

**REFUGEES, GLOBAL INEQUALITY AND
A NEW CONCEPT OF GLOBAL CITIZENSHIP**

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1. INTRODUCTION

Australian Immigration Minister Philip Ruddock urged the 50th anniversary meeting of the United Nations High Commissioner for Refugees (UNHCR) to curtail the rights of those seeking asylum. He suggested that so-called developing states that refuse to take back rejected asylum seekers should have their aid budgets cut.² His call was made amid a global refugee system in grave crisis. According to the available statistics, the flight of people from their states of birth grew dramatically in the final two decades of the 20th century and this mass movement is likely to grow in the 21st.³ Increasingly, they are resorting to unauthorised methods of entry, often at great risk to their lives.

Many Western states are having considerable difficulties, logistically, diplomatically and politically in removing those denied refugee status.⁴ States are spending mounting sums on detecting and detaining unwanted arrivals, deciding their fate and administering the outcomes while giving decreasing funds to the UNHCR, which is responsible for most of the world's displaced persons.⁵ A recent UNHCR-commissioned analysis of European states' responses to the growth of 'people smuggling' concluded that official policy risks "ending the right of asylum in Europe" and that the "current status quo is practically and ethically bankrupt from all positions."⁶ Australia has

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² "Ruddock plan: cut refugee states' aid", Sydney Morning Herald, 14 December 2001 at <www.smh.com.au/news/0112/14/text/national3.html> (visited December 2001).

³ See Castles S and anor, *The Age of Migration: International Population Movement in the Modern World* (1993, Macmillan, London) 5-8.

⁴ See Van Kessel, "Global migration and asylum" (2001) 10 *Forced Migration Review* 11.

⁵ See Telford, "UNHCR and emergencies: a new role or back to basics?" (2001) 10 *Forced Migration Review* 42.

⁶ Morrison, "The trafficking and smuggling of refugees: The end game in European

taken the policy of blocking and deterring unwanted arrivals and detaining asylum seekers, which has fuelled concerns that Australia's international reputation is being damaged.⁷

This article will review the development of the refugee debate, examine the basic contradictions and fundamental flaws of the 1951 Refugee Convention, argue for a new paradigm that overcomes the dichotomy between refugees and immigrants, and recognise the essential democratic right to travel and live where one chooses.

II. GROWTH OF REFUGEE NUMBERS

When the UNHCR was established in 1951, there were an estimated 1.5 million refugees worldwide.⁸ On 1 January 2000, the UNHCR considered 22.3 million people to be "of concern." They included 11.7 million refugees, 1.2 million asylum seekers, 2.5 million repatriated refugees and 6.9 million internally displaced persons and others of concern.⁹ Another 13-18 million internally displaced persons were outside the UNHCR's jurisdiction as were an estimated 3.5 million Palestinians. This totalled 43 million.

The number of people "of concern" nearly doubled during the 1990s from 14.9 million in 1990, reaching an all-time high of 27 million in 1995, in the wake of the Gulf War against Iraq, the fomenting of communalism in Yugoslavia, and the eruption of ethnic warfare in Rwanda and Africa's Great Lakes region.¹⁰

Judging by the statistics for "asylum applications lodged in selected countries", the rise in the 1990s followed an even greater increase during the 1980s. That figure jumped from 180,000 in 1980 to 435,000 in 1989, before skyrocketing to almost 850,000 in 1992 and ending the

asylum policy?" UNHCR, Geneva, July 2000 at <www.unhcr.ch/evaluate/reports/traffick.pdf>.

⁷ See for example Mares P, "Borderline: Australia's Treatment of Refugees and Asylum Seekers (2001, University of New South Wales Press, Sydney); Australian Broadcasting Corporation, "Four Corners report: The inside story", 13 August 2001 at <www.abc.net.au/4corners/stories/s344246.htm> (visited August 2001).

⁸ McMaster D, *Asylum Seekers: Australia's Response to Refugees* (2001, University Press, Melbourne) 9.

⁹ UNHCR, *Refugees by the Numbers* (2000), 6.

¹⁰ *Ibid* 5.

decade at 538,000 in 1999.¹¹ Of the largest concentrations of refugees in 1999, 3.1 million came from Afghanistan and Iraq, about 2.7 million from sub-Saharan Africa and nearly 800,000 from Bosnia and Croatia.¹² Most are living in camps in neighbouring states, usually among the poorest in the world.¹³

The rise in refugee numbers has been related to definite economic and political processes, particularly the collapse of the Stalinist-ruled states in Eastern Europe from the late 1980s, the end of the Cold War, the US-led bombing of Iraq and Serbia and the outbreak of regional conflicts in Eastern Europe, the Middle East, Asia and Africa.¹⁴ In Europe, thousands took the opportunity to flee from the Stalinist regimes and tens of thousands more sought refuge from the severe social dislocation and civil and ethnic conflict associated with the restoration of capitalism. With the collapse of the Asian 'economic miracle' in 1997-98 and the imposition of International Monetary Fund restructuring measures in one state after another, this global movement appears to be rising.

More fundamental driving forces are also at work. The increased demand for asylum has occurred amid an unprecedented globalisation of the world economy since the mid-1980s, creating massive flows of international capital, the rapid shift of production processes from state to state, and a worldwide labour market.¹⁵ At the same time, the ever-widening gulf between the capital-rich, technologically advanced and militarily powerful states and the rest of the world has fuelled the demand for the right to escape poverty.¹⁶

¹¹ "Refugees and others of concern to the UNHCR", 1999 at <www.unhcr.ch/statist/99oview/tab501.pdf> (visited July 2001).

¹² *Ibid* 8.

¹³ Bookstein, "UNHCR and forgotten emergencies: can funds be found?" 10 (2001) *Forced Migration Review* 46, 48.

¹⁴ See for example Nygh, "The future of the United Nations' 1951 Refugees Convention" [2000] *Australian International Law Journal* 1, 2.

¹⁵ See International Committee of the Fourth International, *Globalization and the International Working Class: A Marxist Assessment* (1999, Mehring Books, Sydney); Castles S and anor, *The Age of Migration: International Population Movement in the Modern World* (1993, Macmillan, London) 5-8.

¹⁶ Zolberg, "International migrants and refugees in historical perspective" (1992-1993) *Refugees* 36-42.

III. RESTRICTING THE RIGHT TO ASYLUM

While embracing the global restructuring of economic life, Western states have generally sought to erect new barriers to the movement of ordinary working people. It has been suggested that, “for a growing list of states the best interpretation of the Convention Relating to the Status of Refugees can only be to run it through the shredder”.¹⁷ Some of the arguments raised by those calling for the Convention’s restriction cannot withstand careful scrutiny. Official opposition to the growth of what is characterised as “human trafficking” appears somewhat hypocritical. There is no doubt that so-called people smuggling has become a big business.¹⁸

If refugees are seeking assistance from private sources, and often facing life-threatening conditions as a consequence, this is largely due to the steady erosion of refugee protection over the past decade. As states have restricted entry and intensified measures to detect and exclude unwanted arrivals, refugees have made ever-more risky efforts to gain a safe haven. Critics of the official response have concluded that if states offered expanded settlement programs for people from troubled regions of the world, they would undercut the so-called smugglers’ market.¹⁹

Similarly, the official condemnation of “queue jumping” may be deemed cynical. Far from being in an orderly waiting list, those seeking safe haven confront impossible situations and terrible delays. Those likely to be the most needy, refugees in Africa, Asia and the Middle East, are the least likely to be accepted. It has been stated that in Australia, out of the 7,500 places for offshore applicants in 2000, 45 percent were given to Europeans, leaving 2,206 places for the entire Middle East and 1,738 for all of Africa. On average, applications to Australia take 18 months to come up for consideration. In many states,

¹⁷ Harding J, *The Uninvited: Refugees at the Rich Man’s Gate* (2000, Profile Books, London).

¹⁸ By one estimate, one million people were transported in illegal operations worth up to \$US20 billion in 1999: “The problem with the 1951 Refugee Convention”, Parliament of Australia, Parliamentary Library Research Paper 5, 2000-2001 at 3.

¹⁹ Per C Conybeare, quoted in Mares P, “Borderline: Australia’s Treatment of Refugees and Asylum Seekers” (2001, University of New South Wales Press, Sydney) 192.

including Iraq and Iran, Australia has no facilities for receiving applications.²⁰ Moreover, Australia has cut its 12,000-a-year quota of humanitarian and protection visas for offshore applicants by the number of asylum seekers who reach Australia independently and are granted refugee status. This policy pits the two groups, both in urgent need of protection, against each other.

The charge that asylum seekers who arrive without permission are “illegal” entrants is equally flawed. In most cases they have broken no laws, and have not been convicted of any offence. In any case, because refugees, by necessity, are often forced to escape from their countries and mislead authorities, Article 31 of the Convention stipulates that governments should not penalise applicants “on account of illegal entry or presence.”

Another common argument is that a distortion of priorities is created when Western states spend far more on processing asylum applications than they donate to the world refugee effort. In 2000, Britain spent more on dealing with asylum seekers, \$US2.2 billion, than the UNHCR budget of \$1.7 billion.²¹ Australia spends as much each year on the Refugee Review Tribunal, just one level of the determination process, as it allocates to the UNHCR.²² Yet, this disparity underscores the paltry sums that Western states give the UNHCR. Donations to the UNHCR have decreased in recent years and its total income of some \$US700 million in 2000 fell far short of the budgeted \$1.1 billion.²³ This seems to have been primarily a product of the measures being taken to undermine the right to asylum. A leading UNHCR official has summed up the situation as follows:²⁴

Broadly speaking, two parallel trends have emerged, both of which have impacted negatively on the accessibility of asylum and the quality of treatment received by refugees and asylum seekers. The

²⁰ Ibid 20.

²¹ Ibid 4.

²² Ibid 4.

²³ Telford, “UNHCR and emergencies: a new role or back to basics?” (2001) 10 *Forced Migration Review* 42.

²⁴ Feller, “The Convention at 50: The way ahead for refugee protection” (2001) 10 *Forced Migration Review* 6, 7.

first has been the growth in an overly restrictive application of the 1951 Refugee Convention and its 1967 Protocol, coupled with a formidable range of obstacles erected by states to prevent legal and physical access to their territory. The second is the bewildering proliferation of alternative protection regimes of more limited duration and guaranteeing lesser rights than those contained in the 1951 Convention.

IV. BASIC CONTRADICTIONS

States have generally facilitated the globalisation of economic life, seeking to attract wealthy international investors while shutting their doors to the impoverished. They have deregulated their financial markets to enhance the movement of capital but denied the same freedom to labour. These responses point to several basic contradictions. The above observations may be summarized as follows:

nation-state versus global economy;
mobility of capital versus border controls on people; and
one law for the wealth and another for the poor.

(a) *Nation-state v Global Economy*

The growing global mobility of people and commerce is increasingly in conflict with the efforts of states to prevent the flow of unwanted arrivals. There is a worldwide movement of people, whether for employment, business, education, tourism, sport, entertainment, scientific and cultural exchange or social and political intercourse. More than ever, we live in a global village, linked electronically and by air travel. In large measure, this is the inexorable product globalisation. National borders are becoming increasingly anachronistic.

The world economy today is characterised by the daily movement of vast quantities of capital across national borders, as international financial institutions scour stock and bond markets for the highest return on their investments. In the decade 1980-1990, the volume of cross-border transactions in equities grew at a compound rate of 28 percent a year, from \$120 billion to \$1.4 trillion. Over the same period, international bank lending rose from \$324 billion to \$7.5 trillion and the international bond market increased in size from \$295 billion to

\$1.6 trillion. These sums dwarf the capital at the disposal of any state or central bank.²⁵

(b) Mobility of Capital v Border Controls on People

Whilst capital is free to roam the world, states deny its victims that right. In part, they maintain national barriers in order to better service the needs of transnational corporations, which require reliable supplies of skilled, as well as low-cost, labour. States are competing internationally to supply cheaper, more trained and more disciplined labour forces to investors. At the same time, they retain national restrictions on labour movement in an attempt to shore up their own sovereignty and domestic political control.

(c) One Law for the Wealthy and Another for the Poor

Both overtly and covertly, states discriminate against the poor and working people when deciding whom to admit as migrants, temporary residents, visitors and students. Those who have wealth, particularly money to invest, or sought-after skills, which usually require means to acquire, are far more likely to be granted entry. Although Australia officially has “ a non discriminatory immigration policy, which means that anyone from any country can apply to migrate”,²⁶ in reality a potential immigrant’s personal and/or family wealth is among the most significant factors in the assessment of their application.²⁷ Some classes of visa are reserved specifically for applicants who can pass wealth or income tests. To obtain a Business Skill visa, Business Owners must own or be a part owner/shareholder of a business and have net assets personally or with spouse exceeding \$200,000. In addition, Business Skills applicants obtain bonus points for having or bringing more

²⁵ International Committee of the Fourth International, *Globalization and the International Working Class: A Marxist Assessment* (1999, Mehring Books, Sydney) 10.

²⁶ Department of Immigration and Multicultural Affairs (DIMA), “ Fact Sheet 1: Immigration – The Background”, 23 June 2000 at 1. For the same 1996 policy see: “Bipartisan Joint Statement”, *The Age*, 31 October 1996 cited in Batrouney, “Australia’s immigration policies: A loss of consensus”, (Winter 1998) NIRA Review at <www.nira.go.jp/publ/review/98winter/bat.html>, 1-5 (visited July 2001).

²⁷ *Ibid* 3.

money with them. Thus, investors with \$2 million obtain 80 of the 105 points needed for a visa.²⁸

The poor and most workers can only dream of these sums. They are further blocked by visa application fees that exceed more than a year's earnings for the average person living in a third world state,²⁹ as well as charges for skills assessment, English language tuition and medical testing. Health requirements are another barrier. Poorer people have less access to medical care and healthier lifestyles, and some diseases, such as tuberculosis, are inherently associated with poverty.³⁰

In summary, state responses to globalisation apply several double standards. Nation states compete to attract investment and the wealthy but have no place for the oppressed. In an underlying sense, the economic imperatives that global markets generate clash with the political need to maintain the authority of the nation state.

V. "WHITE AUSTRALIA" AND OTHER COLONIAL LEGACIES

As many commentators have observed, owing partly to its remoteness Australia faces only a trickle of refugees arriving on its shores compared to the states of Western Europe and North America. Even if the figures are adjusted for population, Australia ranks 14th behind states such as Switzerland, Belgium, Austria and the Netherlands.³¹ Yet, it lead calls for harsher restrictions on asylum seekers.

McMaster suggests that one reason for this lies in the continuation or revival of the White Australia policy that prevailed at the turn of the last century.³² One of the first pieces of legislation passed by the Australian parliament was the 1901 Immigration Restriction Act, directed at preventing the entry of non-whites. It was soon followed by

²⁸ For more detail see *The Immigration Kit* (6th edition, 2001, Federation Press, Sydney) 190-210.

²⁹ Bitel, "Does Australia have a truly non-discriminatory immigration law?" Parish Patience Solicitors at <www.parishpatience.com.au/immigration/art10.htm>, 1, 7 (visited July 2001).

³⁰ *Ibid* 9.

³¹ Crocm M and Saul B, *Future Seekers, Refugees and the Law in Australia* (2002, The Federation press, Sydney) Ch. 1.

³² McMaster D, *Asylum Seekers: Australia's Response to Refugees* (2001, University Press, Melbourne) Chapters 3 and 6.

the 1901 Pacific Islanders Labourers Act, which required the deportation of some 8,700 indentured South Pacific workers and their families. In the parliamentary debate, Labor Party MP and Australian

Workers Union leader WG Spence summed up the program of the labour leaders:

If we keep the race pure, and build up a national character, we shall become highly progressive people of whom the British government will be prouder the longer we live and the stronger we grow.³³

The White Australia policy was only abandoned in the mid-1960s because of the growing dependence of Australian mining companies and graziers on Japan and other Asian markets. Right-wing populist politicians such as Pauline Hanson continue to advocate White Australia policies today. While the major parties, the Liberal-National Party Coalition and the Labor Party, formally eschew such policies, they maintain a considerable degree of bipartisan unity on immigration policy, the mandatory detention of asylum seekers, the restriction of detainees' legal rights and other measures designed to deter applicants for refugee status.³⁴

Under the banner of multiculturalism, they have sought to fashion a new national identity and international image but still within the framework of maintaining a relatively small population, insulated from the much larger populations of nearby Asia.³⁵ This is a particular expression of a global divide. Despite the end of formal colonialism in most states, the world remains divided into oppressor and oppressed states, with the advanced industrialised nations profiting at the expense of the so-called third world.

³³ Commonwealth Parliamentary Debates, House of Representative, 25 September 1901, Volume 1 at 5153, extracted in McKinlay B, *A Documentary History of the Australian Labor Movement, 1850-1975* (1979, Drummond Publishing, Melbourne) 28

³⁴ See Head, "The Kosovar and Timorese 'safe haven' refugees: A test case for democratic rights", (1999) 24 *Alternative Law Journal* 279; *ibid*, "Review of Immigration and Refugee Law in Australia" [1999] *Australian International Law Journal* 262.

³⁵ See McMaster D, *Asylum Seekers: Australia's Response to Refugees* (2001, University Press, Melbourne) Chapters 3 and 6.

To secure the means to finance investments, build infrastructure and operate basic facilities, the semi-colonial states have to implement the structural adjustment programs of the International Monetary Fund and the World Bank. These programs usually require draconian cuts to social programs, privatization of state enterprises and tax concessions for international investors. Their effect is to transfer vast amounts of wealth into the coffers of the major banks and transnational corporations. In the words of one commentator:

Not even at the height of its glory did the British Empire possess even a fraction of the power over its colonial subjects that the modern institutions of world imperialism such as the World Bank, the IMF, GATT and the EC routinely exercise over the supposedly independent states of Latin America, Asia, Africa and the Middle East.³⁶

Despite massive debt repayments, extracted at enormous social cost, the level of Third World indebtedness continues to rise. In 1990, the total debt owed by developing states was \$1.4 trillion; by 1997, it had risen to \$2.17 trillion. In 1998, Third World states paid \$717 million in debt service to the major banks and financial institutions every day.³⁷ These glaring disparities will continue to cause catastrophic conditions in many parts of Africa, Middle East, Asia and Latin America, adding to the demand for means of entry to the advanced industrialised states.

VI. DEFENDING RIGHTS WITHIN THE CONVENTION

Asylum seekers and those who oppose the treatment meted out to them will naturally seek to defend their rights to the fullest extent possible within the existing framework of the Refugees Convention. Unfortunately, the Australian High Court has tended to restrictively interpret the scope of judicial review in the refugee context. For example, strong grounds existed for the High Court to prevent the deportation of Kosovo and East Timorese asylum seekers, despite the provisions of the 2000 'Safe Haven' legislation that denied them the right to apply for refugee status.³⁸

³⁶ North D, *Capital, Labor and the Nation-State* (1992, Labor Publications, Detroit) 1.

³⁷ See United Nations World Development Report, 1998.

³⁸ Head, "The Kosovar and Timorese 'safe haven' refugees: A test case for democratic rights" (1999) 24 *Alternative Law Journal* 279.

However, in *Re The Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu*³⁹ the High Court declined to hear the Kosovo refugees' cases. The applicants sought a writ of mandamus and an injunction under section 75(v) of the Constitution. They applied for orders to direct the Minister to consider and determine according to law their requests to be allowed to apply for other visas, apart from the temporary safe haven visas they were originally granted under the 1958 Migration Act. Mr. Ruddock had refused to exercise his discretion to grant their requests under section 91L of that Act.

The applicants sought to challenge the decision on three grounds: (1) unreasonableness, (2) failure to consider relevant matters and (3) denial of procedural fairness. In a brief judgment, Gleeson CJ ruled that the evidence presented did not show that there was a serious question to be tried. However, it may be argued that the legal arguments were potentially more complex than he seemed prepared to accept.⁴⁰

Some commentators have argued that new uses can be found for the Refugees Convention in recognising international human rights claims on grounds of oppression related to gender and sexuality.⁴¹ Others have sought to find ways around the 'gaps' in the Refugees Convention by invoking other international instruments, including the Convention Against Torture and the International Covenant on Civil and Political Rights, to intervene on behalf of those needing protection.⁴² Unfortunately, even in instances of extreme vulnerability, such as those being deported against their will, courts have failed to intercede⁴³, even though violent deportation methods may lead to death.⁴⁴ In some cases,

³⁹ [2000] High Court of Australia 23.

⁴⁰ Head, "The High Court and the removal of Kosovar refugees" (2000) 4 Macarthur Law Review 197.

⁴¹ Walker, "New uses of the Refugee Convention: Sexuality and refugee status", paper presented to the Workshop on the Refugees Convention 50 Years On: Globalisation and International Law, Melbourne, 2001.

⁴² For example Poynder, "Mind the gap: Seeking alternative protection under the Convention Against Torture and International Covenant on Civil and Political Rights", *ibid*.

⁴³ See Head, "When fear of death is not sufficient for refugee status", (1998) 2 Macarthur Law Review 127.

⁴⁴ See for example, the well-documented cases of Joy Gardiner, strangled by British police on 28 July 1993, and Semira Adamu, suffocated by gendarmes in Belgium on 22 September 1998: Socialist Equality Party, *A State Murder Exposed: The Truth About the Killing of Joy Gardiner* (1996, Mehring Books, London); World Socialist

the individual actions of airline pilots or collective opposition, in the form of trade union bans, have saved deportees from disaster.⁴⁵

VI. THE CONVENTION'S FUNDAMENTAL FLAWS

More fundamentally, the fact remains that the Refugees Convention, even augmented by other treaties, does not assist the vast majority of displaced persons. It is well established that the Convention is narrow and restrictive. As noted a decade ago by Hathaway:⁴⁶

Most Third World refugees remain de facto excluded, as their flight is more often prompted by natural disaster, war, or broadly based political and economic turmoil than by "persecution," at least as that term is understood in the Western context.

The Convention is deficient in at least four primary respects.⁴⁷ In the first place, it does not protect the starving, the destitute, those fleeing war and civil war, or even natural disaster, let alone those seeking to escape economic oppression. Its narrow focus on individuals who are persecuted does not allow for mass exoduses in the face of suffering, injustice or discrimination that is not considered serious enough to amount to persecution.

Its requirement that this persecution be on the specific grounds of race, nationality, religious belief, political opinion or membership of a particular social group, does not apply to people seeking refuge from torture, cruel punishment or other infringements of democratic rights, no matter how serious, inflicted for other reasons, despite efforts to extend the interpretation of "particular social group" to include gender, sexual preference and child-bearing.⁴⁸

Web Site, "The death of Semira Adamu and deportation policy in Europe" at <www.wsws.org/news/1998/blg-o06.shtml> (visited July 2001).

⁴⁵ Poynder, "Mind the gap: Seeking alternative protection under the Convention Against Torture and International Covenant on Civil and Political Rights", paper presented to the Workshop on the Refugees Convention 50 Years On: Globalisation and International Law, Melbourne, 2001.

⁴⁶ Hathaway J, *The Law of Refugee Status* (1991, Butterworths, Toronto) 10-11.

⁴⁷ *Ibid* 6-11; see also Nygh, "The future of the United Nations' 1951 Refugees Convention" [2000] *Australian International Law Journal* 1, 3-7.

⁴⁸ See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 *Commonwealth Law Reports* 225.

Secondly, the Convention does not create a right to enter another state; only a limited obligation on a national state not to expel or return a refugee to a state where he or she faces persecution. In fact, the Convention does not recognise the individual's right to asylum; only the right of national states to decide who enters their territory. As recently stated in the Australian High Court:⁴⁹

The right of asylum is a right of States, not of the individual: no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national.

Thirdly, even those accepted as refugees have no right to permanent residence and hence can be consigned to a tenuous and insecure status. Under the Convention Article 33(1), the principle of non-refoulement allows them to be removed to a so-called safe third state or to be forcibly repatriated to their home state once a state deems that the reasons for refugee status have ceased, as provided in Article 1C(5).

Fourthly, the Convention only assists asylum seekers who manage, invariably by means designated as illegal, to arrive physically in the state where they seek refuge. It does not impose any obligation on a state to take offshore applicants, that is, the overwhelming majority of people languishing in refugee camps throughout the poorest parts of the world, whether in their own states or neighbouring states.

This fact further exposes the hypocrisy of states that blackguard unwanted arrivals as queue jumpers, illegals and forum shoppers. Refugees can only obtain the limited protection available under the Convention by escaping and entering a safe state without permission. Further, as stated earlier, the Convention upholds their right to do so, implicitly forbidding discrimination on the grounds of illegal entry.

Those fundamental flaws reflect the Convention's Cold War origins. It was drawn up in the aftermath of the Second World War and the Nazi Holocaust, which had caused the displacement of more than 40 million people within Europe. The knowledge that the advanced capitalist

⁴⁹ Per Gummow J in *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 175 Australian Law Reports 585, [137].

states had refused to open their borders to many fleeing fascist persecution led to a broadly held sentiment that never again should refugees be turned away.

The democratic aspirations were incorporated in the Convention, which set out that all asylum-seeker, defined as those having a well-founded fear of persecution, were to be guaranteed certain inalienable rights, specifically that of refuge. Nevertheless, key states only accepted the Convention on the basis that it did not create any duty to grant permanent residence and they retained the sovereign right to decide which refugees were allowed entry.⁵⁰ As one High Court judge emphasized, the participating states “had no commitment to basing the Convention in the international promotion of human rights.”⁵¹

The framers of the Convention were also mindful of broader political considerations. In upholding the right to political asylum, the West sought to strengthen its democratic credentials against the Soviet Union and Eastern bloc states, and specifically to hold the door open for political dissidents from the Stalinist regimes. The very conception of persecution was tailored to give Western states ideological kudos for providing sanctuary to defectors to the free world.⁵²

VII. PUBLIC OPINION

Many writers in this field assert or assume a public opinion that is hostile to refugees and economic migrants. They tend to present states as simply reacting to or appeasing this sentiment. Crock, for example, after noting that the UN Human Rights Committee had condemned as arbitrary, under the International Covenant on Civil and Political Rights, the automatic and indefinite imprisonment of unlawful entrants in Australian detention centres, wrote:⁵³

⁵⁰ Hathaway J, “Can international refugee law be made relevant again?” World Refugee Information, United States Committee for Refugees, 1999, <www.refugees.org/world/articles/intl_law_wrs96.html> at 1-2 (visited July 2001).

⁵¹ Per Gummow J in *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 175 Australian Law Reports 585 at [139].

⁵² See generally Collinson S, *Beyond Borders: West European Migration Policy Towards the 21st Century* (1993, Royal Institute of International Affairs, London).

⁵³ Crock M, *Immigration and Refugee Law in Australia* (1998, Federation Press, Sydney) 32.

If Australia does not respond in real terms to the Committee's rulings, the case may stand in this country as a testament to an increasing mood of national introspection and even isolationism from the world community.

This supposed mood is, in reality, one that is aggressively cultivated by those who hold political office and by the media proprietors. Crock herself noted instances of poor reporting and blatant scare-mongering in the media, such as early 1998 reports that refugee claimants ("tourists") were coming to Australia for a "\$30 work visa."⁵⁴

Moreover, there is an emerging recognition that the official attack on refugees is part of a wider social offensive. One commentator has noted the creeping denial of a widening range of welfare benefits in Australia, first to newly arrived immigrants then to the unemployed generally.⁵⁵ Fifty years after the Refugee Convention was drafted, the right to decent housing and welfare is under attack in every advanced state. There is therefore, an objective basis for a political struggle, unifying refugees and citizens alike, against the dismantling of basic rights and for the reorganisation of society. The above-mentioned author quoted the famous words attributed to Pastor Niemoeller, a Dutch victim of the Nazis, warning that while the initial victims were the Jews, Communists and trade unionists, "then they came for me – and there was no one left to speak out for me."⁵⁶

VIII. NEED FOR AN ALTERNATIVE PERSPECTIVE

For public opinion on refugees to be genuinely tested, a viable alternative perspective must be advanced, one that corresponds to the requirements of global economic and social life and the needs and aspirations of the vast majority of people, rather than the vested interests of corporate and government elites. A number of authors have suggested possible models for replacing the Refugee Convention with new international frameworks for protecting and assisting refugees,

⁵⁴ Ibid 163.

⁵⁵ Taylor, "Do on-shore asylum seekers have economic and social rights? Dealing with the moral contradiction of liberal democracy" (2000) 1 *Melbourne Journal of International Law* 70, 96.

⁵⁶ Ibid 96. See also Jewish Virtual Library, Martin Niemollor, 1892-1984 <http://www.us-israel.org/jsource/biography/niemollor.html> (visited November 2003).

usually with a wider definition of refugee status.⁵⁷ None of these models, however, challenge the underlying assumption that nation-states and national borders will continue to exist throughout the 21st century. Instead, they seek ways to dilute the refugee obligations of nation-states according to what the authors consider politically palatable. Hathaway has argued specifically that proposals be tailored for change to meet the needs of states, stating that “[i]n an international legal system based on the self-interest of states, it is critical that principled reform proceed in a manner which anticipates and responds to the needs of governments”, and calling for support for a “broader (if shallower) level of protection for most of the world’s refugees.”⁵⁸

In general, those authors invoke notions such as limited safe havens, temporary protection, international, regional and bilateral cooperation, and burden sharing. They seek to separate the refugee regime from migration programs, suggesting that this will ease public concern over so-called asylum-driven migration and people smuggling. Erika Feller, Director of UNHCR’s Department of International Protection, has argued:⁵⁹

What we should be working towards is in fact a revitalisation of the Convention regime, which would preserve its centrality but would buttress it with more enlightened migration policies and harmonised additional protections. This scenario is built around the recognition that the 1951 Convention is far from obsolete, even if in some respects it is incomplete. Might we envisage somewhere

⁵⁷ See Ahilan, “Restructured safe havens: A proposal for reform of the refugee protection system” (2000) 22 *Human Rights Quarterly*; Schuck, “Refugee burden-sharing: a modest proposal” [1997] *Yale Journal of International Law* 22; Freedman, “International intervention to combat the explosion of refugees and internally displaced persons” [1995] *Georgetown Immigration Law Journal* 9; Hathaway, “Can international refugee law be made relevant again?” at <www.refugees.org/world/articles/intl_law_wrs96.htm> (visited July 2001); Hathaway, “A reconsideration of the underlying premise of refugee law” [1990] *Harvard International Law Journal* 31; Burton, “Leasing rights: a new international instrument for protecting refugees and compensating host countries” [1998] *Columbia Human Rights Law Review* 19.

⁵⁸ Hathaway, “Can international refugee law be made relevant again?” in Hathaway J (editor), *Reconceiving International Refugee Law* (1997, Martinus Nijhoff Publishers, The Hague) xxix.

⁵⁹ Feller, “The Convention at 50: The way ahead for refugee protection” (2001) 10 *Forced Migration Review* 8.

down the line protocols on mass influx and temporary protection? Inter-state cooperation, or burden sharing, is another area where the Convention's preambular references could well benefit from being given specific context.

This approach is based on maintaining the strict distinction between refugees and migrants. In a global world, and one increasingly dominated by social inequality, this is an artificial, inhumane and ultimately unreal perspective. The United Nations has estimated that 125 million people are, at any given time, outside their homeland in search of more secure political conditions or a better economic future.⁶⁰ As a senior Canadian immigration official has observed:⁶¹

Almost all parts of the world are witnessing major migratory movements. While in 1965, 65 million people were living long term outside their countries of normal residence, by 1990 there were 130 million and in 2000 an estimated 150 million. Some are persons with legal status in their adopted countries. Most are in an irregular situation and try by various means to regularize their status.

This demand for a more decent life will only grow amid ever-wider disparities in wealth and life opportunities. According to the 1998 United Nations World Development Report, the three richest people in the world have assets exceeding the combined gross domestic product or GDP of the 48 least developed states, the 15 richest people have assets worth more than the total GDP of sub-Saharan Africa and the 32 richest more assets than the GDP of South Asia. The wealth of the richest 84 individuals exceeds the GDP of China with its 1.2 billion inhabitants. Of the 4.4 billion people in so-called developing states, almost three fifths lack basic sanitation, one third have no safe drinking water and one quarter have inadequate housing, while one fifth are undernourished, and the same proportion have no access to decent health services.

⁶⁰ See Bell S and Jimenez M, Canada should go overseas to select refugees, critics say: Plug illegal flow, National Post, 31 March 2000.

⁶¹ Van Kessel, "Global migration and asylum" (2001) 10 *Forced Migration Review* 10. Van Kessel is the Director General, Refugees Branch, Department of Citizenship and Immigration, Canada.

According to the United Nations, of the 147 states defined as developing some 100 had experienced serious economic decline over the past 30 years.⁶² Income inequality has also grown dramatically since the 1970s, producing growing social gaps within most states.⁶³ Further, the advent of new forms of mass information, information technology and greater accessibility to air travel will accelerate and facilitate the movement of large numbers of oppressed people.

IX. CITIZENSHIP AND DEMOCRATIC RIGHTS

There is a profound connection between democratic rights and the rights of the most vulnerable in society - those denied entry to, or citizenship of, a state where they feel secure and able to participate meaningfully in political life. Without the right to live securely with full political and social rights, democracy itself is meaningless. As one study noted, in the 20th century:

The possession of a nationality became a matter of crucial, practical importance to the individual. The stateless person has no right of residence in any territory, no right to apply for employment or establish a business in any particular place. In some countries, a stateless person has only limited access to the legal system and its protection. One needs a nationality in order to enjoy basic security of residence somewhere.⁶⁴

In Australia, the High Court has upheld the power of the state to detain non-citizens (aliens) indefinitely without trial, a practice that breaches one of the most fundamental democratic rights, freedom from arbitrary detention, which is enshrined in the centuries-old common law doctrine of habeas corpus. Legitimising the state's mandatory detention regime for unwanted arrivals, the court, in effect, reserved the right to liberty to citizens.⁶⁵ In the words of Brennan, Deane and Dawson JJ, Australian citizens enjoy a "constitutional immunity from being

⁶² Refer United Nations World Development Report 1998.

⁶³ Galbraith J, *Inequality and Industrial Change: A Global View* (2001, Cambridge University Press, Cambridge).

⁶⁴ Dummett A and anor, *Subjects, Citizens, Aliens and Others, Nationality and Immigration Law* (1990, Weidenfeld and Nicholson, London) 13.

⁶⁵ *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 Commonwealth Law Reports 1.

imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.”⁶⁶

The court found that this constitutional immunity did not extend to immigration detainees because they were not being incarcerated by way of criminal sanction but rather to protect the national interest. Remarkably, ignoring the reality of refugee persecution, the majority asserted that the detainees (Cambodian asylum seekers) were to some extent voluntary prisoners who were free to return to their state of origin if they wished.⁶⁷ In the final analysis, the High Court upheld the mandatory detention regime on the basis of the power to legislate with respect to aliens.⁶⁸ The majority concluded that section 51(xix) of the Australian Constitution conferred upon the executive authority to detain an alien for the purposes of expulsion or deportation, with an incidental power of detention to investigate and determine an application for asylum.

Several commentators have observed that the High Court failed to protect basic human rights,⁶⁹ acting under pressure to accommodate to the vehement views of a state intent on having its way.⁷⁰ Equally ominous was the readiness of the Court to acknowledge that similar regimes of administrative detention could be applied to citizens during times of war, under the defence power.⁷¹ Once a precedent is established for the denial of basic democratic rights, first for the most vulnerable members of society, refugees and others without citizenship status, it can more easily be extended to others whose commitment to the state is called into question.

⁶⁶ Ibid 29.

⁶⁷ Ibid 31-32.

⁶⁸ Crock M, *Protection or Punishment: The Detention of Asylum Seekers in Australia* (1993, Federation Press, Sydney) 346-56.

⁶⁹ Mathew, “Sovereignty and the right to seek asylum: The case of the Cambodian asylum-seekers in Australia” (1995) 15 *Australian Yearbook of International Law* 15, 303.

⁷⁰ Poynder, “An opportunity for justice goes begging: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*” (1994) 1 *Australian Journal of Human Rights* 414.

⁷¹ Per Brennan, Deane and Dawson JJ in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 *Commonwealth Law Reports* 1, 28.

X. GLOBAL CITIZENSHIP

The existence of nation-states, partitioning the globe into a patchwork of larger and smaller entities, each with their own border controls and exclusion regimes, is not natural or of ancient origin. Modern nationalism and general restrictions on the movement of people emerged only in the late 19th and early 20th centuries. Dummett and Nicol have noted:

In earlier periods, restriction was by no means unknown but it was neither so general nor so systematic... Before the 1914 war, it was possible to travel between a number of countries without a passport, and with no restriction on taking work after arrival. With the price of a passage, an individual could take a free decision to look abroad for a new life; even without it, one could 'run away to sea', work a passage and try one country after another.⁷²

From the late 19th century, however, border restrictions began to limit these movements:⁷³

Instead of being 'chained to the soil' of a feudal lord, the twentieth century poor gradually became chained to the territory of their countries of origin because other countries' rules forbade them entry.

Far from nation-states being rooted in primordial nationalist sentiments or even geographical necessity, their relatively recent historical origins are bound up with the socio-economic requirements of emerging capitalism in the struggle against the old feudal order in Europe. The growth of production and accumulation of capital needed the national market to be developed and the breaking down of guild privileges, political restrictions, local customs barriers and tariffs, which hemmed in production on all sides. The development of capitalist production drew together backward villages and provinces; it linked the provinces

⁷² Refer Robert Louis Stevenson's account of his own voyage to America, published as "The Amateur Emigrant" in 1892: Dummett A and anor, *Subjects, Citizens, Aliens and Others, Nationality and Immigration Law* (1990, Weidenfeld and Nicholson, London) 11-12.

⁷³ *Ibid* 13.

with the cities and created a national market, bound together with a common language, laws and a common currency.

In England, France and the United States, revolutions were necessary to overthrow monarchical rule and establish nation-states.⁷⁴ By the early 20th century, however, the enormous development of production engendered by capitalism had already outgrown the nation-state framework, leading to two world wars between the major economic and military rivals. Just as the old feudal fiefdoms, principalities and kingdoms had to be swept aside to clear the way for economic development under capitalism, it is now necessary to replace the nation-state system to allow for the harmonious growth of a world economy. That transformation is inseparable from establishing a new global conception of democracy and citizenship.

As currently instituted, citizenship is confined to a given nation-state, and does not extend beyond its borders. Meaningful democracy in the 21st century demands the right of all people to move wherever they wish around the world; the right to live, work and study wherever they choose, enjoying the political, civil and social rights and benefits available to all. If the poor and the oppressed are to be given the same right to travel and live as the wealthy and if the right to immigrate as well as to emigrate is to be recognised, a new form of citizenship is needed, namely, global citizenship. Some commentators, while acknowledging the crisis of the nation-state system and its inability to deliver the democratic potential of globalised information technology, have dismissed this conception as utopian.⁷⁵ Nevertheless, various attempts have been made to elaborate such a new paradigm.

In his essay, *The Making of Global Citizenship*, Falk sought to combine traditional citizenship, still operating territorially, with global citizenship, operating temporally. A full version of the latter would develop in the future "in accordance with more idealistic and normatively rich conceptions of political community."⁷⁶ He called for a

⁷⁴ See generally Hobsbawm E, *Nations and Nationalism since 1780* (1992, Cambridge University Press, Cambridge).

⁷⁵ See for example Davidson, "Globalism, the regional citizen and democracy" in Galligan B and anor, *Rethinking Human Rights* (1997, Federation Press, Sydney).

⁷⁶ Falk, "The making of global citizenship" in Van Steenberg B (editor), *The Condition of Citizenship* (1994, Sage, London) 139.

sense of citizenship “responsive to the varieties of human situation and diversity of cultural values”, which would presuppose a reconstituting of the dominant political powers.⁷⁷ In effect, at least for the foreseeable future, this model would still leave political power in the hands of states that would essentially continue to embody the interests of national-based capitalist classes. In reality, the entire system of nation-states must be overturned and replaced by a global federation of peoples.

In their recent work, *Empire*,⁷⁸ Hardt and Negri argued that the power of transnational corporations and new forms of labour and production have already created a new imperial global order. They identified new conceptions of identity and difference, networks of communication and control, and paths of migration, contending that they establish the basis for a truly democratic global society without national state borders. This is not the place to discuss the flaws in their analysis, but the fact that their volume has become something of a best seller internationally demonstrates an emerging popular recognition of the need for a global reshaping of human civilization.

XI. CONCLUSION

Those fleeing the civil wars, persecution and famine are ultimately the victims of the prevailing global socio-economic system - that of capitalism. Official politics has made them the guilty culprits. Like the Jews in Hitler's Germany, asylum seekers and refugees are treated as scapegoats for the social ills besetting workers in the West. Indeed, Australia's actions in late August 2001 in turning away the MV Tampa laden with 433 rescued Afghan refugees, were reminiscent of the infamous voyage of the St Louis in 1939 when 937 Jewish refugees fleeing Nazi persecution in Europe were refused entry to both Cuba and the United States and were returned to Belgium, which was shortly to be occupied by Nazi forces.⁷⁹

⁷⁷ See also Turner BS, *Citizenship and Capitalism: The Debate over Reformism* (1986, Allen & Unwin, London).

⁷⁸ Hardt M and anor, *Empire* (2000, Harvard University Press, Cambridge).

⁷⁹ See Head, “The High Court and the Tampa refugees: A critical examination of *Vadarlis v Minister for Immigration and Multicultural Affairs*” (2002) 11 *Griffith Law Review* (forthcoming).

While Australia, like many other states, is seeking to appeal to a national interest, working people have common class interests with refugees, not “their” states. They have the same basic needs and aspirations as those seeking to escape oppression and exploitation worldwide, decent living standards, social services, democratic rights and social equality.

The right to asylum is a basic democratic question, as important as the right to free speech or assembly. As history has often tragically demonstrated, not least in Nazi Germany, the denial of civil liberties to those deemed ‘alien’ or foreign is often followed by the removal of democratic rights enjoyed by ordinary people. In Australia, the measures employed in the Tampa case, arbitrary removal and wide use of executive power, apply directly only to asylum seekers at present⁸⁰, but democratic rights are under assault more broadly. Soon after the Tampa case, Attorney-General Daryl Williams confirmed the intention to proceed with legislation giving the domestic political surveillance agency, the Australian Security Intelligence Organisation (ASIO), powers to detain people incommunicado for interrogation without charge, deny them access to legal advice and force them to answer questions, on pain of imprisonment for up to five years.⁸¹

The realisation of a truly global perspective of liberating humanity from national straitjackets will require the reorganisation of economic, social and political life completely along genuinely democratic, egalitarian and internationalist lines. This must become a common goal for the 21st century. Anything less will leave the vast majority of refugees and displaced persons with denied protection.

⁸⁰ Ibid.

⁸¹ Williams D, Media Release, “Upgrading Australia’s counter-terrorism capabilities”, 18 December 2001 at <http://law.gov.au/aghome/agnews/2001newsag/1080a_01.htm> (visited July 2002).