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‘A violation of his or her human security’ New grounds for the recognition of refugee status: a proposal for reform

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Introduction¹

This paper puts forth a new legal definition of a refugee premised on the non-violability of one's 'human security.' It suggests that article 1A(2) of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol² (the 'Refugee Convention') be reformulated as follows:

No Contracting State shall expel, return ('refouler') or extradite a person to another state where there is a well-founded reason for believing that s/he would be subject to a violation of his/her human security and that such a violation would engage the Contracting State's obligation either to provide protection within its territory or, to enable protection on the territory of another Contracting State as a result of a binding resettlement agreement.

The proposal pays tribute to the manifold criticisms of the unduly restrictive scope of article 1A(2)'s persecution standard and expands the ambit of protection to all such harms that affect an individual's human security. Moreover, the link between the types of harm suffered and their causal nexus to the Convention grounds³ is conspicuously absent from this new definition. These grounds are considered an unnecessary hindrance to the application of refugee status for persons with objectively established risks of serious harm.

A further distinction of this new standard relates to the standard of proof for establishing a risk to human security. The definition proposes a 'well-founded reason for believing' in light of the recommendations made by Hathaway and Hicks⁴ against the binary test used in the present 'well founded fear' standard – the objective is preferred over the subjective assessment of risk (the fear factor).

And finally the proposal incorporates, along with the negative duty of non-refoulement, a positive obligation on the host state to protect the refugee. Whereas the non-refoulement provision was borne from a political decision between drafting states *not* to create a positive duty to admit, the reformulation is driven by an obligation to

¹ The arguments in the paper are drawn from the author's doctoral thesis entitled: 'The Politics of Gate-keeping: Revisiting the concept of Effective Protection in International Refugee Law,' which was defended at the European University Institute in Florence in October 2006.

² Geneva, 189 U.N.T.S. 137, July 28, 1951. The Refugee Convention was intended to fill the vacuum juris on persons qualifying as refugees immediately in the aftermath of the Second World War. There are, at present, 143 signatory states to the Refugee Convention.

³ It is reminded that article 1A(2) of the Refugee Convention defines a refugee as a person who "owing to a 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, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his habitual residence, as a result of such events is unable, or owing to such fear, unwilling to return to it."

⁴ James Hathaway and William Hicks, 'Is there a subjective element to the Refugee Convention's Requirement of 'Well Founded Fear?'' *Michigan Journal of International Law*, 26:2(2005).

engage in responsibility sharing, thereby providing the necessary impetus to protect in one of two ways: either within or outside the host state's territory.⁵

The object of this paper is to defend the use of the security discourse for refugee status determination and to provide a workable legal framework for human security in order to assess legitimate claims for refugee status. The argument for human security as *ratione personae* protection for refugee status is made first theoretically, by defining the capacity of 'human security' as well as the types of harm that constitute it, and then formally within a concrete legal structure.

The theoretical argument in defence of the language of security instead of the language of rights is made on two grounds. The first relates to the language tools within the discipline of security which are particularly apt for making sense of the refugee phenomenon. The terminology of the security discourse, namely the construction of self and other, the dialectic of trust and fear, the boundaries of inclusion and exclusion all finds parallel references in the politics of refugee protection.

I argue therefore that it is only in addressing the symbiosis between asylum and security that we will enhance our understanding of the various and conflicting dimensions of refugee rights versus state interests. I also aim to demonstrate that labelling something as a security issue – the act of securitizing⁶ – has the ability to transform the perceptions of a subject and/or a condition of security. It is this performative⁷ or hermeneutic function of security that will promote a change in understanding refugees not only by favourably representing a refugee as an object of security, but by de-stabilizing conceptions of security that view refugees in a negative light. This leads on to the the second reason for suggesting the security discourse as part a legal definition for refugees.

Asylum seekers and refugees have long been viewed as existential threats to the security of the host states, communities and citizens. The struggle in assessing claims for protection is located within the security and integrity of the host community as against the legal and moral duty to uphold the human rights of refugees. To desecuritize⁸ the concept of asylum would be the ideal solution - separating the label of security from asylum all the while situating refugee protection within the spectre of moral obligations to protect an individual's human rights. However, so long as this is neither feasible nor effective, the pragmatic response must be to challenge the

⁵ The mechanism of resettlement forms an integral part of the reformulation of the refugee definition. It is, however, not the scope of this paper to explore the matter in detail.

⁶ This idea has been coined by both constructivist and post-structuralist schools of security studies whereby security is seen as a speech act (Ole Waever, 'Securitization and Desecuritization' in R. Lipschutz, *On Security*, (Columbia University Press 1995), ch. 3) and/or as a thick signifier (Huysmans, 'Security! What do you mean? From Concept to Thick Signifier,' *European Journal of International Relations*, 4:2(1998), pp226-255) respectively.

⁷ Jef Huysmans drew a distinction between representational security which makes a claim of the right or wrong, good and bad representations as opposed to the performative force of security whereby the utterance itself is the act. ('Defining Social Constructivism in Security Studies: The Normative Dilemma in Writing Security,' *Alternatives*, 27(2002), Special Issue, pp 41-62, at p 45.)

⁸ Ole Waever, note 2 supra, warned against over-securitizing and defined the process of de-securitization as a legitimate concern of security studies – this will be considered in more detail in section 2.2.2.below.

negative with the positive securitization of refugees and establish a common language for assessing protection claims.

The argument in favour of the language of security rather than that of rights is made through logic of confrontation – where refugees and states meet as equals. The positive impact and considerable advancement of refugee protection using the logic of human rights is not being denied here. Rather, it is argued that the dynamic of human rights versus state interests leads to a competition between two incommensurables where the claim for refugee rights cannot transform the competing claims for state interests whereas security can. The sense of human security is to create an environment where the interests of host states and refugees can be equitably negotiated because, by their very existence, they challenge and subsequently transform each other. This also promotes transparency in the determination procedure by publicising (and externalising) those security concerns that influence the provision of protection.

The formal argument of using the human security construct is made initially by defining the term and then by instituting a legal basis for providing refugee protection within a two-tiered definition. It is shown that ‘Human Security’ is the product of an internal transition of security studies which is moving away from conceptions of collective towards individual security. Thus, such a widening agenda has provided an ideal platform for discussing individual (refugee) security concerns.

The proposed two-levelled legal framework consists, first of *specific provisions* that are directly derived from international human rights treaties and conventions and include prohibitions from violations over and above those put forth in the subsidiary protection status of the European Union’s Qualification Directive.⁹ The idea is to bring refugee and complementary protection under the umbrella of human security and unify their status. The second tier offers a *framework provision* guiding the assessment of the decision maker with regard to other rights than those catered for in the specific norms. This is meant to provide a guideline for future assessments and avoid an exhaustive listing of those violations that trigger protection by a host state. The former, specific provisions are simply a concrete manifestation of the latter.¹⁰ All violations that legitimate protection provide a single protection status. The applicant will have to demonstrate a sufficient risk (material evidence based largely on the applicant’s testimony) of a violation of his/her human security leaving the host state with the responsibility to (dis)prove that such is the case.

Why security?

Security studies find their origin in the framework of strategic military threats in an inter-governmental world. The focus on national security assumes that states are inherently insecure, creating a pervasiveness of competition, conflict and war. The

⁹ [2004] OJ L304/12 on - minimum standards on the qualification and status of third country nationals and stateless persons as refugees and as persons otherwise in need of international protection. The corpus of subsidiary protection has been chosen as a representation of the ideology and content of complementary protection schemes.

¹⁰ This two tracked approach is inspired by Gregor Noll in his analysis of the construction of a subsidiary protection scheme: ‘Fixed Definitions or Framework Legislation? The Delimitation of Subsidiary Protection Ratione Personae’, UNHCR Working Paper, 55(2002), pp 4-5

doctrine of sovereignty and national security becomes a justification for the maintenance of a state of flux between peace and war. "Citizenship paradoxically becomes a source of insecurity and the claim to citizenship becomes the justification for violence."¹¹ What is characterized by this traditional International Relations approach to security, especially during an era of almost unchallenged dominance of realist political theory, is the centrality of the state as the referent object of security assuming that the nation and the state happened to be coterminous.¹²

However, the communities within a state are no longer a homogenous group of people with similar cultural, religious and social objectives. It is more difficult for a state to secure peace and a sense of unity in a diverse, multi-cultural environment. Although the state is meant to define what peace can be and how it can be secured, what it actually prescribes is the middle ground between peace and security. "The State has become the non-community of contingencies, Others, and mere relations outside the boundaries of the state' whereas security has become a proper perverse of the Ministry of Uncertain things."¹³ The role of the security discourse is therefore to accentuate the indeterminacies in the role of the state.

Despite the clear changes in the applicability of the national security dynamic, the appeal to the idea of state security is still prevalent to the logic of security. Barry Buzan explains the circularity to the continued primacy of national security: "Individuals find their freedom increased at the expense of their security. Unacceptable chaos becomes the motive for sacrificing some freedom in order to improve levels of security, and in this process, government and the state is born.

The paradox is that the state power grows and the state becomes a threat for the individual. Thus citizens of a state must accept the better of the two evils where the state will constitute the more modest threat. As the symbiosis of society and state develops along more complex, sophisticated and economically productive lines, the state of nature image becomes more and more unappealing. Costs of reversion being too high, the state becomes irreversible, there is no real option of going back and therefore the security of individuals is inseparably entangled with that of the state."¹⁴

National security concerns engage citizens in several ways. They desire protection from physical threats and the maintenance of their economic well-being. They also demand social and cultural cohesion. The latter issue is embedded in identity politics and threat formation through the dialectic of trust and fear. Sameness is premised on national affiliation where the political community undertakes the role of protecting cultural, social and religious homogeneity from external threats. The Political is conceptualised in Schmittian terms¹⁵ with the State as a central actor with the task of maintaining the friend/enemy distinction. The political community within traditional notions of security is, therefore, fully immersed in the politics of inclusion and

¹¹ Ole Weaver, 'From Strategy to Security: Foundations of Critical Security Studies,' in K. Krause and Williams, *Critical Security Studies: Concepts and Cases*, (UCL Press 1997), Ch 2, p 45.

¹² See Bjorn Miller, 'The Concept of Security: the Pros and Cons of Expansion and Contraction,' *Working Paper*, Copenhagen: Center for Peace and Conflict Research, (2000), p 2

¹³ R.J.B Walker, 'The Subject of Security,' in K. Krause and M.C. Williams, *Critical Security Studies: Concepts and Cases*, (UCL Press 1997), Ch 3, p76

¹⁴ Barry Buzan, *Peoples, States and Fear: an Agenda for Security Studies in the Post Cold War Era*, (Harvester Wheatsheaf 1991), p 38

¹⁵ See Carl Schmitt, *Political Theology*, (1922)

exclusion. “Whereas morals deal with good and evil, aesthetics in beautiful and ugly, economics in costs and benefits, the space of politics is defined by inclusion and exclusion of social communities (..) The political is necessarily an agonistic concept constantly involving implicit or explicit decisions about the line between us and them.’¹⁶ The national security discourse is based on an *a priori* claim about the nature of the human subject and the type of political order it necessarily requires.

Identity politics: trust and fear

The focus on identity issues has led the security discourse to focus on communities. This is partly due to the increased awareness of the heterogeneity of communities within a state but it also relates to the disciplinary move of security studies away from international strategic studies focussing on political military conflict and inter-state politics. Security, and the resultant threats and dangers have taken on a wide variety of meanings in various contexts.¹⁷ This transition is crucial for refugee politics because it further identifies the causes and consequences of insecurities of community identities and allows the security logic to move from the abstract collective to concrete groups and even individuals.

The concept of societal security has been most forcefully promulgated by Centre for Conflict and Peace Research in Copenhagen.¹⁸ It transcends the construction of the state and the nation as compatible wholes and argues that societal security should be considered independently of the interests of the state. The Copenhagen school argue that state security has sovereignty as its ultimate criterion whereas societal security is held together by concerns of identity. They advocate both aspects to security to be seen as distinct from, but related to, one another.

Societal security is demonstrative of a shift in focus from abstract individualism and contractual sovereignty to a stress on culture, civilisation and identity. The societal security discourse moves away from an objectivist and rationalist approach towards more interpretative modes of analysis. The Copenhagen school advises against viewing societal security as a sum of the security of social groups as this would produce an aggregate view of security thus missing the essential dynamics of collective units. It recommends that one concentrate on larger units and engage in a question of interpretative community - society as opposed to social groups.

¹⁶ Andrea Behnke, ‘Post-Modernising Security’, paper for ECPR Joint Sessions 1999, p 8, found on <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/mannheim/w18/behnke.pdf>

¹⁷ Stephen Walt, in his famous reappraisal of the security discourse (‘Renaissance of Security Studies,’ *International Studies Quarterly* 35 (1991)) by contrast insisted on the predominance of state within the security discourse. His argument was that security should continue to be seen through the state lens because undue expansion could lead to the destruction of the intellectual coherence and remedial property.

¹⁸ The concept of societal security has been carefully developed in O. Waever, B. Buzan, M. Kelstrup and P. Lemaitre, *Identity Migration and the New Security Agenda in Europe* (Pinter Publishers 1993). See also Barry Buzan, ‘Environmental, Economic and Societal Security,’ *Working Paper*, Copenhagen : Center for Peace and Conflict Research, (1995); Barry Buzan, *Peoples, States and Fear: an Agenda for Security Studies in the Post Cold War Era*, (Harvester Wheatsheaf 1991); Ole Waever, ‘Insecurity and Identity Unlimited,’ *Working Paper*, Copenhagen : Center for Peace and Conflict Research, (1994).

Societal security puts a unique spin on the concept of security seen through the state lens. Society is fundamentally about the preservation of social identity and about sustainability within acceptable conditions for evolution of traditional patterns of language, culture, association and religious and national identity and custom. A negative consequence of a societal security construct, however, is the existence of what Paul Roe¹⁹ has described as the societal security dilemma which, in simple terms, is when the actions of one state, in trying to increase its own security, cause a reaction in a second state which decreases the security of both states.

The societal security dilemma is also one which provokes societies to experience processes “in which perceptions of the others develop into mutually reinforcing enemy pictures leading to the same kind of negative dialectics as with the security dilemma between states.”²⁰ As a consequence, people become protective of their social identities and use cultural means to reinforce societal cohesion and distinctiveness so that society reproduces itself effectively. Strengthening one’s own identity can involve the weakening of another. And it is often by comparing one identity to another that dominant identity values are produced. The construction of difference in the security discourse plays a crucial role in understanding the identity politics that conceptualises refugees as the feared, unknown and alien others.²¹

The wider debate also resonates with the needs of the individual. Human security places the individual as the focal point of analysis. The conditions of security are difficult to define in absolute terms since they can touch upon a very large range of issues. Despite the emergence of a strong consensus on the need to widen the concept to human security, disagreement persists about where to draw the line. To expand the notion of security too far, for example the absence of all types of problems, is said not to be practical. To erode the precision of the security discourse to include an all encompassing focal point is considered dangerous.

As a result, human security has been introduced in an *ad hoc* manner, and for the most part, defines an inward moving trend of humanitarian development mandates from “security through armaments to security through human development, from territorial security to food, employment and environmental security.”²² Despite the emergence of an individuated conception of security, the academic community has been reluctant to embrace the concept out of fear that doing so might “blunt the edges of security as an otherwise sharp analytical tool”²³ in international relations. The exact scope of the term will be analysed later in the paper.

It is within this context of individual, societal and national security concerns, the friend/enemy distinctions, and fear of difference and the instability of sameness that

¹⁹ Paul Roe, ‘The societal security dilemma,’ *Working Papers 3*, Copenhagen: Center for Peace and Conflict Research (1997), pp 1-3.

²⁰ Barry Buzan, in developed in O. Waever, B. Buzan, M. Kelstrup and P. Lemaitre, *Identity Migration and the New Security Agenda in Europe* (Pinter Publishers 1993), note 15 supra

²¹ The following section will take a closer look at the securitization of asylum and the causes of insecurities and threat formation in relation to refugee protection.

²² *United Nations Development Programme, New Dimensions of Human Security*, Human Development Report 1993 at 24 (1993)

²³ Bjorn Miller, ‘National, Societal and Human Security: General Discussion with a Case-Study from the Balkans,’ in *What Agenda for Human Security in the Twenty-First Century*, www.unescodoc.unesco.org, p1-138, at p38.

