrifice human rights on the altar of expediency, and often denied the people their economic welfare for as long as their physical safety was guaranteed. While containment assured communities across borders of relative peace and stability, hundreds of thousands were subject to either threats to life and liberty or dispossession of property and productivity.

Over the next five years, human rights NGOs launched a massive information and advocacy campaign, highlighting the follies of containment and the need for more harmonized international response. The history of displaced persons will not be told without recognizing the important role that civil society played in raising international awareness of their suffering. Once the information and exposés got into electronic superhighways, there was considerable impact on the collective conscience of the world community. Domestic constituencies began to influence their governments' international humanitarian policy.

By 2010, the containment experience of the last ten years, informed by the greater lessons of nearly a century of attempting to protect refugees, have significantly altered

19. See HELTON, *supra* note 3, at 19.

20. Governments were – and still are – the greatest obstacles to change.

the perspectives of national, regional, and international refugee law and policy, towards policies and institutions of international cooperation.

On the *national level*, countries like Canada, France, the Netherlands, Norway, Denmark, Switzerland, and Sweden – responding to pressure from their citizens and civil society – increased voluntary contributions for the establishment of more and better equipped shelters or centers. The Americans and the British – while still wary of the dangers of another Somalia – are more willing to place their armed forces at the disposal of UN peace-operations and in enforcing UN-created safe havens. These governments are also using diplomatic pressure and world media to call the attention of governments to their fundamental responsibilities under the Hanoi Convention and other human rights treaties.

Foreign ministries are taking the lead in humanitarian policy to enhance international coordination and cooperation. Countries are relaxing tax legislation to encourage Pfizer-type philanthropical programmes in displacement situations.

For the first time, Canada, invoked Article 41 of the International Covenant on Civil and Political Rights (ICCPR) and brought a complaint against an African nation for its inability to protect the safety and liberty of displaced persons. And it appears that other complaints are being prepared. It is now clearly accepted that territorial boundaries, which used to be demarcations of sovereignty, are no longer justifications for ignoring the plight of displaced populations.²¹

Governments of countries bordering affected States are now more willing, or more susceptible to being pressured, to host temporary shelters or refugee centers, and are closely working with agencies like the UNHCR and International Committee of the Red Cross (ICRC). At the same time, however, usually in the context of regional arrangements, pressure is exerted on the State of origin to resolve the crisis situation as soon as possible. Recognizing the financial burden, at the very least, of caring for displaced persons, their *prompt but safe* repatriation has become the 21st century battle-cry. In the meantime, governments and humanitarian agencies are transforming refugee centers into “Little Puerto Princessas,” inspired by the Viet-ville²² in Puerto Princessa, Philippines. Financial and technical assistance are being channeled to refugee centers to enable displaced persons

to establish some livelihood and to become economically productive. Security and travel restrictions, however, are still a basic issue.

At the *regional level*, organizations are adopting pro-active strategies in dealing with crisis situations. During the 2008 Leaders’ Meeting in Manila, the Association of South East Asian Nations (ASEAN) institutionalized the *ASEAN Troika*²³ mechanism, first used in 1998 to implement its constructive engagement policy on Myanmar. The *troika* is envisioned to be a small committee of senior decision-makers that can immediately provide an institutional response on behalf of the organization to cases of conflict and/or displacement. ASEAN leaders have emphasized that the greatest value of the *troika* is its ability to prevent humanitarian crises from occurring in the first place. But when displacement does occur, the *troika* facilitates regional cooperation for the provision of temporary shelter and basic services to displaced persons, and initiates regional discussions regarding safe repatriation or resettlement. The *troika* has implemented better coordination among ASEAN disaster relief agencies, promoted confidence-building measures, and pushed technical capacity building within ASEAN, as recommended to regional organizations by the 2006 Sweden-funded Helton Commission on Strategic Humanitarian Action and Research.²⁴ The *troika* mechanism was replicated by regional arrangements in the Americas, Africa, and South Asia; and in the European Union, they established a similarly-mandated group of mid-level officials from national relief cooperation agencies.

These regional arrangements are particularly crucial where the displacement of people in a region does not rise to such a magnitude that impinges on the international peace. Absent international enforcement action from the United Nations, they become sufficient surrogates to a much-needed international response. They provide a framework within which reaction to human rights violations and other economic needs is effectively channeled to the affected populations. Moreover, these arrangements are complemented by the decision of regional development banks to establish an account for providing humanitarian grants in emergency situations. Many African states have already availed of such a window at the African Development Bank.

Judgments are increasingly being entered by the European Court of Human Rights, such as those against a number of Baltic states that became members of the European Union in 2007.

21. HELTON, *supra* note 3, at 270.

22. Viet-ville is an 8.2 hectare village now home to Vietnamese refugees who chose to remain in the Philippines. Viet-ville is a self-managed community with self-sustaining livelihood projects such as a restaurant, bakery, noodle manufacturing, and fish-sauce making.

23. The *troika* is led by the Foreign Minister of the ASEAN member who is Chair (held by rotation) of the organization during the year when the *troika* is established. The other two members are the Foreign Ministers of the immediate past Chair and incoming Chair of the organization.

24. Helton was a Columbia Law Professor who suggested the SHARE initiative.

In the *international level*, particularly at the Security Council, there is growing recognition and more agitation for considering displacement as a threat to the international peace and stability. The argument is not only do gross violations of human rights necessitate action under Chapter VII of the UN Charter, but that economic deprivation and displacement also have a direct correlation to the peace and stability of bordering countries and regions. While still in nascent stages, there are already a few precedents after Haiti and Yugoslavia where Chapter VII was invoked in the use of U.N. forces in conflict situations, e.g. a new administration was installed in a small central African republic after a total breakdown of social order, and UN peacekeepers were inserted into a central Asian nation in order to protect minorities from being forcibly displaced. Many governments also view as imperative the active involvement of the United Nations in restoring peace and order in conflict areas to resolve long-term implications of displacement. Displacement is so massive, that as will be seen later, re-settlement does not seem to be a feasible policy option anymore.

Refugees and IDPs have also been on the annual agenda of the United Nations General Assembly since 2006. The level of concern expressed by delegations has been so serious that the Assembly requested the Secretary-General to prepare an updated report on the problems of refugees and displaced persons. The report was circulated in late 2010 and the controversial proposal made by the UN Secretary-General for the consolidation of UNHCR, OCHA-IDP and International Organization for Migrants (IOM) into a super-agency is gaining support from governments, and should be adopted at the 2011 World Conference on Displacement in Ramallah, capital of newly-independent Palestine.

But indeed the troubles of displaced persons are far from over. While their safety and economic future are paramount concerns for governments, borders remain closed to permanent integration. The number of displaced persons is just staggering and countries do not have the resources with which to deal with them. The *Caribbean Initiative for Responsibility Sharing*²⁵ simply cannot be replicated in countries where the influx of displaced persons is in the hundreds of thousands. But addressing the root causes of many conflicts, governments are giving more attention, effort, and money to the achievement of the Millennium Development Goals. That is probably one step in the correct direction.

III. EPILOGUE

In 2010, this may be a world where as another day comes to an end in UNHCR Refugee Center 2789, a young Somali child runs home from a

25. Adopted from HELTON, *supra* note 3, at 259.

makeshift primary school. As his shadow is cast upon the orange stains of a thousand sunsets on the horizon, the words of a long forgotten public servant should remain true:

The efforts of the private organizations and of any ... organization for refugees can only mitigate a problem of growing gravity and complexity. The problem must be tackled at its source if disaster is to be avoided. [W]hen domestic politics threaten the demoralization and exile of hundreds of thousands of human beings, considerations of diplomatic correctness must yield to those of common humanity.²⁶

This was the sad lesson of the 20th century. And it seems that it is the same lesson that humankind will have to learn yet again.

26. Resignation letter of Mr. James G. McDonald, High Commissioner for German Refugees (1936).