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REVIEW ESSAY

The Legal Implications of the Refugee Crisis

*R.K.L. Panjabi**

CLOSING THE DOORS: THE FAILURE OF REFUGEE PROTECTION. By David Matas with Ilana Simon. Toronto: Summerhill Press 1989.

David Matas is a Canadian lawyer who has served on a Task Force on Immigration Practices and Procedures, has participated in the Canadian Council for Refugees, and has spoken publicly on the refugee crisis. He has written a critical, provocative analysis of the response of the Western world to the refugee problem, with emphasis on the policies of the present Government of Canada. His aim is to expose the injustices of the legislative and procedural systems for refugees in Canada. He writes with fluency and clarity, emphasizing his ideas in a manner that appeals both to the head and to the heart of the reader.

Closing the Doors will be very useful for international lawyers anxious to understand the system of a country that was, until quite recently, widely regarded as a haven for sanctuary. Americans interested in refugee issues should read this book because the Canadian context can apply to some aspects of the refugee experience in the United States. Human rights advocates and students of human rights will find Matas' suggestions and ideas thought provoking. Though some politicians in the United States and Canada undoubtedly will take issue with his views, they might be wise to take note of his opinions, because his perceptions are widely shared in both North American nations. Matas does not confine his criticism to the Canadian experience. He also describes and analyzes the legal systems and measures for refugees in the United States and in Europe.

The universal nature of the refugee crisis is undisputed. As Matas

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explains, "[n]o corner of the globe has been left untouched. Every country is either the source of exodus, a temporary refuge, a place of resettlement, or a financial contributor to the system."¹ The recent Iraqi invasion of Kuwait precipitated yet one more massive refugee exodus as thousands of men, women, and children of every race and nationality sought refuge in Jordan from the brutality of Iraqi troops. Their painful sojourn in the desert drew world-wide sympathy and was doubtless a factor in the nearly universal condemnation of Saddam Hussein's invasion. Though Matas wrote his book before the Kuwaiti refugee crisis, his insight and knowledge of the ramifications of the refugee problem add to the relevance of the book in view of the world's current interest in this issue.

Matas shares one objective with the numerous authors who are writing about refugees: He reminds us that the world requires proper policies and fair procedures for dealing with the refugee crisis, not stop-gap measures and punitive penalties. Matas asserts that "[t]he overall argument of *Closing the Doors* is that refugee protection is accepted in principle, but denied in fact" and that governments engage in "calculated hypocrisy" and "say one thing about refugees and do another."² Matas' primary goal is to uncover this hypocrisy and insist that "genuine refugees [should] receive the protection they deserve."³

Matas traces the history of the immigration policies of the Canadian government and condemns the attitudes that have lumped immigrants and refugees into one category. The difference, Matas explains, is that "[w]hile immigrants are pulled, refugees are pushed."⁴ The deliberate attempt by the Canadian Government to merge the two groups results in a "spillover of racist attitudes towards immigrants onto refugees."⁵ While Matas is somewhat sweeping in his criticism, his basic suggestion that immigrants and refugees need to be perceived as different is gaining some acceptance in Canada.

In a wider context, the definition of "refugee" is causing problems throughout the world. The 1951 United Nations Convention on the Protection of Refugees defined a refugee as "someone who has a well founded fear of persecution because of race, religion, nationality, mem-

1. D. MATAS & I. SIMON, *CLOSING THE DOORS: THE FAILURE OF REFUGEE PROTECTION* 13 (1989).

2. *Id.* at 18.

3. *Id.* at 18-19.

4. *Id.* at 27.

5. *Id.* at 28.

bership in a social group, or political opinion."⁶ The current definition, however, is subject to the acceptance procedures and legislative measures enacted by receiving states. In countries of primary asylum and eventual resettlement, attempts are being made to restrict the scope of the definition in order to exclude numerous claimants. Matas strongly deplors this trend, pointing out the tragic consequences.⁷ In particular, Matas notes that "[a] person who is persecuted for an unlisted reason is legally not a refugee."⁸

Governments in Europe and North America have shown a marked preference for refugees from Communist or other "hostile" states and, on occasion, have been indifferent to the plight of those fleeing the repression of states whose governments have alliances and friendly relations with the West. This indifference can have the unfortunate consequence of sacrificing lives "to preserve economic, strategic, and political ties."⁹

The linkage between a state's foreign affairs and refugee policy has been condemned by a number of authors. Several refugee experts, political scientists, and lawyers have criticized the United States Government for its refugee admissions policy, with particular reference to claimants from El Salvador and Guatemala. In *Open Borders? Closed Societies?*, Mark Gibney and Michael Stohl note that critics of United States refugee policy have charged that, "[d]espite the passage of the 1980 Refugee Act, or, more accurately, because of it, critics of U.S. refugee policy have charged that foreign policy concerns, rather than the plight of the individual, continue to dominate refugee/asylum determinations."¹⁰ Karen Jorgensen, in her essay *The Role of the United States Congress and Courts in the Application of the Refugee Act of 1980*, concludes that the Refugee Act of 1980 "has become for the most part, impotent."¹¹

6. *Id.* at 42.

7. Matas indicates that:

It's not enough to be the victim or potential victim of *generalized* violence. The violence must be directed towards the claimant. A villager who is shot at because of his political opinion can be a refugee; villagers who are bombed from the air because, for example, they live in guerilla-controlled territory are not thereby considered refugees Ironically, the more generalized the violence in a particular country, the less likely a person from that country is to be considered a refugee.

Id. (emphasis original).

8. *Id.*

9. *Id.* at 43.

10. Gibney & Stohl, *Human Rights and U.S. Refugee Policy*, in *OPEN BORDERS? CLOSED SOCIETIES?* 151 (M. Gibney ed. 1988).

11. Jorgensen, *The Role of the U.S. Congress and Courts in The Application of the Refugee Act of 1980*, in *REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES* 139 (V. Nanda ed. 1989).

While conceding that the United States has been generous in admitting over one million refugees since 1975,¹² Gibney and Stohl believe that "individuals [fleeing] from countries with the worst human rights violations are being bypassed in U.S. refugee admissions."¹³ They conclude that, "[a]s a general rule there is little relationship between the level of political terror in other societies and U.S. refugee/asylum policy with regard to individuals from these countries."¹⁴

Gibney and Stohl explain that the United States policy is to insist that most Salvadorans in the United States are economic migrants,¹⁵ and hence "the acceptance rates for asylum claims has consistently been in the range of 2 to 3 percent."¹⁶ Another author, Angela Delli Sante, insists that "[t]he U.S. government has refused to recognize Guatemalans and Salvadorans as refugees."¹⁷ In addition, the United States refugee policy has provoked criticism from the United Nations High Commissioner for Refugees.¹⁸

Matas is highly critical of the United States policies toward Salvadorans and Guatemalans fleeing persecution. He explains that refugees from these two states are "barred entry, without any semblance of compliance with the procedures set out in American law."¹⁹ Refoulement (forced return) generally is carried out indirectly by turning the refugees over to Mexican authorities who return them to an uncertain fate in their home countries.²⁰

The problems in Guatemala appear to be continuing. In October 1990, Nineth de Garcia, President of a Guatemalan Group for Mutual Support, attempted to convince the Canadian Government to link its aid to Guatemala with the latter's human rights record in an effort to improve the situation.²¹ Ms. Garcia, whose own husband has disappeared, believes that, "[s]ince 1988, the kidnappings and killings have increased again."²² Even women and children are subjected to torture and

12. Gibney & Stohl, *supra* note 10, at 160.

13. *Id.* at 164.

14. *Id.* at 172.

15. *Id.* at 154.

16. *Id.*

17. Delli Sante, *Central American Refugees: A Consequence of War and Social Upheaval*, in *REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES* 100 (V. Nanda ed. 1989).

18. Gibney & Stohl, *supra* note 10, at 156.

19. D. MATAS & I. SIMON, *supra* note 1, at 184-85.

20. *Id.* at 185.

21. *Toronto Globe and Mail*, Oct. 11, 1990, at A13, col. 5-6.

22. *Id.*

execution.²³

Matas also criticizes the United States discrimination against refugees from all other Latin American countries.²⁴ He explains that the United States President's power to determine the number of refugees allowed into the United States resulted in only very minimal allocations to Latin American refugees.²⁵ Matas postulates that the problem for the United States Government stems from the unfortunate linkage between foreign policy and refugee admissions policy.²⁶ In particular, Matas notes that "[r]efugee recognition means acknowledging persecution."²⁷ He suggests that "to avoid tainting refugee recognition by foreign policy considerations, refugee determination should be made independently from foreign policy."²⁸

Foreign policy may weigh heavily as a factor in the United States Government's approach to refugees. In Canada, however, the connection between the two is not as significant, largely "because Canada's foreign

23. Ms. Garcia's account of the horrors being perpetrated in Guatemala included her discovery in 1985 of the bodies of the abducted Vice President of the Group for Mutual Support and her two year old child. She recounted: "I can't remember how [the Vice President] really looked before. All I can remember is how she was when I saw her naked and tortured and her child of only 2 years old didn't even have fingernails. I can never forget that." *Id.*

The ordeal faced by families in such unstable societies can be comprehended only when the case histories of individuals are narrated. In her study of Salvadoran refugees in the United States, anthropologist Margarita Melville recounts the nightmarish horror that confronted the Sanchez family of El Salvador on February 5, 1981. At 1:00 a.m., soldiers invaded the Sanchez home and raped their thirteen, sixteen, and eighteen year old daughters and forced the family to witness the brutal attack. The soldiers left and then returned to abduct the two older daughters. After searching frantically for days, the desparate father located the body of one daughter. It was "mutilated and swollen, her severed hand being chewed by a dog." The other girl's body apparently had been burned. The family's "crime" was that one of the girls had joined an organization in her high school. Melville, *Salvadorans and Guatemalans*, in *REFUGEES IN THE UNITED STATES* 179 (D. Haines ed. 1985).

24. D. MATAS & I. SIMON, *supra* note 1, at 182-83.

25. *Id.* In 1980, the allotment to Latin America (excluding Cuba) was 1000 out of 231,700 refugees.

In 1981, out of a total of 217,000 [refugees], Latin America (including Cuba) was allotted 4000. In 1983, out of a total of 90,000, Latin America and the Caribbean were allotted 2000. In 1984, out of a total of 72,000, 1000 were from Latin America and the Caribbean. In 1985, out of a total of 70,000, Latin America and the Caribbean were allotted 3000.

Id.

26. *Id.* at 190-91.

27. *Id.* at 190.

28. *Id.* at 191.

policy interests are not as extensive as those" of the United States.²⁹ For this reason, Canada was able to assist Salvadoran refugees who were in danger of being deported from the United States³⁰ and accepted over ten thousand Central Americans in the 1980s.³¹ The hurdles and obstacles facing refugees, however, are now equally severe in both states. As Matas explains: "[a]lthough Canada has a different legal structure from the U.S. for refugees, the outcome is the same."³²

The present Canadian government, headed by Prime Minister Brian Mulroney, has initiated significant changes in the refugee legal system. The Refugee Reform Act (Bill C-55)³³ and the Refugee Deterrents and Detention Act (Bill C-84), passed by Parliament in 1988, include these changes. Although Canada formulated this new refugee system in an attempt to deter abuse by illegitimate claimants and to streamline the process of refugee determination and acceptance, it has resulted in serious problems for refugees and for agencies who seek to assist claimants.³⁴ Some critics argue that it is adversely affecting Canada's image abroad as a safe haven for the persecuted people of the world.

Matas summarizes the problems with the new Canadian refugee system. First, "[t]he claimant is denied access to counsel at the original refugee interview"³⁵ If a claimant decides not to claim refugee status, that decision is irrevocable.³⁶ In general, the law promotes a "hurry up atmosphere."³⁷ The law also foists designated counsel on the claimant, places the burden of proof on the claimant, and provides for proceedings that "are adversarial in nature."³⁸ In addition, credibility determinations are based "on the disposition of other cases from the claimants' country of origin"³⁹ and "[i]mmigration adjudicators are involved in these refugee decisions."⁴⁰

The most serious problem, however, is the discrepancy between the theory and implementation of the new refugee system. Theoretically, "a

29. *Id.* at 217.

30. G. DIRKS, BEHIND THE HEADLINES: WORLD REFUGEES THE CANADIAN RESPONSE 14 (1988).

31. *Id.*

32. D. MATAS & I. SIMON, *supra* note 1, at 216.

33. For a discussion of Bill C-55, see *id.* at 97-103.

34. *Id.*

35. *Id.* at 128.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

person ordered deported may be allowed to leave voluntarily and select the country of departure."⁴¹ In fact, however, deportees are sent back to the country from which they fled.⁴² Should an error occur in the consideration of a claim, rectification is difficult because, as Matas asserts, "(1) there is no appeal on merits; (2) appeals are heard only by leave; [and] (3) claimants are removed before the appeal is heard."⁴³

The Canadian Government's legislative measures have been dictated by a growing perception among policy makers that the majority of claimants are abusers of the system. In a keynote address to a 1987 Conference on Human Rights and Protection of Refugees under International Law, Benoit Bouchard, then Canada's Minister of Employment and Immigration, suggested that, "[u]nfortunately there has been a growing knowledge that many claiming refugee status were simply sneaking into Canada through the back door. So the focus has shifted from responding to need, to a focus on the extent to which Canada's fairness and humanitarian traditions are being abused."⁴⁴ Bouchard opined that, in fact, seventy percent of refugee claimants in 1987 would be economic migrants.⁴⁵

Given this perception within the Canadian Cabinet, it is not surprising that Parliament passed the Refugee Deterrents and Detention Act (Bill C-84). Matas, in addressing the severity of the Act, explained:

Under this legislation detention without judicial or quasi-judicial review is allowed for seven days; airlines can be required to hold passports, in violation of international standards; and government was temporarily given the power to turn back boatloads of refugees in Canadian waters. The Act allows the government to label persons as security risks without a refugee determination; criminalizes help to refugees; and permits search by force without a warrant of any place, including homes, looking for any evidence

41. *Id.* at 125.

42. *Id.*

43. *Id.* at 136. Barbara Jackman's study of the Canadian legislation leads her to conclude that "[f]irst, we will put refugees in orbit." She also echoes Matas' fear: "Second, our system will result in the refolement of some refugees. Third, this . . . system is going to break down because of Charter challenges based on unfairness and the lack of access to the determination system. . . . The fourth consequence is that the emphasis will be on selection overseas. . . ." Jackman believes that overseas selections are both racist and sexist. Jackman, *Canada's Refugee Crisis: Planned Mismanagement?*, in *HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW* 325 (A. Nash ed. 1998).

44. Bouchard, *The Refugee Challenge: Time for a World Response*, in *HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW* 22 (A. Nash ed. 1988).

45. *Id.*

that a person plans to help refugees come to Canada.⁴⁶

Ironically, "it is not an offence to come to Canada, but it is an offence to assist refugees to come to Canada."⁴⁷ Further, "even assisting refugees to report to the authorities is a crime."⁴⁸ The Act provides that Canadians assisting refugees can be punished by prison sentences up to ten years and fines up to five hundred thousand dollars.⁴⁹ Inevitably, such legislation inspires court challenge and public protest. Time alone will tell how much of this new refugee system will survive the test of judicial scrutiny.

Commenting on Bill C-84, Julius Gray stated that "[o]ne may once again speculate about Canada's seriousness with respect to its commitment to comply with the Refugee Convention and consequently with international law."⁵⁰ He proposed that "Bill C-84 is simply beyond the pale and must be scrapped in its entirety."⁵¹ Matas cautions against restricting rights only for the reason that those rights may be abused: "If we abandon rights for fear of potential abuse, we will soon lose all of our rights."⁵²

Matas believes, however, that if a few reforms are implemented, the system established by the Refugee Reform Act (Bill C-55) may be workable and more fair:

Immigration adjudicators should have no part in refugee determination. The Act should state the claimant has the benefit of the doubt. Disposition of other cases from the country the claimant fled should not be a basis for determining credible-basis. A decision not to claim refugee status should be revocable.

There must be an opportunity to appeal from errors of fact as well as errors of law. Appeal and access to the Federal Court Trial Division must be by right and not by leave. The claimant must be allowed to remain in Canada pending appeals The Act should not impose designated counsel on the claimant. The deport [or] depart decision should be made at the end of the whole process rather than at the beginning.⁵³

Matas also favors the administrative removal of the credible basis hear-

46. D. MATAS & I. SIMON, *supra* note 1, at 149.

47. *Id.* at 155.

48. *Id.*

49. *Id.*

50. Grey, *Refugee Status in Canada*, in HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW 310 (A. Nash ed. 1988).

51. *Id.*

52. D. MATAS & I. SIMON, *supra* note 1, at 165.

53. *Id.* at 144. See *supra* notes 34-42 and accompanying text.

ing,⁵⁴ and proposes that there be provision for an "appeal on the merits of a claim."⁵⁵

Fairness toward refugees is clearly a moral and political imperative for Canada, the United States, and the countries of Western Europe. The international reputation of these countries is at stake as are their values of humane, humanitarian assistance to those in need. By choosing fairly, these Western nations benefit as well. As political scientist Gerald Dirks comments: "Over the past forty years Canada has selected and admitted more than half-a-million refugees and displaced persons, who, along with their dependents, have added to our ethnic mosaic, enriched our culture, and have become integrated members of society."⁵⁶

Matas' blueprint for a fair refugee processing system could have equal validity in any of the ultimate resettlement countries of North America and Western Europe. It is imperative that Western European and North American nations not use the rationale of deterring refugees to dismantle democratic safeguards. The Canadian Refugee Deterrents and Detention Act, with its punitive measures against Canadian citizens, is a significant example of a trend in the wrong direction.

Howard Adelman argues that "both self-interest and self-sacrifice favour granting refugees the right to claim the protection of a country in which they find themselves on very fair administrative procedures."⁵⁷ Fairness and efficiency surely can be achieved without sacrificing the inherent civil liberties of one's own citizens or the basic rights guaranteed to refugees by the principles of international law.

Matas' warning should alert all those committed to upholding democratic values: "All countries with refugee determination systems are caught up in the game of competitive destruction of procedural safeguards."⁵⁸ The panic-stricken reaction to the influx of refugees ought not to result in the destruction of civil rights and fundamental justice in democratic societies. Democracy is a precious but fragile form of government that requires the eternal vigilance of citizens to ensure its survival. The ultimate question is whether any nation that claims to live by democratic values can allow arbitrary systems to operate against a minority like the refugees. Is it fair to subject these people who have fled nightmarish horrors to further humiliation, doubt, and ultimately, injustice by en-

54. D. MATAS & I. SIMON, *supra* note 1, at 145. *See supra* note 36.

55. D. MATAS & I. SIMON, *supra* note 1, at 145. *See supra* note 42.

56. G. DIRKS, *supra* note 30, at 17.

57. G. Adelman, *Obligation and Refugees*, in HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW 87 (A. Nash ed. 1988).

58. D. MATAS & I. SIMON, *supra* note 1, at 233.

meshing them in legal and bureaucratic coils designed to confuse and further harass them?

If Canada, the United States, the United Kingdom, or any of the Western nations indulge in a frantic dismantling of human rights in order to deter refugees, the entire framework of freedom within these countries will be at risk. In allowing our governments the freedom to restrict the rights of refugees, are we, as citizens of Western nations, placing our own rights at risk? It would be prudent to ensure that there is no threat to the rights of either refugees or citizens of democratic states. As governments in North America and Western Europe do react and respond to public opinion, it is appropriate to stress, as does Matas, the need for fairness and non-discrimination in the treatment of refugees.

The refugees ultimately serve as a mirror, reflecting the strength and weakness of our commitment to democratic values. With stark clarity, they show us our best and our worst features. In protecting the rights of refugees, we guarantee our own liberty. Lest we in the Western nations become too complacent about the eternal survival of our system of personal freedom, let us seriously ponder the possible consequence of a future breakdown in human rights and democratic values that could result in some or many people having to flee from their homes and their countries. If that awful situation should even occur, would there be any place left to go?