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Humanitarianism in the Reception of Refugees: Implications, Contradictions, and Limitations

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ABSTRACT

Addressing the plight of refugees, whether ensuring their physical protection by preventing refoulement or providing material assistance, has both a rights dimension and a humanitarian dimension. The aim of this paper is to examine the ways in which the languages of humanitarianism and of refugee rights, though equally important, have become entangled in the different procedures established by states to receive refugees into their societies. Of particular interest are instances when states grant visas to refugees without calling them refugees per se. Rather, they are referred to as humanitarian refugees. Because the *refugee* is not a static idea, the paper will begin with an overview of the different ways in which the term has come to be defined. The paper will then proceed to examine the cases of Australia's humanitarian admissions, Japan's humanitarian status refugees, as well as humanitarian considerations espoused by Malaysia towards refugees in its territory. The paper then concludes by considering the implications, contradictions, and limitations of the different ways in which states have appropriated and redefined the terms *refugee* and *humanitarianism*. In doing so, this paper hopes to contribute to the literature on the discourse of humanitarianism and its implications for the study and practice of assisting refugees.

INTRODUCTION

It is scarcely possible to define who refugees are and what ought to be done for them without turning to the 1951 United Nations Convention Relating to the Status of Refugees (UNCRSR), the cornerstone of the contemporary international refugee regime, to which 147 countries to date have acceded. In it, a refugee is defined as one who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (UNCRSR, art.1, A, para.2)

The same Convention also stipulates that refugees are entitled to a bundle of rights, foremost of which is the right of refugees not to be returned to a country where they risk persecution, also known as the principle of non-refoulement (Article 33). Other rights include the right not to be expelled, except under certain strictly defined conditions (Article 32), exemption from penalties for illegal entry into the territory of a contracting State (Article 31), the right to work (Article 17), the right to housing (Article 21), the right to

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education (Article 22), the right to public relief and assistance (Article 23), the right to freedom of religion and free access to courts (Articles 4 & 16), freedom of movement within the territory (Article 26), and the right to be issued identity and travel documents (Articles 27 & 28). The study of refugees is thus very much a matter of refugee rights or, in other words, entitlements which signatory states are obligated to respect and fulfill.

At the same time, however, the issue of refugees appears very much to be a matter of humanitarian concern. The Concise *Oxford English Dictionary* defines humanitarianism as "concerned with or seeking to promote human welfare" (2009, p. 694). Following this definition, protection and assistance to refugees, as individuals who are bereft of citizenship and vulnerable to various hardships, can easily be understood as concern for human welfare and therefore a humanitarian issue. In fact, the United Nations High Commissioner for Refugees (UNHCR), the UN refugee agency that is both guardian and implementer of the UNCRSR and its 1967 Protocol, has been referred to as one of the "gold standard[s]" in the field of humanitarianism (Barnett, 2010, p. 14).

If refugee protection and assistance is a matter of both refugee rights and of humanitarian concern, how exactly do these two approaches figure into various countries' responses to the needs of refugees? Signatories to the UNCRSR have responded to their obligations and to the needs of refugees in a variety of ways. One way is by supporting the UNHCR and its activities through financial contributions. Another way is by institutionalizing systems for receiving refugees for resettlement within their own borders. Because one of the most fundamental needs of the refugee is a place to live and the recognition and protection of the state where he or she is living, this paper is concerned with the latter. The aim is to examine the ways in which the language of humanitarianism and of refugee rights have become entangled in the different procedures established by states to receive refugees into their societies. Thus, of particular interest to this paper are instances when states grant visas to refugees without calling them refugees but, rather, humanitarian status refugees. An underlying premise of this paper is that neither "refugee" nor "humanitarian" is a static idea and in instituting their own procedures for receiving refugees, states come to negotiate their own definitions in ways that fit the perceived needs of the state which consequently work to reconstitute the notion of who a refugee is and how states are to respond to them.

The paper will proceed by briefly going over the literature on humanitarianism in refugee policies. Because the *refugee* is not a static idea, this paper will follow with an examination of the different ways in which it has come to be defined. The paper will then proceed to examine the cases of some states that have acceded to the UNCRSR and have instituted procedures to identify and resettle refugees in their own territory while paying special attention to the ways in which states have distinguished between so-called Convention refugees and humanitarian status refugees. The paper then concludes by considering the implications of these different ways in which states have appropriated and redefined the terms *refugee* and *humanitarianism*.

RELATED LITERATURE

In the existing literature, the study of various responses to refugees and those in refugee-like situations is often subsumed under the rubric of "humanitarian responses," the so-called "humanitarian order," or even simply, "humanitarianism." For example, Chimni, writing about the protection of refugees specifically, is highly critical of humanitarianism in general, referring to it as "the ideology of hegemonic states in the era of globalization marked by the end of the Cold War and a growing North-South divide" (2000, p. 244). It is an ideology in the sense that it "mobilizes a range of meanings and practices to establish and sustain global relations of domination" (Chimni, 2000, p. 244.). Humanitarian NGOs, for instance, insofar as they are informed by an ideological and financial independence on Northern states, are considerably undermined in their ability to challenge and contest the policies of these powerful states (Chimni, 2003).

Often, the UNHCR is criticized in its role as the humanitarian organization that is both guardian and implementer of the UNCRSR. Barnett (2011) has taken the case of the UNHCR and the evolution of its responses to refugee situations to assert his thesis that humanitarianism is essentially paternalistic as it contains elements of both emancipation and domination. Goodwin-Gill, sensitive to the need to provide legal recognition as the basis for the protection on one hand, and the need to provide material assistance to refugees on the other hand, has argued that the UNHCR has demonstrated "a distinct, formal disinclination to characterize itself in terms of its statutory duty to provide international protection to refugees, and a preference instead for locating its role in a file to be called humanitarian action" (1996, xvi). Protection, he concludes, seems to be fading rapidly from the refugee agenda's embrace of humanitarian action and the willing endorsement of this move by many states has compromised the agency's mandate responsibility: it is no longer identified primarily as a protection agency, but primarily as an assistance provider. Echoing the same sentiment, Jaquement, Chief of the Protection Capacity Section of the UNHCR's Department of Protection at that time of writing, has proposed that

> the language of humanitarianism should be systematically substituted with the language of human rights. For example, UNHCR should systematically portray itself as a "human rights agency for refugees" and for example relief or assistance should be renamed … by something like "creating conditions for refugees to fulfill their economic rights." (Jaquement, 2002, p.111)

Other than the UNHCR, states have also been scrutinized in their policies towards refugees under the heading of humanitarian policies. To name a few, Hugo (2002) has written extensively on trends in refugee and humanitarian migration policies in Australia, while Neumann (2004) provides a comprehensive historical perspective on Australia's humanitarian record concerning refugees.

It appears though that there are very few who problematize the existence of a humanitarian category of refugee as distinct from a so-called Convention refugee (those who meet the narrow criteria of the UNCRSR) in the policies of some countries. Dauvergne (2005) examines the humanitarian components of Australia and Canada's immigration programs and finds that these reflect and articulate the national identities of these two countries including perceptions of the need to control borders in the case of Australia. Likewise, Bauder views Canada's humanitarian immigration as a means of constructing Canada's identity as a compassionate nation (2008) and Germany's humanitarian migration as representing the German state as safeguarding human rights and international law (2009).

Thus it appears there is no shortage of critiques of humanitarian practices but there is relatively little that has been written on the reception of refugees on the basis of humanitarianism rather than in fulfillment of the obligations contained in the UNCRSR. Among those that do consider humanitarian admissions, the tendency is to examine its implications for national identity rather than for the practice of refugee protection and assistance in different countries.

REFUGEE DEFINITIONS

While the UNCRSR is seen as the cornerstone of the international refugee regime, it is not the only source for a definition of who a refugee is. According to the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (CGSARPA) signed by the members of the Organization for African Unity (OA):

> The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. (CGSARPA, art.1, para.2)

This definition is significant as it expands the definition of refugee from one who faces individual persecution (as in the definition of the UNCRSR) into one who faces generalized violence and disorder. This definition was quite influential in that it was picked up by the drafters of the Cartagena Declaration on Refugees (CDR) during the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama. As a result, the Declaration states:

> it is necessary to consider enlarging the concept of a refugee, bearing in mind … the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which … includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order. (CDR, 1984, III, para.3)

Thus the definition of a refugee - depending on which definition one subscribes to - is not necessarily limited to those who face racial, ethnic, religious or political persecution, but it could also include those who are fleeing generalized violence and various forms of aggression as well as massive human rights violations. One key characteristic of a refugee that underpins any definition is that he or she is unwilling (due to well-founded fear) or unable to avail of the protection of their state (or any other state for that matter). In this sense, the refugee is an outcome of the severance of the link between the state and the citizen. Thus it has often been repeated that the existence of refugees is perhaps not merely an exception but an inevitability in an international system which wrongly assumes a seamless relationship between state, citizen, and territory (Haddad, 2003, pp. 297-298).

While the definition of who a refugee is under the UNCRSR now appears unclear in light of the various definitions, the means of identifying them is even less straightforward. Arakaki laments the absence of any substantive guidance for determining who a refugee is in the UNCRSR (2008, p. 6). As a result, signatories to the UNCRSR have devised different mechanisms for identifying refugees. In countries where such a system is not yet in place, or where the state is unable to conduct their own procedure, the UNHCR itself carries out a refugee status determination procedure or RSD. In many of these procedures, the refugee is distinguished from the asylum seeker, an individual whose refugee status has yet to be proven. International refugee law scholars such as Hathaway are quick to point out the erroneousness of this assumption by citing Paragraph 28 of the *UNHCR Handbook*, which states that a person becomes a refugee as soon as he or she fulfills the criteria condition in the definition. He or she does not become a refugee because he or she is recognized. Rather, they become recognized because they are refugees (*UNHCR Handbook*, para. 28). Hathaway also points out that the term asylum seeker does not appear anywhere in the UNCRSR and as such there is no basis for using this category (Hathaway, 2011). From this point of view, the treatment of asylum seekers or refugees yet to be recognized is also crucial for the protection rights.

THE HUMANITARIAN REFUGEE

Having briefly discussed some of the factors involved in identifying and determining who a refugee is, I will now proceed to examine the different means by which two states have identified and received refugees for resettlement. To be sure, the protection of and assistance to refugees is multifaceted. It does not begin at a status determination procedure and it does not end with granting of a visa. This paper attempts to examine a mere fraction of this long and complicated process by focusing on the reception and treatment of those determined by either the UNHCR or a state organ to be deserving of protection and assistance under the ambiguous category of, generally-speaking, a humanitarian refugee.

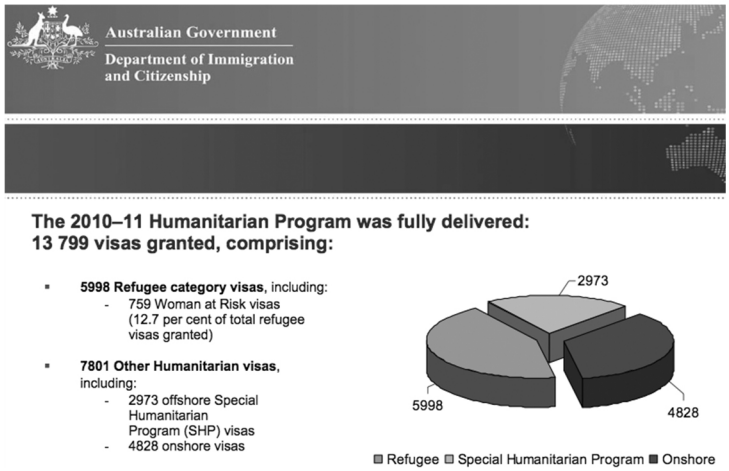
It is useful to begin with a country that has had a long-standing refugee resettlement program such as Australia. It is also worthwhile to look at a relative newcomer to the

resettlement of refugees as can be seen in the case of Japan. Finally, it is also worth contrasting the use of the language of humanitarianism in the case of a state that has not acceded to the UNCRSR but nonetheless hosts a significant number of refugees and asylum seekers in its territory.

Australia's Humanitarian Program

Australia has been receiving refugees as far back as the interwar years when they resettled some 7,500 Jewish refugees. Since then they have received large numbers of refugees from various parts of the world including some 14,000 Hungarians in the aftermath of the 1956 uprising and 6,000 Czechs after the 1968 uprising (Hugo, 2002, p. 27). In 2010, Australia received the third largest number of refugees (5,636) for resettlement from the UNHCR preceded only by Canada (6,706) and the US (54,077) (UNHCR, 2011, p. 4). The Refugee Council of Australia (RCOA) boasts that Australia has one of the most sophisticated comprehensive resettlement programs for refugees and humanitarian entrants in the world (RCOA, 2008, p. 21). Services established by the Australian Government for refugees include: cultural orientation, settlement support, language support, torture and trauma services, and youth services (RCOA, 2011a). A quick look at Australia's 2010-2011 Humanitarian Program available on the DIAC website offers the following picture:

Figure 1.
Australia's 2010-2011 Humanitarian Program (DIAC, 2011)



It appears from the image above that of 13,799 visas granted under the Humanitarian Program, less than half (5,998 or some 43.5 percent) were "Refugees," while the rest were "Other Humanitarian."Of those in the "Other Humanitarian" category, 2,973 (21.5 percent) were under the "Special Humanitarian Program" while 4,828 (35 percent) were labeled "Onshore."

A closer look at the Australia's definitions of various refugee and related admissions shows a distinction between two functions of this Humanitarian Program: the onshore protection/asylum component which "fulfills Australia's international obligations by offering protection to people already in Australia who are found to be refugees according to the Refugees Convention" and the offshore resettlement component which "expresses Australia's commitment to refugee protection by going beyond these obligations and offering resettlement to people overseas for whom this is the most appropriate option" (DIAC, 2011).The category of offshore resettlement is subdivided into two: Refugees and Special Humanitarian Program (SHP). Here, refugees are defined as "people who are subject to persecution in their home country, who are typically outside their home country, and are

in need of resettlement" (DIAC, 2011). A majority of applicants under this category are identified and referred by UNHCR to Australia for resettlement. This category is further subdivided into Refugee, In-country Special Humanitarian, Emergency Rescue, and Woman at Risk visa subclasses. Meanwhile, SHP comprises "people outside their home country who are subject to substantial discrimination amounting to gross violation of human rights in their home country, and immediate family of persons who have been granted protection in Australia" (DIAC, 2011). DIAC maintains that applications for entry under the SHP must be supported by a "proposer" who is an Australian citizen, a permanent resident or eligible New Zealand citizen, or an organization that is based in Australia. On the other hand, those granted onshore visas can be divided into three categories: Protection visas for IMAs, Protection visas for non-IMAs, and Other Program countable onshore visas. The same fact sheet that provides all the information mentioned here so far does not explain what IMA refers to but the RCOA (2011b) reveals that IMA stands for Irregular Maritime Arrivals; in other words, those arriving by boat while non-IMAs may most likely have arrived by plane.

Based on these definitions, it is apparent that 4,828 recipients of on-shore visa statuses and the 2,973 beneficiaries of SHP are just as much refugees as those among the 5,998 individuals counted as "Refugees."After all, the Australian government conducts its own RSD procedure and those granted humanitarian status visas under the onshore category were identified as refugees under Australia's own determination process. It may even be argued that those who applied onshore are in greater need for the Australian government's recognition because they are already in Australian territory and are unlikely to receive recognition from another state. On the other hand, those that Australia counted as "Refugees" were referred by the UNHCR and therefore could still possibly be referred to another country that was willing to receive them. The RCOA is also critical of the effort to separate onshore refugees and SHP refugees from "Refugees." Apparently, "each time an asylum seeker is recognised by Australia as a refugee through its onshore protection process, one position is deducted from the Special Humanitarian Program" (RCOA, 2011b, p.13). This serves to fuel "negative public perceptions and the myth that there is an orderly 'queue' i.e. refugees who are found to be owed protection after arriving in Australia are seen to be 'taking from' refugees overseas who are in need of resettlement," according to the RCOA (2011b, p. 13). Nicholls (1998) has detailed how this metaphor of the queue was traditionally used to assure the Australian public that there are few entry points and that the country is not in danger of being overrun. At the same time, this metaphor has also been used to portray refugee applicants or asylum seekers who have found a way to Australian territory as "riding roughshod" over refugees in need of resettlement (Nicholls, 1998, pp. 76-77).

Indeed, as mentioned at the beginning of this section, the Australian government specifies that offshore resettlement refugees represents an effort to go beyond their international obligations. In saying this, the Australian government appears to present an image of a hierarchy of obligations and suggest that for every refugee accepted under the offshore program, Australia has already fulfilled its obligations and is even showing extra generosity by going above the requirements of the UNCRSR. As much as there is a great need for resettling refugees through the UNHCR, there is in fact no explicit obligation for Australia or any country for that matter to receive refugees in this manner. More importantly, receiving refugees for resettlement through the UNHCR does not absolve a signatory to the UNCRSR from its obligations to refugees or asylum seekers in its territory.

Another point worth noting concerns the SHP category which is specifically for those that have the endorsement and/or support of an Australian citizen, a permanent resident, an eligible New Zealand citizen, or an organization that is based in Australia. According to the RCOA, the SHP provides a means for persons who have been granted protection in Australia to be reunited with their immediate family refugee or refugee-like situations (2011b, p.15). While family reunification is certainly a valid humanitarian imperative, none of the international conventions concerned with refugees necessarily identifies family

connection as criteria for defining who a refugee is or is not. From a legal point of view, it might be questioned if the immediate family of an individual in a refugee-like situation has a greater claim for refugee status than one who does not have any such family connection, unless perhaps in the case of a child.

Japan's Humanitarian Refugees

Information on Japan's refugee policies is scant owing to the fact that it has been receiving far fewer refugees for resettlement, Japan's Immigration Bureau has not been very transparent, and a significant language barrier exists between Japan and the outside world. Nonetheless, information is available through the first comprehensive book on refugee law and practice in English written by Prof. Osamu Arakaki. Insights and additional information were also drawn from a presentation delivered by Daniel Alkhal, Senior Legal Officer of the UNHCR Representation in Japan, at a lecture at Tokyo University in 2011.

Since acceding to the UNCRSR in 1981 until 2006, Japan has received 4,882 applications for refugee status. Of these, 454 have been approved (including 44 that were granted on appeal), 3,162 were disapproved and some 523 were cancelled or in some way discontinued. This places Japan's average acceptance of refugee status applications at 18 individuals per year over a period of 25 years. Beginning in 1991, the Japanese government appears to have started granting Permits to Remain for Humanitarian Status Reasons. From 1991 until 2006, Japan granted 434 such permits representing an average of about 29 individuals per year over a period of 15 years (Arakaki, 2008, p. 27). On 28 September 2010, the first 18 Karen refugees arrived in Japan as part of a three-year pilot resettlement program to receive a total of 90 refugees from the Mae La Camp in northern Thailand (UNHCR, 2010). At of the end of 2010, there were a total of 577 Convention refugees and 1,746 Humanitarian Status Holders in Japan (Alkhal, 2011).

Japan's Convention refugees receive a Long-Term Resident Visa, are eligible to apply for naturalization after 5 years, and can also apply for family members to come to Japan. Among the Humanitarian Status visa holders, about one-tenth are granted the same Long Term Resident visa but the rest are granted a so-called Designated Activities visa that allows them to work. Both Convention refugees and Humanitarian Status refugees are eligible for National Health Insurance, Social Insurance, and free access to public education but not educational financial aid. Convention refugees receive a six-month Refugee Assistance Headquarters (RHQ) subsistence allowance and are eligible for livelihood assistance, but Humanitarian Status visa holders can only apply to local governments for the same. Convention refugees are granted six months free housing and are eligible for public housing assistance while Humanitarian Status refugees are only eligible for public housing assistance. Convention refugees are entitled to six months of RHQ language courses, but Humanitarian Status refugees are not. Refugees resettled from abroad are also entitled to courses on integration whereas all other categories of refugees are not (Alkhal, 2011).

The basis for granting Humanitarian Status visas is unclear. According to Arakaki, Article 50 of Japan's Immigration Control and Refugee Recognition Act (ICRRA) stipulates that the granting of humanitarian status is to be exercised at the discretion of the Minister and there are no standards expressed for the exercise of discretion. There is little information on the exercise of the discretion and even when the discretion is exercised in favor of the applicant, substantive reasons for permission are not provided. Arakaki postulates, "in practice, granting humanitarian status partially functions to ease the anxiety of the RECs with respect to cases in which they have declined refugee status but remained unsure" (2008, p. 101). On the other hand, for Alkhal (2011), possible reasons why humanitarian status visas are granted include generalized violence in the refugee's home country, marriage to a Japanese citizen, and failure to meet Japan's narrow interpretation of the Convention.

Given the limited amount of information available, it is difficult to make any inferences

on the Japanese government's interpretation or reinterpretation of humanitarianism in its treatment of refugees. However, the fact that the granting of humanitarian status visas are highly discretionary and that no clear guidelines are available demonstrates the malleability of the term *humanitarianism*. On the one hand, these humanitarian status visas may well be out of concern for the welfare of the refugee applicant. On the other hand, the Japanese government may well be utilizing the term *humanitarianism* to expand the scope of assistance program but not of their definition of who a refugee is. The fact that Japan has approved an average of fewer than 10 percent refugee status applications per year while granting triple the number of humanitarian status visas as of 2010 suggests that the Japanese government has a very narrow interpretation of the UNCRSR's definition of a refugee. The different entitlements granted Convention refugees and Humanitarian Status refugees are significant but not altogether vast, so one would be hard pressed to say that it is a matter of fiscal austerity.

Malaysia

The case of Malaysia is radically different from the previous examples but it is nonetheless worth noting how humanitarianism figures into Malaysia's policies towards refugees. As Malaysia is not party to the UNCRSR nor its 1967 Protocol there is no legal framework for the protection of refugees or asylum seekers. In the absence of any such framework, refugees are vulnerable to the same harsh immigration laws that affect some 1.9 million undocumented migrant workers, including arrest, detention, beatings, and deportation.

UNHCR began operating in Malaysia in 1975 with the arrival of Indochinese refugees in the aftermath of United States' withdrawal from Vietnam. Since then, the UNHCR has assisted in the resettlement and repatriation of Indochinese refugees arriving in Malaysia, as well as in the reception and local settlement of Filipino Muslims arriving in Sabah in the 1970s and 1980s, Muslim Chams from Cambodia in the 1980s, and several hundred Bosnian refugees in the 1990s. UNHCR continues to operate in Malaysia to this day and conduct all activities related to the reception, registration, documentation and status determination of asylum-seekers and refugees. As of the end of January 2012, there were some 97,000 refugees and asylum seekers registered with UNHCR in Malaysia.

Why the Malaysian government allows the UNHCR's presence and operations despite not acceding to the UNCRSR is not entirely clear. However, in a press release issued on 16 December 2008 regarding the presentation of the letter of appointment of Alan Vernon, the current UNHCR Representative to Malaysia, the Ministry of Foreign Affairs states, "Although Malaysia is not a State Party to the UNCRSR and its Protocol Relating to the Status of Refugees, it has not prevented Malaysia from cooperating with the UNHCR in addressing international refugee issues on humanitarian grounds" (Wisma Putra, 2008).

Whether or not the Malaysian government fully cooperates with and recognizes the outcome of status determination procedures conducted by the UNHCR is another matter. Frequent immigration crackdowns that do not discriminate between refugees and other undocumented migrants and that lead to arrests, detention and deportation are not unheard of. So much so that Malaysia received a grade of 'F' for the second year in a row in the 2009 *World Refugee Survey* issued by the US Committee on Refugees and Immigrants (USCRI, 2009).[1]

The UNHCR, human rights organizations, and other observers believe there have been improvements. Alice Nah reports that over time, as the UNHCR began to issue laminated, tamper-proof identification in place of letters, and with increased awareness on the part of Malaysian authorities concerning the UNHCR and its functions, recognition of UNHCR-issued documents has improved (2007, p. 54). According to a report by the International Federation for Human Rights (FIDH) and Suara Rakyat Malaysia (SUARAM):

> Despite an absence of formal recognition and protection, those who have obtained recognition from the UNHCR may be able to enjoy a basic de facto status at the national

> level. This recognition provides them with status in international law, and some very limited dispensation from the enforcement of immigration law in Malaysia. (2008, p. 9)

In practice, refugees and asylum seekers so long as they are not arrested during a crackdown are able to work in the informal sector and even access some assistance from local NGOs that provide basic services (Lego, 2011). The Malaysian Bar Council (Khoo, 2010) summarizes the Malaysian government's current de facto policy towards refugees and asylum seekers as follows:

- non-return to countries of origin until conditions are conducive;
- allowing refugees to work in the informal sector;
- allowing refugees to access health care services;
- allowing non-governmental organizations to provide assistance to refugees;
- cooperating with UNHCR on a humanitarian basis and allowing UNHCR to register, determine refugee status and extend protection to refugees;
- facilitating resettlement of refugees to third countries.

Human rights activists might contest the extent to which this so-called de facto policy is implemented but there is general consensus that such policies can be detected. However, as the same policy paper points out, these policies are highly inconsistent leading to abuses for which the Malaysian government has been severely criticized (Khoo, 2010). In their 2009 Annual Report, SUHAKAM, Malaysia's Human Rights Commission admits that, "refugees/asylum seekers are vulnerable to arrest even if they possess a UNHCR card" (2009, p. 35).

Why the Malaysian government cooperates on some level with the UNHCR concerning refugees is also a mystery but the subject of humanitarianism again comes up. On 5 July 2010, Foreign Minister Datuk Seri Anifah Aman reiterated the primacy of Malaysian law over refugees in Malaysia, saying that refugees are subject to detention under the Immigration Act with one caveat:" on humanitarian grounds, these people are handed over to the UNHCR (on request) if they can prove that they are under the protection of the organisation and had obtained verification from it" ("Refugees Subject," 2010, July 5).

A number of things can be inferred concerning the repeated juxtaposition of humanitarianism against Malaysia's de facto policy towards refugees and non-accession to the UNCRSR. First, the UNHCR's presence, and more so its functioning, is an exception from Malaysian policy of non-accession to international refugee norms. Second, this exception is only made possible for humanitarian reasons. Humanitarianism is therefore justification to abrogate on Malaysia's otherwise well-defined policy of refuting international refugee norms. In that sense, the Malaysian government's non-accession to the international convention is justified and perhaps even rendered unnecessary by virtue of its alleged humanitarianism evident in the UNHCR's continued existence in Malaysia. The existence of refugees is tolerated, they are able to live and work thus there is no need for Malaysia to sign the refugee convention, as the argument goes. This latter sentiment is echoed by former human rights commissioners interviewed by the researcher (Adnan, M.H., personal communication, 19 August 2010; Subramaniam, S., personal communication, 25 August 2010). A survey of Malaysia's encounters with refugees in the past also demonstrates that humanitarianism has made possible the expression of concern for Muslim minorities compared to other minorities (Nair, 1997). Lastly, the use of the term *humanitarianism* appropriates a noble role for the Malaysian government while simultaneously distancing itself from human rights or the rights of refugees and any obligation that the language of rights invokes.

IMPLICATIONS, CONTRADICTIONS, LIMITATIONS

In limiting the use of the category of refugee to those received through the UNHCR and excluding those who arrive directly on Australian territory, the Australian government

diminishes the notion that those in the latter category are entitled to protection and assistance. Instead, they are beneficiaries of Australian generosity bestowed out of humanitarian concern. In much the same way, the Japanese government continues to narrowly interpret the UNCRSR and grant Convention refugee status to a small fraction of applicants while providing protection and assistance to a relatively larger fraction of individuals, not on the basis of any entitlement provided by the UNCRSR but on the basis of Japanese humanitarianism. While of a totally different mold, Malaysia's inconsistent tolerance of refugees and asylum seekers on its territory is justified in much the same way, if not more perversely. Malaysia is under no obligation to protect or assist refugees since it has not signed the UNCRSR yet it tolerates refugees, allows them to work, sometimes even releasing them from detention, etc., out of humanitarian concern, it is argued.

Of course, the UNCRSR does have a very narrow definition of who a refugee is (Arakaki, 2008). On the one hand, the notion of humanitarianism provides a justification for expanding this narrow definition, even acting asa safety net by providing additional grounds in favor of the protection of individuals in refugee-like situations. On the other hand, two problems arise. Humanitarianism as a basis for granting the same rights entitled to refugees is highly discretionary, if not arbitrary, as seen from the examples of Australia and Japan. Humanitarianism cannot therefore be considered a standard for justice. At the same time, for as long as such safety nets are available to address the needs of some who would otherwise be vulnerable, the need to rectify the shortcomings of the UNCRSR may be ignored. In other words, while humanitarianism helps to mitigate the limitations of the law, it also serves to reinforce these very limitations.

The cases presented above also confirm Chimni's assertion that humanitarianism "represents the boundaries between human rights law, refugee law, and humanitarian law as being irrelevant to the end of giving protection to an individual" (2000, p. 253). This is especially evident in the case of Malaysia in which some measure of assistance that reaches refugees and asylum seekers in its territory is used as justification for non-accession to the UNCRSR. Limitations placed by the Australian government on places for resettlement and the deduction of places from one category for another and what seems to be deliberate efforts to minimize recognition of refugees arriving in Australian territory could also be said to be contrary to the object and purpose of the UNCRSR.

The main objective of this paper has not simply been to criticize the policies of various governments towards refugees nor to reject the use of the term *humanitarianism* altogether. Dauvergne (2005, p. 164) observes that humanitarianism has "theoretical and rhetorical weight across a wide range of liberal theory, and it resonates in the popular discourse," and as such is "the strongest mobilizing principle we have for rallying to alter the law." As a strong mobilizing principle then, it must be used. After all, the needs of refugees, asylum seekers, and those in refugee-like situations are far from met. The UNHCR (2011, p. 2) estimates that for 2012, some 172,196 refugees will be in need of places for resettlement. The number of places offered by different countries around the world remains at 80,000. This means that more than 92,000 refugees will be in need of resettlement places. As this paper has hoped to emphasize, however, humanitarianism cannot be the main and only principle guiding refugee policies. Whether as a subject of academic inquiry or as a rallying point for refugee rights advocates, the notion and practice of humanitarianism must be constantly exposed and interrogated.

NOTES

1. The survey evaluates the enjoyment of rights mandated by the UNCRSR Relating to the Status of Refugees such as non-refoulement or the right not to be forcibly repatriated, access to courts, freedom of movement, and the right to earn a livelihood by refugees in major host countries such as Malaysia. Of the four categories, (1) physical protection, especially on the prevention of refoulement or forcible repatriation; (2) little or no arbitrary detention and access to courts; (3) freedom of movement and residence; and (4) the right

to earn a livelihood, Malaysia received an F, the lowest grade possible, except on freedom of movement and residence for which it received a D.

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