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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. Wæver, 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.

the issue of refugee protection necessarily presents itself. The security discourse uncovers the various aspects of refugee politics that have up until now been silenced by the law. To ignore this dimension of asylum politics would be to paralyse any real engagement with the issues at stake when considering more inclusive entrance policies for refugees.

To “securitize”: the performative function of securitization

Indicating that something is a security concern not only represents the subjects of insecurities (states, societies, individuals, the environment) and the kinds of threats that are the cause of insecurity (military threats, immigration and asylum, ecological disasters) as objectively given – this is known as the widening agenda in security studies. But it also engages in an act of securitization which is a process that advocates a subjective conceptualization of security. The mere utterance that something is a security issue influences the perception of it. The security label moves an issue from the domain of normal politics to a specialised and prioritised area and has a transforming capacity which can be used to emphasize or undermine the chosen subjects. “While objectivist approaches focus on measuring the scope and seriousness of a threat and/or on hierarchising given insecurities on moral and ethical grounds, its de-constructivist and constructivist challengers focus on how this measuring is embedded within social, cultural and political processes and frameworks that represent or construct phenomena into threats.”²⁴

The Copenhagen school takes a constructivist position when advocating security as a speech act.²⁵ They argue that securitization does not consist of a predetermined objective standard but rather is the product of the social processes in which it becomes securitized.²⁶ The subject of securitization carries out an act of ascribing security valence to the referent object. Thus the relationship between subject and object is constructed inter-subjectively through social relations and processes. Security as a speech act becomes a self referential practice.²⁷ The performative nature of the act draws upon a particular set of rules that are true to security practice – “the language introduces a generic structure of meaning which organises dispositions, social relations and politics according to a rationality of security.”²⁸

The Copenhagen school has correctly identified the problem with limiting security to its representational capacity is that it assumes that security discourses can be remedied by a *correct* representation. “This is problematic (...) because it assumes a true, undistorted history of the object of research is possible.”²⁹ The issue is not whether threats are real or perceived but understanding the purpose for which they are constructed and legitimated? Ronnie Lipschutz frames the security dialectic within three dimensions. First, what or who is being secured – the state, a community,

²⁴ Jef Huysmans, ‘Agency and the Politics of Protection,’ in J. Huysmans, Dobson & Prakhovnik (eds), *The Politics of Protection – Sites of Insecurity and Political Agency*, (Routledge 2006), p 4

²⁵ Ole Waever, Securitisation and Desecuritisation, in R. Lipschutz, *On Security*, Ch 3, pp46-86.

²⁶ Wouter G. Werner, ‘Securitisation and Legal Theory’, Working Paper Copenhagen Centre for Conflict and Peace Research (1998), p 4

²⁷ Barry Buzan in B. Buzan, O. Waever, J. De Wilde, *Security: A New Framework for Analysis*, (Boulder, Colo : Lynne Rienner 1998), p26.

²⁸ Jef Huysmans, *The Politics of Insecurity*, (Routledge 2006), p24

²⁹ *Ibid*, p48

citizens, others? Second, what is the condition of security, in other words who is the identified adversary causing insecurity - enemy states, terrorists, immigrants? Third, how do ideas about security develop? With this latter question Lipschutz identifies the genesis behind the moving targets in the security discourse. This performative element of security is discursive so far as it describes how “a different dressing of the logic changes the relationship between the agents enacting the logic.”³⁰ In understanding the benefits of securitizing, it is important to consider the rationality and logic of rendering certain issues intelligible as security events. The agency of security, namely the person or institution that transforms a subject or condition into a security issue is vital in understanding the purpose and context of securitization. What is crucial is to present a particular valued object as being existentially threatened and one that requires further assistance than that provided within the normal rules of the political game.

The Copenhagen school distinguishes politicisation from securitization: the former is when an issue is taken out of the private realm and put into the public and uses an objective standard for assessing threats whereas the securitization of an issue concerns a matter of emergency that by-passes the normal rules of the political game and uses subjective standards for assessing threats. The language of securitization changes the way something is viewed internally and to the outside world. The security discourse makes us aware of the changes that take place in the world as well as those changes in ‘us’, in what we think and how we perceive things.³¹ Ole Waever defines the security problem as something that challenges the survival of the political order: “The ability to fend off a challenge is the criterion for forcing the others to acknowledge its sovereignty and identity as a state.”³² He, however, warns against the overuse of the term: “(T)he major problem with such an approach is deciding where to stop, since the concept of security otherwise becomes a synonym for everything that is politically good or desirable.”³³

In sum, the speech act itself is the securitizing move. What follows in the acceptance of the issue being securitized. “The exact definition and criteria of securitization is constituted by the inter-subjective establishment of an existential threat with the saliency sufficient to have substantial political effects.”³⁴ This conception of security relies on capable actors for mobilising and legitimating securitization. “Who can “do” or “speak” security successfully, on what issues, under what conditions, and with what effects?”³⁵ Securitization can either be *ad hoc* or institutionalised. In the latter case, the issue is with regards to the political agency capable of mobilising the speech act into legitimate security politics. Huysmans describes this as a sociological question on the transformative capacity of those making and enacting these alternative security claims and how this translates into political strategy and tactics of the agents/actors.³⁶ There is no clear answer to this question – the appropriate means for

³⁰ Ibid, p49

³¹ Ken Booth, ‘Security and Self: Reflections of a Fallen Realist,’ in K. Krause and M.C. Williams, *Critical Security Studies*, Ch 4, p105.

³² Waever, note 21 supra, p 53

³³ Waever, in B. Buzan, O. Waever, J. De Wilde, *Security: A New Framework for Analysis*, (Boulder, Colo: Lynne Rienner 1998), p? I will take a closer look at the argument for desecuritization in the next section.

³⁴ ibid, p25

³⁵ ibid, p27

³⁶ Jef Huysmans, note 20 supra, p6-7.

situating and legitimating new security claims depends on the reasons for wanting to securitize and the context surrounding the subjects of protection. If Huysmans is indeed correct in identifying the role of the political agency as crucial to the success of a securitizing move, then I argue that the securitization of the meaning of refugee-hood (as suggested in this paper) can most effectively be conducted through the language of the law which (trans)forms the understanding of refugee rights in host state jurisdictions *par excellence*.³⁷ Language, irrespective of context, has the capacity to simulate action. The language of the law, as an instrument through which society understands itself, has the political power to re-create its boundaries.

The act of securitization is a ‘thick signifier’ as distinct from a definition or a concept. Huysmans argues that “(I)n a thick signifier analysis, one tries to understand how security language implies a specific metaphysics of life. The interpretation does not just explain how a security story requires the definition of threats, a referent object, etc. but also how it defines our relations to nature, to other human beings and to the self.”³⁸ Again, the emphasis is on the fact that security therefore does not refer to an external, objective reality but establishes a security situation by itself. “It is the enunciation of the signifier which constitutes an (in)security condition (..) The question is one of politics of the signifier rather than the true or false quality of its description (or explanation).”³⁹

In response to the question posed in this section, namely, why use the language of security in favour of refugee protection, I argue that the language of security not only dramatises the policy question but acts as a catalyst to fundamentally reframe its understanding. There is thus a political instrumentalism in using the security discourse whose emergency context can convert the interests of refugees into high priority. In addition, the security discourse possesses the relevant language tools to analyse the subjects and conditions of security. And finally, the performative nature of the security label can alter the traditional perceptions of identity and difference that plague the refugee discourse to date. In the following section, I unpack the negative manner in which asylum has been securitized thus far.

The securitization of asylum

What is the current dynamic between the concept of security and the refugee discourse? In mobilising refugees as referent objects, attention needs to be paid to the construction of refugees being a *cause* of insecurity. Security, as traditionally understood, is premised on the need to maintain an ordered and integral environment within the territorial boundaries of a nation state. It is the role of the state to protect the economic, social and cultural welfare of its citizens. In doing so it is necessary to define a community of citizens and their entitlements. The State undertakes policing functions to protect its political community from real, imagined or constructed threats. As a result, state-centric conceptions of security necessarily perpetuate the inclusion-exclusion dichotomy in which the refugee discourse finds itself.

³⁷ In the section below on desecuritization, I will demonstrate why it is more beneficial to re-securitize refugees in a positive light *in the law*, rather than attempt to desecuritize their negative image with the help of the media and public discourse.

³⁸ Huysmans, ‘Security! What do you mean? From Concept to Thick Signifier, *European Journal of International Relations*, 4:2 (1998), pp226-255, at p231.

³⁹ *Ibid*, p232.

Refugees and existential insecurity

Asylum has emerged in this arena as a system which impinges upon sovereign authority on the rules of membership as well as upon the identity of a community. The unpredictable and forced arrival of asylum seekers unbalances the feeling of one-ness within a community. Refugees are one of the principle conditions of national and societal insecurity – to label them as the enemy can help moderate the indeterminacy and fear felt by citizens. “The pursuit of freedom from existential threats institutes political communities of insecurity. Securitizing immigration and asylum constructs political trust, loyalty and identity through the distribution of fear and intensification of alienation.”⁴⁰ Huysmans describes this as the construction of existential insecurity. The development of the security discourse in the area of asylum was a response to the challenge it posed to public order and domestic stability. Asylum seekers are seen to disrupt the supposed harmony of a national community presumed to be culturally homogenous.

Four main axes of being threatened by refugees and migrants can be identified: a) a socio-economic axis - unemployment and crisis of the welfare state; b) a securitarian axis - loss of control narrative that associates issues of sovereignty, borders and both internal and external security; c) an identitarian axis - where migrants are considered as being a threat to the host societies’ national identity and demographic equilibrium; and d) a political axis - where anti-immigrant, racist and xenophobic discourses are often expected to facilitate the accrual of political benefits.⁴¹

The security construct allows the asylum discourse to combine internal security logic and looming political questions on the preservation of cultural and racial identity. Asylum is represented as a threat to the foundations of the modern political world and the security discourse is used to accentuate this rupture. A precursor of the negative impact of asylum is the ongoing politics of terror in the backdrop of any policy-making process.

On one level, an attempt to classify the types of threats provoked by asylum quickly runs into the distinction between real and perceived threats where the latter tend to be paranoid notions of threat or anxiety best described as xenophobia or racism.⁴² On another level, the negative securitization of asylum is subjectively constructed, and successfully implemented in the general environment of insecurity, by politicians and the media in an attempt to identify and categorise the fears and insecurities that trouble the political climate in a state and jeopardise its authority. Huysmans believes that the security logic seeps through the boundaries of reason by associating all types of problems with migrants as the propaganda of false perceptions prevalent in western states. “The security continuum is an institutionalised mode of policy making that allows the transfer of the security connotation of terrorism, drug trafficking and money laundering to the area of migration.”⁴³ Refugees provoke feelings of insecurity

⁴⁰ Jef Huysmans, (2006), note 24 supra, p47.

⁴¹ Ayse Ceyhan & Anastassia Tsoukala, ‘The Securitization of Migration in Western Societies: Ambivalent Discourses and Policies,’ *Alternatives*, 27(2002), Special Issue, pp21-39, p24.

⁴² Myron Weiner, ‘Migration and International Security,’ in Sean M Lynn-Jones & Steven E Miller, *Global Dangers – Changing Dimensions of International Security* (MIT Press 1995), p195

⁴³ Huysmans ‘The European Union and the Securitisation of Migration,’ *Journal of Common Market Studies*, 38:5(2000), pp 751-777, at p 760.

where the threat is not only perceived by individuals but by ‘us.’ As a result, threat perception is a story about instilling fear.

Societal insecurity is the main contributor to the negative publicity of refugees. The security construct enters a world of already constituted identities through which threats are constructed. It is from this subjective standpoint that the *status quo* of societal cohesion is perceived as an unquestionable truth. Identity is thus construed as being static. The mutually constitutive relationship between the logic of security and the production and reproduction of identity has been left largely unexamined. “Agents are created by a unification of smaller units into a bigger one. The smaller ones set their differences and conflicts aside to become one agent. Conflicts are moved to the external environment thus promoting internal harmony. Hence identity involves the localisation of harmony (inside) and disharmony (outside).”⁴⁴ This circular security tale shows how security is implicated in the construction of identity.

In securitizing refugees, as a necessary Other, the national, societal and individual Self is created. “In the modern security story, threat definition creates identity, and this creation of identity is constituted within a particular social construct. This construct first centres the world upon identity which defines itself as being threatened. The threat itself is located outside the identity – in the periphery. Another identity is created as the source of the threat. So threat definition creates a self and another in a process in which the definition of the self depends upon the definition of the other. Thus the creation of the centre and the periphery are interlocked. And finally the construct puts the centre in a position of control. If the centre wants to survive it has to control the periphery.”⁴⁵

The dialectic of inclusion and exclusion is reduced to a dialectic of trust and fear. Refugees are not allowed a positive identity in the host community, and they are also annihilated of their worth. Their identity, being different from the majority, is denied existential value. Refugees, therefore, stand apart not because of the quality of difference but because of the instability of sameness. Societal insecurity is used defensively to ensure that the Other remains conceptualised outside the community.

The premise thus far has been that security is a social construct which varies in meaning depending on the society in which it is transposed. An ethnically homogenous society may place a higher value on preserving its ethnic character than a heterogeneous society and as a result asylum will be regarded as more of a threat in some societies than in others. An interesting example is the European integration process which has created further insecurities in relation to the identity crisis. The European Union’s struggle to promote unity in its diversity is not helped by the added burden of integrating Euro-foreigners.

Asylum has been securitized in the European Union as a result of ongoing worries about EU integration, particularly in the fields of cultural security, internal security (economic and social) and with regard to the crisis of the Welfare state.⁴⁶ Moreover the influence of mass migration within the project of European Integration through the

⁴⁴ Jef Huysmans, ‘Migrants as a security Problem – dangers of securitising societal issues,’ in Miles and Thranhardt, *Migration and European Integration: the Dynamics of Inclusion and Exclusion*, (Pinter Publishers 1995), chapter 3, p 56

⁴⁵ *ibid.*, p59

⁴⁶ Huysmans, note 39 *supra*, p 769.

entrenchment of a security framework is considerably bound up with the separation of society from the state which only aggravates the identity issues mentioned above. The securitization of the European Union is occurring independently of the securitization of asylum as it represents as a threat to ontological and existential security in the lives of European citizens. The Union is forced to balance headline security concerns of conflicts on its borders with structural security concerns of conflicts with and about its citizens.⁴⁷ The European Union's political and identarian instability becomes in itself a synonym for threat, and the threat of asylum within its borders further aggravates the feeling of insecurity. "Traditional forms of identity are no longer taken for granted. There is much at stake in the present Europe because there is a certain openness to fundamental changes in the organisation of that Europe (..) Furthermore other aspects of instability are that modernity is at stake and that a process of globalisation considerably questions given forms of identity."⁴⁸

It is in this negative light that the securitization of asylum has occurred. The proposal in this paper to introduce human security into the definition of refugee-hood is to balance this negative construction using the same terminology, and therefore the same level of urgency. An expansive refugee definition, premised on human security, is therefore an antithesis to the traditional understanding of the political community and its established identity. The following section considers the possibility of de-securitizing this negative vision of refugees in place of the proposed human security standard and argues that the former is not only a difficult task, but it also withholds from the refugee discourse essential components which enhance the understanding of the politics of refugee protection.

Against the de-securitization of asylum

Securitization entails a construction of risk perceptions which depend on the subjectivity of different social groups. "The treatment of refugees brings to the fore a tension between notions of democratic citizenship and borderless strains of liberalism that are anchored in the idea of rights attached to the person."⁴⁹ One of the major concerns of broadening the security debate outside of the state-centric domain is that labeling things as security issues can as much legitimize the problem as turn it into a taboo. The argument for desecuritization is that it is equally important to look at the possibilities of handling some problems in non-security terms, that is, to take on the problems, but leave them unsecuritized.

Huysmans uses the example of environmental security as put forth by Daniel Deudney⁵⁰ to describe the problems with the security label. Huysmans quotes him in accepting the importance of the security language as a "rhetorical device designed to simulate action."⁵¹ Deudney describes the mapping of the securitization process for environmental concerns as one which uses the mindset of national security, thus

⁴⁷ Ole Weaver, *Societal Security and European Security*, chapter 10, in note 15 supra.

⁴⁸ Jef Huysmans, note 39 supra, p 754.

⁴⁹ Colin Harvey, 'Refugee Rights and Human Security,' *Refuge*, 19:4(2001), pp 94-99, at p 95. He argues that one should look at the constitutive principles of democratic polities to understand the potential for contradiction between what we call citizen security and security of others.

⁵⁰ Huysmans (2006), note 24 supra, pp 22-24; Deudney, D, 'The Case Against Linking Environmental Degradation and National Security,' *Millennium*, 19:2 (1990), pp461-476.

⁵¹ Deudney, *ibid*, p465.

retaining the stark friend/enemy distinctions and using blaming tactics. He warns against using this polarized logic to highlight environmental issues, arguing instead for values and symbols of the growing ecological awareness to be mobilized, such as human health, property values and concern for future generations. Huysmans, by virtue of this logic, defines de-securitization of refugees as “a critical strategy that tries to re-locate the question of migration to a context of ethno-political judgement in which one does not seek to found the political on the basis of existential insecurity.”⁵²

The argument is that de-securitizing politics is sometimes more effective than securitizing problems. The issue with regard to migration and asylum politics is that it is already firmly securitized in a negative manner and so the success of de-securitization will depend on the ability of a speech act to unwind the distrust and fear in relation to refugees and their impact on the host society.

Huysmans puts forth a strategy which unmakes the politics that identifies a political community. “Instead of simply removing policy questions from one sector and plugging them into another sector, de-securitization turns into a political strategy that challenges the fundamentals of Schmittean political realist constitution of political community.”⁵³ He argues for creating a space in which issues relating to migration and asylum can be discussed outside the politics of the political community. “Trying to shift the language used to define migration and asylum and the institutional instruments for the regulation of migration and asylum from discourses of danger and policing to the protection of human rights and/or the economic validation of free movement are the typical examples in this policy area.”⁵⁴

Huysmans seems to be arguing against using the language of identity, friend/enemy, in understanding the dynamics of inclusion and exclusion and focussing instead on the language of human rights and legitimacy from the idea of free movement to promote the refugee discourse. He argues for de-dramatizing refugees by moving away from internal security practice and discourses of danger to the more ordinary social, economic and political issues that relate to them.

On one level, this form of argumentation is commendable because it seeks to transcend the polarised debates of self and other, trust and fear, and it rightly considers refugee protection as an issue of human rights and humanitarian duty. On another level, avoiding the issue of identity politics fails to confront the trust and fear issues within refugee protection, but adheres to the goodwill of applying human rights logic to entrance policies. The problem with limiting the discussion to such legal and moral duties upon states is that it can only take the protection discourse so far. Until de-securitization of asylum is complete, the compromise between host state interests (entrenched in security concerns) and refugee human rights will be one of arbitrary decision-making rather than a real negotiation between equally relevant interests of both parties.

I argue that in virtue of the fact that the refugee story is premised on membership rules, sovereign authority and citizen identity, and in so far as these issues have led refugees to being viewed with caution as causes of insecurity, the most effective way

⁵² Huysmans, note 24 supra, p127.

⁵³ Huysmans, *ibid*, p130.

⁵⁴ Huysmans, *ibid*, p142.

of promoting their rights and duties is by engaging in the very discourse that envelops them. To de-securitize, in an attempt to dissociate security and therefore sovereignty from refugee politics would render it impossible to address the internal relationship between these two concepts. I argue then that promoting human rights ideology alone cannot radically challenge the established securitization of asylum. Moreover, with the widening debate and the individualisation of referent objects, the security discourse has become sufficiently malleable to accommodate the interests of refugees and host states/societies.

Defining human security

When considering the concept of security as a political technique of framing policy questions, Huysmans makes reference to the distinction between understanding refugees through a humanitarian lens or as a security issue. “While the former allows for compassion or for relating to the refugee as a rights holder, the latter sustains fear of refugees and policies of territorial and administrative exclusion.”⁵⁵ What this concedes is that, in the refugee discourse, security is conceived of as the construction of antagonistic relations between host state interests and the human rights of refugees. Huysmans makes reference to Claudia Aradau’s work on the trafficking of women *being at risk* (humanitarian approach) rather than *being a risk* (security approach).⁵⁶

It is argued in this paper that the construction of refugees as security threats needs to be done internally – within the security discourse itself. Accentuating the importance of the human security of refugees fuses the understanding of them *at risk* and *as a risk*. Because the security discourse possesses the relevant tools and transformative capacity to engage in a thorough analysis of the politics of refugee protection it need not be rejected in favour of the charitable humanitarian approach alone. Furthermore, the widening of security studies to focus on individual security has created a perfect framework for advancing the rights of refugees which does not equate difference with threat and recognizes the possibility of conducting asylum regulation in terms of an ethics of heteronomous responsibility? In the following sections I will define the conditions of security constructed in this way as well as the legal mechanism for defining refugees.

The scope of human security

Human security entails a logic of universal rights to minimum standards of life with the individual as referent object. The particular ingenuity of the human security construct is that it widens the meaning of security to encompass the well-being of the individual outside of his/her associative relations with the state of nationality. Security is viewed for humans *qua* individuals rather than humans *qua* citizens. Whereas national security is defence-oriented and pertains to the preservation of sovereignty and order and societal security is premised on the maintenance of identity and social cohesion, the concept of human security is flexible and very much depends on the context in which it is framed. It can involve factors such as life, health, status, wealth

⁵⁵ Huysmans, note 24 supra, pxii, preface.

⁵⁶ Claudia Aradau, ‘The perverse politics of four letter words: risk and pity in the securitization of human trafficking,’ *Millennium: Journal of International Studies*, 33:2(2004), pp251-277.

and freedom. It can also distinguish between negative and positive evaluations of the circumstance, for instance, the protection from crime or the maintenance of civil liberties. The two are clearly interlinked where the former relies on the pre-disposed construction of threats (the violations surrounding the crime) whereas the latter is focused on the absence of any such threats in upholding the human rights of individuals.⁵⁷ The scope of human security is nevertheless determined by the purpose and context in which an individual is securitized.

Raquel Freitas, in perceiving a link between human security and the advancement of refugee rights asks how the concept of human security can shape the panorama of refugee protection.⁵⁸ She argues that depending on its positive or negative framing human security in the post-September 11 environment of insecurity may reverse the present tendency to associate anti-terrorism policies with diminishing refugee protection. In the context of refugee protection different ideological projects that use the term may have distinct referent objects and distinct threats. The obvious distinction is that human insecurity, for instance, may regard the citizen of a host state as referent object while human security can relate to the refugee. Another distinction relates to the types of insecurity that can affect refugee protection – for example determining whether citizens of host states fear the asylum system allowing the infiltration of terrorists, or whether they fear illegal migrants abusing the asylum system.

Security is a construction of risk perceptions. In the context of refugee protection, human security becomes particularly useful for legal purposes since it is capable of overcoming the limits set by a strict interpretation of the Convention and the UNHCR mandate by integrating all categories of people, whether formally refugees or not.

How then is human security framed in the context of refugee law and what are the conditions of insecurity from which refugees need protection? In the Millennium Report, the United Nations Secretary General, Kofi Annan held that “human security was once synonymous with the defence of territory from external attack, the requirements of security today have come to embrace the protection of communities and individuals from internal violence (..) human security can no longer be understood in purely military terms, rather it must encompass economic development, social justice, environmental protection, democratization, disarmament and respect for human rights and the rule of law.”⁵⁹

Human security, in the context of development, rises above the provision of basic human rights to include social and environmental protection. Hans van Ginkel and Edward Newman state that “in policy terms, human security is an integrated, sustainable, comprehensive security from fear, conflict, ignorance, poverty, social and

⁵⁷ See Arnold Wolfers, ‘National Security as an Ambiguous Symbol in Discord and Collaboration,’ in *Discord and Collaboration: Essays on International Politics*, (John Hopkins University Press 1962), pp147-165 for a distinction between subjective and objective threats: “security, in an objective sense, measures the absence of threats to acquired values, in a subjective sense, the absence of fear that such values will be attacked.” (p150).

⁵⁸ Raquel Freitas ‘Human Security and Refugee Protection after September 11: A reassessment,’ *Refugee*, 20(4) (2002), p36.

⁵⁹ In the United Nations Secretary General Millennium Report (2000), chapter 3, pp 43-44, found at <http://www.un.org.millennium/sg/report/full.htm>.

cultural deprivation, and hunger, resting upon positive and negative freedoms.”⁶⁰ This definition extends the dangers affecting one’s human security to include issues related to poverty. Sadako Ogata, the former High Commissioner for Refugees, in a keynote speech at the International Symposium on Human Security⁶¹ claimed that human security is a term which can mean all, and nothing, from the fear of death and suffering to a sense of insecurity through conflicts, terrorism, arms proliferation, transnational threats of the movement of people, drug trafficking, the spread of HIV, environmental pollution, natural disasters and the abject poverty which forces hundreds of millions of people to live oppressed and hopeless lives.

Despite its vagueness, Ogata maintained that the concept was important in the context of refugees: “first, human security, although not a legal concept, nor can it be very precisely defined, does however represent a set of very concrete elements – places, objects, values, feelings. Human security is what refugees lose when they abandon their homes – a job, a family, an identity. Human security is not an abstract idea – it is a real, tangible need. Second – and I speak here as the head of the agency responsible to protect refugees, but also to find solutions to their plight – we should not look at human security just from the point of view of theory and definition, but rather examine what practical steps and measures can enable us to maintain people in, or restore them to, a state of security. In other words, “human security” should be a conceptual tool that leads to action.” She claimed that people should be able to enjoy, without discrimination, those human, political, social, economic and cultural rights that belonging to a State implies as well as the prospect of social inclusion and equal access to the political, social and economic policy making process.

Ogata defines a refugee’s human security first negatively, with the loss of a job, life and identity and then calls for this loss to be remedied with social, economic and cultural rights. This is a considerable expansion of the rights and obligations put forth by the Convention – it is not, however, a call for a wider refugee definition, but rather a solution-oriented enhancement of refugee protection with regard to complementary measures and resettlement schemes. The message, nevertheless, is for a widened understanding of the causes of insecurity which, if placed within an effective legal system, is deemed to be a useful factor for refugee protection.

Other definitions of human security include the Ellen Lammers’ all inclusive “all types of security which involve human individuals and/or groups protected by or protecting against all kinds of threat found in their human environments”⁶²; Ramesh Thakur focussed on economic means when linking human security with a quality of life and states it is a core element of human rights⁶³; Steven Loneragan put stress on the ability to fend for oneself - “human security is achieved when and where individuals and communities have the options necessary to end, mitigate or adapt

⁶⁰ Hans Van Ginkel & Edward Newman, ‘In Quest of “Human Security,”’ *Japan Review of International Affairs*. 14:1(2000), p 79. Human dignity may, in effect, be threatened by factors such as fear, conflict, ignorance, poverty, social and cultural deprivation and hunger.

⁶¹ Sadako Ogata, *Enabling People to Live in Security*, found at www.unhcr.org.

⁶² Ellen Lammers, *Refugees, Gender and Human Security, Theoretical Introduction and Annotated Bibliography* (Utrecht: The Netherlands: International Books, 1999).
ch 4, p55

⁶³ Ramesh Thakur, *Human Security Regimes*, paper prepared for the workshop on Human Security, University of Queensland, Brisbane, September 3-4, 1998, at 16, available at http://www.hsph.harvard.edu/hpcr/events/hsworkshop/comparison_definitions.pdf.

threats to their human, environmental and social rights'⁶⁴; Amartya Sen, in a report presenting his preliminary findings for a project on human security and development coordinated by the United Nations Commission on Human Security, linked human security to human dignity as "the protection and preservation of human survival and daily life and also the avoidance of indignities that can result in injury, insult and contempt as well as the participation and empowerment of individuals and communities"⁶⁵; the United Nations Development Program (UNDP) was the most expansive in its Human Development Report where it proposed a unique definition of "freedom from fear and freedom from want."⁶⁶ This has been heavily criticized as being too vague, not objectively measurable, too woolly, too encompassing and lacking specification.⁶⁷

Barry Buzan has been instrumental in trying to formalize the limit the scope of the term in outlining four basic areas of threat: physical threat (pain, injury, death), economic threat (seizure or destruction of property, denial of access to work), threat to rights (imprisonment, denial of normal civil liberties) and threat to position and status (demolition, public humiliation).⁶⁸

What is apparent is that most definitions of human security are aimed at transcending the dominant orthodox paradigm that view critical concerns on basic needs or human rights as a problem of interstate politics and reinstating these concerns within the realm of the ethical and the moral. The notion of human security also clarifies the rigid separation between the different material and non-material dimensions of insecurity. It is applicable in contexts of transition and change, making it a dynamic concept which relates to the past, present and future perceptions of (in)security. The dilemma is in determining how to balance the freedom of action of the individuals against the potential or actual threats that such freedom poses to others. In other words, what Buzan describes as enhancing the liberation of community without amplifying the oppression by authority.⁶⁹ The challenge is to move beyond abstract all-encompassing enunciations of human security and focus on specific solutions for specific political issues.

The final part of this analysis will develop the specific threats and entitlements that legitimise refugee status on account of human security. This will detail a two-tiered approach which lists (non-exhaustively) the specific conditions of insecurity and provides an explanatory framework for host states to assess refugee claims.

⁶⁴ Steven Lonergan et al., *The Index of Human Insecurity*, VISO Bulletin Issue No. 6 (Jan. 2000).

⁶⁵ Third Meeting of the Commission on Human Security, Haga Castle, Stockholm 9-10 June 2002: report p 4. By way of background information, the Commission on Human Security convened to discuss issues on the relationships between human security, human rights and democracy. The findings of two main research projects were presented: Amartya Sen's 'human security and development' and Sadako Ogata (former UNHCR) on 'human security in conflict situations.'

⁶⁶ *United Nations Development Program, New Dimensions of Human Security*, U.N. Development Program, Human Development Report 1993 at 24 (1993). The UNDP later added that human security comprises two further aspects: safety from such chronic threats as hunger disease and repression; and the protection from sudden and hurtful disruptions in patterns of daily life. (see United Nations Development Programme, Human Development Report 1994, at Chapter 2, p24/5).

⁶⁷ Raquel Freitas 'Human Security and Refugee Protection after September 11: A reassessment,' *Refugee*, 20(4) (2002), p36

⁶⁸ Barry Buzan, *Peoples, States and Fear*, (1991), chapter 1, p37

⁶⁹ *ibid.*, p37

Specific provisions – obligations arising from international instruments

The following enlists provisions drawn from the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR), the 1984 Convention Against Torture (UNCAT) and the 1966 International Covenant on Civil and Political Rights (ICCPR), all of which are constitutive of refugee status.

The refugee needs to demonstrate a well-founded reason for believing⁷⁰ that they are at risk of:

- i) Persecution on grounds of race, religion, nationality, membership of a particular social group and political opinion.⁷¹
- ii) Torture or cruel, inhuman or degrading treatment or punishment.

This is included in article 15(b) of the Qualification Directive and has been established by Article 3 of the ECHR, Article 3 of the UNCAT and Article 7 of the ICCPR. I have re-introduced into the definition the term ‘cruel’ from Article 7 of the ICCPR because it renders the scope of the prohibition more flexible than Article 3 of the ECHR because it focuses on the way in which the individual has been treated.⁷²

Ryzard Piotrowicz highlights a number of circumstances that will instigate protection under the inhuman or degrading treatment category that are worth mentioning here: Depending on the circumstances, persons subject to death row, execution; persons who are frequently subject to unsuccessful attempts at expulsion or persons in orbit; persons who are refused admittance to the territory as a result of racial discrimination; persons infected with HIV and who may be deprived of adequate medical care if expelled thus amounting to physical suffering; persons facing normal punishment for an offence according to the legislation of the country concerned, where this punishment is arbitrary, discriminatory, cruel or excessive.⁷³

It is noteworthy that these areas of protection, drawn from international instruments, provide for a protection against expulsion but no formal obligation to grant specific rights. It should be recalled that the definition proposed takes this further by making reference to an engagement of the host state to protect within its territory or within that of another contracting state through a resettlement agreement, thereby developing upon non-expulsion and refoulement provisions.

⁷⁰ I maintain this test as it allows the most flexible assessment of objective and subjective fears of harm.

⁷¹ There seems to be little need to extend this definition to persecution for non-Convention grounds as such an applicant would most probably fall within one of the other categories.

⁷² This was the (non binding) opinion of the Human Rights Committee, General Comment 7, 30 April 1982, in Ryzard Piotrowicz & Carina Van Eck, ‘Subsidiary Protection and Primary Rights,’ *International and Comparative Law Quarterly*, 53(2004), p120-121: “the scope of the protection required goes far beyond torture as normally understood. It may not be necessary to draw up sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment.”

⁷³ *Ibid.*, p121

- iii) A violation of a human right.

The Qualification Directive was amended to exclude this statement and replace it with article 15(a)'s reference to a death penalty or execution. It is argued that the broader category of human rights violations should be included and relates to:

- a) Those non-derogable human rights so fundamental that they would legitimate a claim for non-refoulement and further protection. These include those derogations never permitted with respect to article 4 (prohibition of slavery or servitude) and article 7 (no punishment without law).⁷⁴ Article 4 is particularly relevant for situations of human trafficking which has been recognised as an immigration issue as well as a serious crime posing grave threats to basic human rights.⁷⁵ Article 7 incorporates the principle of legality which prohibits holding anyone guilty of a criminal offence on account of any act or omission that was not a criminal offence under national or international law at the time of commission. This provision may have few applicants but it still ought to be included in order to tally with international obligations;
- b) A second area that should be covered is that of serious and unjustified harm constitutive of serious, albeit derogable obligations. Although these should be interpreted restrictively, they can relate to serious risks – an example is article 6 of the ECHR which prohibits the flagrant denial of right to a fair trial.⁷⁶ The violation must of course reach a certain level of magnitude to trigger protection.
- iv) A risk to life, safety or freedom from situations of indiscriminate violence in situations of international or internal armed conflict.

It is recalled that the Convention and the subsidiary protection put forth in the Qualification Directive requested an individual risk amidst indiscriminate violence⁷⁷ which is very difficult to establish in such situations of mass violence or disruption. With regard to the Directive, it was argued that the need to individualise the requirement was because there exists an alternative means of protection *via* the

⁷⁴ Another non derogable right which is not included is the right to family unity (article 8) but this is an element that is considered as part of the entitlements of refugee status rather than as a cause for seeking refuge.

⁷⁵ Particularly in the EU, reference has been made in The Treaty on the European Union, article 29; Tampere European Council 1999, conclusion 23, Laeken European Council 2001, conclusion 42; Council Framework Decision of 19 July 2002 on combating trafficking in human beings.

⁷⁶ The European Court of Human Rights judgement of *Soering v. United Kingdom*, (A series, no 138, 1988, 11 EHRR 533) cemented this right in relation to refugees.

⁷⁷ Article 15(c): serious and individual threats to civilian life or person due to indiscriminate violence in situations of international or internal armed conflict.

distinct temporary protection regime in situations of mass influx. The problem with this requirement is that the period of temporary protection is shorter, two years with regard to the European Council Directive,⁷⁸ which is not always a sufficient amount of time for the conditions of return to be appropriate. With the applicant unable to obtain refugee status due to the lack of individuated risk, he/she will then be sent back to violence. This also draws an artificial distinction between threats on account of the administration of large numbers. It is recalled that Hathaway argued for attention to be paid to the seriousness of harm, rather than the unfairly burdensome establishment of differential risk, in assessing claims of civilian non-combatants in generalised violence situations.⁷⁹

All of the above provisions are to include harm by non-state agents and the assessment criteria which take personal circumstances, facts on the country of origin and individual position (background, age, gender, health and disabilities) into account. Account should also be taken of the positive obligations under indirect refoulement. These are situations where there is a reasonable likelihood that an asylum seeker will be sent back to the violation by another state.⁸⁰

Discretionary (compassionate) grounds

The specific provisions ought to include some mention of those obligations to provide protection on compassionate grounds. This is particularly important when considering a harmonised system of asylum between states, where such areas of protection would be left to national discretion. Those most commonly used compassionate grounds are in relation to the age of the applicant, the medical condition of the applicant, as well as practical issues relating to the availability of travel documents etc which render expulsion incorrect and contrary to the spirit of humanitarian protection. I will return to this issue below when delimiting the exceptions to the human security category.

The framework provision

The framework provision is intended as a guideline for interpreting the list of provisions and/or future situations that may legitimate refugee status which are not yet documented within the specific provisions. The idea is to create a definition of refugees that contains a flexible understanding of the types of situations that mobilise protection status. This is in line with the fact that the causes of flight are not static but

⁷⁸ COM(2001) 55 EC. Council Directive on *minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*.

⁷⁹ The argument in this paper forms part of the larger reformulation project of my doctoral thesis in which I argue for the need to address the legitimate concerns of states on managing large scale influx by i) a clear resettlement scheme as part of refugee status determination, and ii) the provision of mandatory return upon cessation of refugee status.

⁸⁰ This was recommended by the Human Rights Committee in *AS v Sweden* no 149/1999, (2001) 8 International Human Rights reports 970, para 9, on p 123. This is particularly important for preventing the burden shifting. An equitable resettlement scheme in place as part of the refugee determination procedure terminates the need for the practice of returning to a safe third country and any other 'new vision' schemes such as regional protection zones and transit processing centres. This thesis argues for confronting responsibility sharing in an open and honest fashion in assessing the credibility of applications rather than through alternate administrative schemes.

rather subject to changing political circumstances. The idea is to address the spirit of refugee protection as put forth through the human security standard.

Two aspects are considered when assessing the extent of this obligation. The first establishes the guideline for assessing the qualifying threats and dangers and the second puts forth the categories of persons that fall short of the human security definition – the exceptions.

A few principles guide the assessment of the seriousness of harm:

- i) the precise reasons why an individual may face risk should be irrelevant to the fact that the seriousness of harm is/can be objectively established;
- ii) the severity of the (risk of) violation must be weighed up against the probability of its materialisation - the greater the violation, the lesser the probability of its materialisation should be necessary to trigger host state obligations;
- iii) the severity (of risk) violation should outweigh the need for differential impact; These take a common sense view on the reasons for providing protection, namely when individuals are in great need of it, irrespective of whether the type of harm they are (at risk of) suffering falls within the confines of the enlisted legal definition or the respective interpretations;
- iv) the serious harm/indiscriminate violence must not be a one-time affair in those situations where the harm has actually occurred – thus the possibility of recurrence must be shown. In situations where the applicant is at risk for violation but where it has not occurred, there is no need to prove a violence pattern but rather the possibility of being subjugated to such harm;
- v) each category of protection is on equal footing with the same provision of civil, political and social rights; and
- vi) the burden of proof rests with the individual to prove a sufficient degree of likelihood of a violation to his/her human security with a counter-onus on the host state to disprove that the individual falls within the refugee definition. As per the second part of the proposed definition (“*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 host state also has the option to argue that although the application is valid and legitimate, it is unable to provide protection within its territory thereby triggering the resettlement process into action.

A second role of the framework provision is to name those categories of persons that are excluded from the human security definition of refugees despite the fact that they are suffering a violation of their individual security. There are two such situations where refugee status protection cannot *per se* be granted. First, those persons that

have left their country of nationality to seek refuge in another country on account of the economic deprivation in their home country are excluded from refugee status. Such persons are often labelled economic migrants and are excluded from the Refugee Convention. The second overlapping category relates to those persons fleeing their home states because of poverty-stricken conditions, famine and hunger. The same reasoning for exclusion applies to both, namely that refugee status is accorded on account of extreme deprivation rather than the opportunity of economic betterment.

The problem with a strict separation between political refugees and economic/poverty stricken migrants ('economic migrants') is that they are very often a by-product of the forces of nationalism, ethnic intolerance, widespread violations of human rights and undemocratic governance. Unsurprisingly these are grounds for applying for refugee and status as well as the new complementary protection mechanisms and it therefore seems unjust to exclude (outright) those persons that are a consequence of such circumstances. Such situations routinely lead to economic marginalization, poverty, massive unemployment and environmental degradation. Persons fleeing for these reasons may also be genuinely suffering serious violations affecting their livelihood.⁸¹

The difficulty with including economic migrants is with regard to the stated purpose of International Refugee Law, namely a provider of surrogate protection from serious violations *where the home state is unable or unwilling to provide protection*. Thus where applicants have chosen to migrate on account of being able to better their economic and social status, refugee status should be disallowed. Two further problems in creating such an open-ended category of refugees is that: a) It provides disincentives for the citizens of developing states for improving their own politics and economy and further encourages the 'brain drain' from these developing to developed countries; and b) Such a legal protection mechanism would further aggravate the levels of intolerance within host state societies whose security and integrity needs to be weighed against the legitimate needs of refugees.

However, the dilemma arises where applicants are in situations of extreme deprivation of their economic and social rights. It is difficult to reconcile such denial of refugee status on account of the fact that such persons are not subject to a violation of their civil and political rights.

In a recent study, Michelle Foster examines whether the Refugee Convention is capable of including claims based on economic destitution and contends that it is indeed capable of recognizing that many types of claims with an economic element can legitimate refugee status.⁸² Through an analysis of case law in common law jurisdictions she identifies that the crucial element, which transcends the divide between the various categories of rights, is one which endorses the seriousness of harm over and above any other consideration. "There is implicit recognition that if the

⁸¹ Another problem with this rigid divide is that it predominantly assumes a hierarchy in the 'International Bill of Rights' (1948 Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its two Optional Protocols) where socio-economic rights occupy a lesser, secondary status to civil and political rights, a view which is subject to much debate in international law.

⁸² Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, (Cambridge University Press, forthcoming 2006).

violation in question is not *fundamental, key or grave*, or in other words, does not impinge on the core of the right, then it will not, at least alone, be considered sufficiently serious as to amount to persecution.”⁸³ Foster suggests that measuring whether the *core* of a right has been violated is perhaps the most apt and equitable for assessing refugee claims rather than the sometimes crude division between the levels of human rights.⁸⁴

Such an analysis would suggest that the human security framework provision needs to build in a system of recourse which allows the violations to an applicant’s socio-economic rights to be considered against the spectrum of the severity of harm. The applicant must therefore prove that the violation to his/her socio-economic rights is sufficiently severe to constitute serious harm. Conversely the host state has the possibility of disproving this claim and demonstrating that the migration is the result of opportunity and economic betterment. This seems to be the only ethically viable option for a protection mechanism premised on the protection from serious harm.

Conclusion

This paper has proposed a definition of refugees that not only expands the refugee definition but also attempts to transform the perception of refugees as security threats. The security discourse has up until now never seen the refugee as referent object and his/her concerns considered on a level with those of host states and societies. Using the language of security in the law to define the protection status forces an honest and transparent dialogue between the concerns of both parties, thereby eliminating the need to invent strategies of deflection or narrowly to interpret the terms in the refugee definition to avoid host state obligations. The deliberation then engages in a negotiation between the refugee’s security and national and societal security which not only voices the differing interests but also changes the perceptions of them.

With regard to the balancing exercise, there is no simple methodology on how to conduct the compromise as this will entirely depend on the circumstances of the individual and those of the host state. This process raises awareness of those reasons states use for not wanting to protect applicants and weighs them against the very needs of these applicants. Of the four identifiable axes of insecurity due to refugees, three are likely to be relevant to the application procedure: The identitarian axis which takes issue with national identity and demographic equilibrium; the securitarian axis which highlights the diminished control of the sovereign on internal/external security; and the socio-economic axis concerned with the demise of the welfare state. The arguments in favour of national/societal and freedom to pursue economic advancement will be judged against the violations of a person’s physical and mental security.

The principles of proportionality and the ethics of solution finding will then be central to the rhetoric of refugee rights. The question, for instance, whether it is morally acceptable for a state to be unwilling to protect a person who faces legitimate risks of serious violations on account of its cultural homogeneity and economic prosperity?

⁸³ Ibid, chapter 4.

⁸⁴ Foster cites the recent New Zealand Refugee Appeals decision which characterized the relevant focus in determining persecution as being “on the minimum core entitlement conferred by the relevant right.” Refugee Appeal 74665/03, RSAA, July 7, 2004, para 90.

We must ask how far we can morally allow our fear of identity dissolution to prevent the protection of a person's human integrity and security. The latter issue of preservation of a quality of life and economic progress would be difficult to reconcile with the fact that economic and poverty-stricken migrants are, in principle, excluded from refugee status on a similar basis. If we exclude the reasoning of one, should we not disallow the use of the other?

An important outcome of this negotiating process is accepting that the protection of the individual is just as important as the preservation of a community. It also has the ability to reverse the presumption away from the collective to the particular. And finally, the flexibility of the definition in light of the framework provision breaks away from the understanding and expectations of host states in trying to grasp the conditions, reasons and plight of refugees.

This paper has attempted to address the challenge of rendering human security practical and solution-specific whilst placing emphasis on the inclusiveness and holism of the term. By introducing a list of harms that validate protection as well as a clear framework of exclusion, I have tried to narrow the realm of application to accommodate the refugee situation. I argue that using human security as an umbrella term for refugee and complementary protection statuses helps to demonstrate the need for a reappraisal of the Convention as opposed to the contradictory process of gap-filling currently underway. However, what this expansion of the refugee definition entails is a review of the timeframe of protection since refugee status ranges from long term risks of persecution to shorter term general oppression and civil wars. The ultimate bargain between host states and refugee law lies in implementing mandatory return policies when the conditions in the country of origin so allow.