Australia and Canada compared: the reaction to the Kosovar crisis

Jackie King*

This paper compares the Australian and Canadian responses to the 1999 Kosovar refugee crisis. The paper examines the various philosophical perspectives that influenced the different responses of Australia and Canada's traditionally similar refugee programs and compares the policy processes and refugee programs of both states. The crux of the paper explains the legislative frameworks utilised for the reception of Kosovar refugees, assesses the treatment accorded to the refugees during their stay and evaluates the circumstances of their return vis à vis international obligations. The paper concludes that the different philosophical focuses and the more insular policy process in Canada resulted in a much more generous and humanitarian response from the Canadian Government than that which was provided by the Australian Government. It should be noted that the legislation referred to throughout the article was current at the time of the Kosovo crisis, and the article does not deal with any subsequent legislative or regulatory changes.

• • •

The NATO bombing of Yugoslavia from 24 March 1999 triggered a mass exodus of refugees from Kosovo into Macedonia. Canada and Australia, along with 30 other countries, responded to a United Nations High Commissioner for Refugees (UNHCR) request to provide asylum for 750,000 refugees in Macedonian refugee camps (Schmeidl 1999: 3). Within this context, asylum for 92,000 Kosovar refugees was facilitated under the US brokered Humanitarian Evacuation Program. While Canada provided for the landing of 5000 refugees under the international program and another 2000 via the domestic family reunification program, Australia developed a new legislative mechanism to participate in the international response — the Safe Haven visa. The nature of these two schemes resulted in the very different treatment of the refugees, with the possibility of permanent residency in Canada only.

Part 1 of this paper examines the various philosophical perspectives that influenced the different responses of Australia and Canada's traditionally similar refugee programs. Part 2 compares the policy processes of both states and Part 3 compares

* School of Law, King's College, London.

the refugee programs of both states. Part 4 of the paper explains the legislative frameworks in place at the time that were utilised for the reception of Kosovar refugees and Part 5 assesses the treatment accorded to the refugees during their stay and the circumstances of their return vis à vis international obligations. The paper concludes that the different philosophical focuses and the more insular policy process in Canada provided a much more generous and humanitarian response from the Canadian Government than the Australian Government.

Part 1: philosophical perspectives

It is important to understand the basis upon which each state justifies its response to and treatment of refugees. Whatever the moral claim of various classes of immigrants, the strongest moral claim is clearly that of refugees. This is the harshest, most critical context for an evaluation of the morals of the receiving society. To say that someone is a refugee is to say that he or she has a legitimate moral claim regardless of whether we will be able or willing, or even obliged, to meet that claim. It is the treatment accorded the stranger that provides a key to the principles of justice in the political community. Thus how well the state handles the problem of refugees is a crucial test of its legitimacy.

Despite this, there is much academic debate regarding the sources of moral obligations to refugees. According to Carens (1991: 20), while causal connections between specific states and specific groups of refugees are an important source of moral obligation with regard to refugees, moral claims can also arise even when there are no such specific connections. In these cases, the basis of the obligation is humanitarian in nature. A third source of moral obligation to refugees is that states ought to help refugees because the moral legitimacy of the state system depends on the provision of some safe state membership to everyone. This makes helping refugees an issue of justice rather than just humanitarian concern.

According to this last argument, refugees are orphans of the state system.

> Their plight reflects a failure, not only from the particular state from which they are fleeing, but also of dividing the world into independent sovereign states and assigning people at birth to one of them. The duty to assist refugees derives from each state's own claims to exercise power legitimately in a world divided into states (Carens 1991: 20).

Both Australia and Canada have traditionally used elements of each of these arguments to support their policies on refugees and asylum seekers. Both countries initially accepted foreigners for economic reasons, with no distinction between economic immigrants and refugees until after the Second World War. Today

however, it appears that Canada has a humanitarian concern influencing the development of its refugee policies, while Australia, especially in recent times, appears to focus upon the legitimacy of the state system rather than a humanitarian justification. This is certainly reflected in the respective responses of the two states to the Kosovar refugee crisis.

Part 2: the policy process

Australia and Canada have both acted as generous refugee resettlement countries over the last 50 years. There are nine major offshore resettlement countries: the United States, Canada, Australia, Sweden, Norway, New Zealand, Finland, Denmark and Netherlands. In absolute numbers, Australia has the third highest offshore resettlement program. On a per capita basis, Australia is second only to Canada. Canada provided 14,300 settlement places in 2000, at a rate of .046 per capita. Australia provided 8000 places, at a rate of .043 per capita (Illingworth 2000).

The immigration selection and control systems employed in Canada and Australia display many similarities along with a few interesting and significant differences. Governments in both countries undertake formal consultations with various community interests before announcing an immigration plan for the following 12 months. In Canada, this is known as the 'levels plan', while in Australia it is simply referred to as the 'immigration program'. Each employs a hybrid system incorporating a specific numerical overall target for total intake along with the continuation of some demand driven categories, with the buffer between the two consisting of other adjustable categories which contract or expand as required to meet the overall target (Bursten, Hardcastle and Parkin 1997: 188).

Despite the similar frameworks, the policy processes engaged by each country in the determination of their respective annual plans and the relative influence of various actors in the policy process resulted in the very different responses to the Kosovo crisis. While the Canadian response was developed by an insulated elite with minimal external influence, the Australian response, subject to other influences, was more of a populist, law and order based response, rather than a genuinely humanitarian response.

There are many institutional and procedural similarities between Australia and Canada in their policy making processes with respect to immigration and refugee matters, and in both countries an understanding of the distribution of policy influence seems conceptually portrayed by a tension between 'statist' and 'pluralist' dynamics. Within this broad pattern of similarity, Australia's policy process seems somewhat more open, at least at present, to external pluralist style representations,

while Canada's governmental elites appear more successful in defending their 'statist' predominance (Hardcastle and Parkin 1994: 124). This argument particularly explains the divergence in policies in regard to Kosovo: 'While the Canadian state moves...in the direction of higher intakes, the outcome of Australia's pluralist interaction is in the opposite direction' (Hardcastle and Parkin 1994: 124).

Another explanation for the different responses in this case, is the different policy objectives that are incorporated into the migration acts of both countries, and the need for these objectives to be accounted for in the respective policy process of both states. More specifically, s 3 of the Canadian *Immigration Act 1976* (the Canadian Act), in place at the time of the Kosovar crisis, indicates some of the factors that the Canadians considered in their response to the Kosovar crisis. Subsection (g) states that one of the objectives is to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted. This is balanced by subss (a) and (h) which state respectively that the aims of the immigration and refugee program are: to support the attainment of such demographic goals as may be established by the Government of Canada in respect of the size, rate of growth, structure and geographic distribution of the Canadian population and; to foster the development of a strong and viable economy and the prosperity of all regions in Canada. The selection of the Kosovar refugees and their interviews by Canadian immigration officials in the Macedonian refugee camps reflects these objectives, and provided for the possibility of permanent residence in Canada.

The goals of the Australian humanitarian and refugee program had a different focus than the Canadian objectives. Australian immigration and refugee policy aims to: provide protection to individual refugees; participate responsibly in the international community; honour its Convention obligations; further the interests of the people of Australia; meet high standards of administration; and acknowledge as much as possible changes in refugee populations (Senate Legal and Constitutional References Committee 2000). Thus on the basis of these objectives, the Canadian policy accommodated the concerns of the Kosovar refugees and simultaneously promoted its own national interest, while Australia, having to further the interests of the Australian people and take domestic social and economic factors into account, merely accepted the minimum responsibility under its international obligations to appear to be playing a fruitful role in the containment of this human tragedy.

Thus it is clear that in spite of similar histories, frameworks and procedures, there are a number of fundamental, philosophical differences between the two systems. While the Australian Government seemed to have a more pluralistic process and a seemingly favourable initial response to the refugees, with time it became clear that the safe haven visa was in fact a restrictionist policy, severely limiting the rights and

opportunities of the Kosovars in Australia. In contrast, the Canadian immigration and refugee policy process has been described as 'bureaucratic dominance' so that policy making elites in Canada are more insulated than their Australian counterparts, and are therefore not as influenced by public pressure in the formulation of policy. Accordingly, it appears that they had a far more humanitarian response to the Kosovars in the long term, in that they offered them the choice of permanent resettlement. The impact of the different policy processes was also influenced by the different objectives that each Government was bound to consider in the formulation of their respective responses, with the Canadian approach more humanitarian in its considerations. It is within this broader context that a comparison of the two country's reactions to the Kosovar crisis must occur.

Part 3: refugee programs compared

Despite similar legislative structures and visa categories, there are a number of fundamental differences in the substance of the refugee programs of Australia and Canada. Australia ratified the UN Convention Relating to the Status of Refugees[1] (the Convention) on 22 January 1954 and the 1967 Protocol Relating to the Status of Refugees[2] (the Protocol) on 13 December 1973. The terms of the Convention and Protocol are incorporated into Australian law by s 36 of the *Migration Act 1958* (Cth)

---

1 The Convention provides the international definition of refugee, contained in Art 1A (2). It 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 is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable, or owing to such fear is unwilling to return to it.'

2 As new refugee situations continued to emerge in the 1950s and 1960s, particularly those associated with decolonisation in Africa, it was considered necessary to extend the provisions of the 1951 Convention to cover these later refugees. Following consideration by the General Assembly, the Protocol Relating to the Status of Refugees of 31 January 1967 was agreed to. Effectively, the 1967 Protocol removed the restriction of the definition of refugee from events occurring in Europe prior to 1 January 1951, and extended the provisions of the Convention to events around the world that have taken place since that time. It entered into force on 4 October 1967. By accession to the 1967 Protocol, States undertake to apply the substantive provisions of the 1951 Convention to refugees as defined in the Convention, but without the 1951 dateline and geographical limitation to Europe. Although related to the Convention in this way, the Protocol is an independent instrument, accession to which is not limited to State parties to the Convention. While the Protocol does not expressly adopt the procedural sections of the Convention, its procedural provisions are the same.

(the Australian Act) which provides for a class of refugee visas and applies the Convention definition of refugee to such status determination. However, Australia has also developed a number of humanitarian visas for people who do not fall under the Convention definition of refugee. These include the special humanitarian visas and the special assistance category visas, targeted at specific groups who are persecuted in designated countries. There is also a ministerial discretion to provide entry to Australia on humanitarian grounds to those who do not fall within any of the above categories.

The refugee visa covers people classified as refugees under the Convention who are identified by the UNHCR as requiring resettlement. There are a number of sub-visas that comprise this category, including the refugee protection visa, emergency rescue visa and women at risk visa. The alternative Special Humanitarian Program is available for those who are outside their country of origin and have been identified as having experienced or fear gross discrimination amounting to a substantial violation of their human rights, but do not fulfill the requirements for a refugee visa. However, people entering under this program must demonstrate a connection to Australia. This is most commonly achieved via a family connection or having previously resided or studied in Australia.

The special assistance category was established in 1991 for groups with close family or community links to Australia who are in particularly vulnerable situations overseas but do not meet the criteria for other categories. The category has been used to allocate places to particular groups who are considered in danger because of unrest or civil conflict, because of severe discrimination or who have been displaced. Again, prior links with Australia are a requirement (Refugee Council of Australia 2000: 22).

Each of these visas constitutes Australia's offshore humanitarian program, that is, the applicants are overseas when they apply for the visas and must wait in a third country to be accepted. Of the 12,000 places available under Australia's refugee and humanitarian program, 8000 places are allocated to the offshore component. The remaining 4000 places are allocated to Australia's onshore program — to people who arrive on Australian shores without valid visas. Thus it is only under the onshore program that Australia owes the full spectrum of Convention obligations.

Canada has a similar humanitarian program and visa structure to Australia. In 1969 Canada acceded to both the 1951 Convention and the Protocol of 1967. The definition of Convention refugee found in s 2(1) of the *Immigration Act* is adopted from the Convention. Like Australia, Canada established a number of visas for those who fail to meet the requirements under the Convention definition. Known as the humanitarian designated classes, these came into effect in May 1997. Within these

classes, the country of asylum category and source country category are the most relevant. To be admissible under these classes, the refugee must, in addition to proving their eligibility, demonstrate an ability to successfully establish in Canada, meet the medical requirements and pass security and criminality checks.

The country of asylum class describes persons who are fleeing generalised violence rather than personal persecution and therefore includes those suffering from massive violations of human rights. Persons selected under this class are required to be outside their country of citizenship and must be sponsored by the private sponsorship program. The source country class recognises that persons who still remain in their homeland may need protection. The class includes those who have suffered serious deprivation of their civil rights and have been detained and imprisoned as a consequence. The class also includes those who are persecuted for reasons contained in the refugee definition. There is a list of countries in which this class can be applied. As is the case in Australia, if an asylum seeker does not fulfill the requirements of any of these classes of visa, there is also the possibility of receiving a Minister's permit on special humanitarian grounds. Such a permit allows a refugee to travel to Canada immediately and undergo medical and security checks after arrival. It was the Ministers permit that was provided to the Kosovars who travelled to Canada under the Humanitarian Evacuation Program.

Despite the similar structures and processes, there are a number of provisions in the

3 Over the years, Australia has seen a number of temporary visas granted to people already in Australia who were unable to return to their home countries, such as Iraq, Lebanon and Sri Lanka. Then, as a result of the tragic events in Tienanmen Square in 1989, four year temporary visas were granted to the affected Chinese in Australia at the time, with these later being converted to permanent visas. In 1992 the *Migration Reform Act* established a statutory category of four year temporary protection visas for refugees in s 26B(1). However, the four year period of temporary protection effectively made the scheme untenable as applicants remained uncertain of their status and unattractive to employers for an unreasonably long period. As a result, in 1994 the Government returned to offer permanent protection to refugees, including who applied for asylum onshore. It was not until the events in the former Yugoslavia that the notion of temporary refuge gained prominence in Australia again. The Australian Government provided temporary protection to citizens of former Yugoslavia who on June 1992 had been a citizen of Yugoslavia and had arrived in Australia (of their own initiative) on or before 31 July 1996 with a temporary protection visa until 31 July 1997. They were expected to leave Australia by that date. Those who were granted former Yugoslavia temporary visas were able to apply for a protection visa or a change of status to permanent residence if they met the criteria for any other visa, including the family and skilled visa. From October 1999, Australia's experience of temporary protection manifested itself in the form of the safe haven visa and a three year temporary protection visa for unauthorised arrivals who were found to be genuine refugees.

refugee programs of Australia and Canada that are quite different. Perhaps one of the major differences between the two systems is that all Canadian refugees are granted permanent residence in Canada, for Canada does not have a policy of temporary protection. In contrast Australia has had some experience of temporary protection visas, most notably in response to the Tienneman Square Massacre in 1989 and the crisis in the former Republic of Yugoslavia.[3] Further, while Canada has a system of private sponsorship, over and above the government sponsorship of refugees, Australia has a very limited avenue for private sponsorship. In Canada, the privately sponsored humanitarian category is effectively a demand driven category — a sponsored applicant, with refugee status confirmed, is admitted, with no numerical limit to the intake. In Australia however, where the distinction between privately sponsored and government assisted entrants has little significance, there is a designated planning level for the total humanitarian intake. Canada's management system does not provide the legal authority to limit family and refugee immigration, whereas the Australian system clearly does. Moreover, while the Canadian system, like the Australian system, has separate intake quotas for onshore and offshore refugees, Australia's programs are linked, so that if onshore asylum seekers increase, the number of offshore applicants processed is reduced proportionately to the number of onshore arrivals (Department of Immigration and Multicultural Affairs 2001).

Another major difference between the two systems is that Canada's *Charter of Rights* provides a more specific legal reference point than exists in Australia's refugee determination system in regard to the treatment of asylum seekers. It has been held in numerous cases that the Charter applies to and must be accounted for in refugee determination decisions. This suggests that the Canadian system is much more aware of the international rights of refugees applying for asylum within its borders than the Australian system. In fact, the Canadian *Immigration Act* states in s 3(f) that one of the Act's objectives is to 'ensure that any person who seeks admission to Canada is subject to standards of admission that do not discriminate in a manner inconsistent with the Canadian Charter of Rights and Freedoms.' No such clause exists in the Australian Act.

Part 4: the legislative responses

Australian legislative framework

The Australian Government determined that in dealing with the UNHCR request to resettle Kosovar refugees, temporary refuge, implemented by the creation of additional classes of temporary visa, was the best means of simultaneously fulfilling its international obligations and appeasing an increasingly disconcerted public.

The *Migration Legislation Amendment (Temporary Safe Visas) Act 1999* (Cth) (the Act) provided a new legislative framework for the safe haven policy. In order to qualify for the grant of a 'subclass 448 Kosovar safe haven (temporary) visa' the applicant must have been resident in Kosovo on 25 March 1999 and displaced from Kosovo since that date or be a member of the immediate family of a Kosovar safe haven visa holder (Taylor 2000: 76).

An application for a temporary safe haven visa was valid only if made upon the invitation of the Australian Government. The period of a temporary safe haven visa was set at the discretion of the Minister for Immigration. The Minister had the power to extend the period initially specified by notice in the *Commonwealth of Australia Gazette* (the Gazette), but did 'not have a duty to consider whether to exercise' the power. Under the Act, the Minister also had a wide discretion, by notice in the Gazette, to shorten the period of a safe haven visa. A visa may be shortened if 'in the Minister's opinion, temporary safe haven in Australia is not longer necessary for the holder of a visa because of changes of a fundamental, durable and stable nature in the country concerned'. However, in this case, the Minister also has a power, to be exercised personally, to exempt safe haven visa holders from removal, 'if the Minister thinks it is in the public interest' under s 91L(1) (Head 1999).

Section 4 of the Act states that an application made before the commencement of the Act 'ceases to be valid' on the Act's commencement, 'despite any provision of the Migration Act or any other law'. In order to 'avoid doubt', s 4 states that this rule applies even if the application is the subject of a review or appeal to 'a review officer, body, tribunal or court'. There are also provisions that render invalid any application for a different class of visa after the enactment of the Act. Section 91K provides that if the holder of a safe haven visa applies, or purports to apply for a visa other than a temporary safe haven visa, then 'that application is not a valid application' (Head 1999). The Australian Government claimed that such an approach ensured that Australia could meet its commitment to provide temporary safe haven and also effectively maintain the integrity of Australia's migration and humanitarian programs (Campbell 1999: 3975). Section 91H that explains that 'the Parliament considers that a non-citizen who holds a temporary safe haven visa, or who has not left Australia since ceasing to hold such a visa, should not be allowed to apply for a visa other than a temporary safe haven visa'.

The main criteria for the grant of a subclass 449 humanitarian stay (temporary) visa were that the applicant: be displaced, or face a strong likelihood of being displaced, from his or her place of residence; if displaced, cannot reasonably return; and hold a 'grave fear for his or her personal safety' because of the circumstances causing or threatening displacement. A member of the immediate family of a humanitarian stay

visa holder also qualified for a humanitarian stay visa (Taylor 2000: 77). According to the Department of Immigration and Multicultural Affairs there was a requirement for the Act to not only provide for the temporary stay of the Kosovars, but also the wider requirement to set up the legislative framework for other similar situations. The Act therefore created a specific visa for the Kosovar refugees but also provided an open category of visa, the humanitarian stay (temporary) visa, subclass 449, that is not country specific. These two subclasses of visas were the legal mechanisms by which Australia engaged in its safe haven policy.

Canadian legislative framework

While Australia developed a whole new legislative mechanism to accommodate the Kosovar refugees, the Canadian government enlarged a number of already existing programs to accommodate their Kosovar intake, and no legislative amendments were made. The Kosovar refugees transported to Canada were all provided with Minister's permits, under s 37 of the *Immigration Act 1976*.

According to the regulations in place at the time, Minister's permits should be granted only for humanitarian and compassionate reasons, or if it is in the national interest that the person be allowed to enter or remain in Canada. Further, a Minister's permit may be issued only for compelling reasons where the risk to Canadians, or to Canadian society is minimal. The control and facilitation objectives found in s 3 of the *Immigration Act* are the ones to be considered in the decision to grant a Minister's permit, which is only to be issued in special circumstances (Galloway 1997: 192). These objectives are:

> (c) to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;
> (d) to encourage and facilitate the adaptation of persons who have been granted admission as permanent residents to Canadian society by promoting co-operation between the Government of Canada and other levels of government and non-governmental agencies in Canada with respect thereto and;
> (e) to facilitate the entry of visitors into Canada for the purpose of fostering trade and commerce, tourism, cultural and scientific activities and international understanding.

Section 37 (3) of the *Immigration Act*, under which the Minister's permits were issued to the Kosovars, provides that the Minister may issue a written permit authorising any person to come into or remain in Canada, for such period, not exceeding three years as is specified in the permit. In the Kosovars' case, the permit specified a 12 month period (CIC 1999b para 10.5).

The Minister's permits were provided either under the special needs humanitarian scheme or the family reunification scheme. Approximately 5000 arrived in Canada under the first program, while another 2000 arrived under the latter. Under the humanitarian resettlement program, special needs refugees with no ties to Canada who clearly could not repatriate to Kosovo were airlifted to Canada. These refugees were referred by the UNHCR or other international non-governmental organisations (NGOs) present in the area. The family reunification program allowed Kosovars who had family in Canada to apply for a Minister's permit with the sponsorship of their Canadian family. The regulations extended the ordinary definition of family under this class to include: spouse, child (irrespective of age or marital status), parent, grandparent, grandchild (irrespective of age or marital status), sibling (irrespective of age or marital status) niece/nephew, (irrespective of age or marital status), aunt/uncle (irrespective of age or marital status). The definition also included step and in-law relationships (CIC 1999b para 3.3).

Although the ability to establish successfully in Canada was still cited, the Operations Memorandum on the Fast Track Processing for Kosovo Refugees (CIC 1999b) stated that the ordinary selection criteria should only be used as guidelines in relation to the Kosovars, rather than binding regulations. For example, the ordinary selection criteria were loosened for the Kosovars so that it was not necessary for the applicant to speak English or to have a certain level of education or work experience (CIC 1999b para 2.2). This was done on the basis that 'these refugees cannot be expected to have the same qualifications as independent applicants, although some may' (CIC 1999b para 2.2). Nor was it essential that the applicant prove that he or she will be self-supporting within one year as required by the regulations. Rather, 'the visa officer should simply be satisfied that ... the refugees will be able to settle into life in Canada and support themselves in a reasonable manner within a reasonable period of time (normally within three to five years of arrival in Canada)' (CIC 1999b para 2.2).

Despite the provision of these seemingly flexible guidelines, there were criticisms that the Canadian selection of Kosovar refugees in the Macedonian camps discriminated against those who had serious medical needs and those who did not have identity documents. Although it was possible for Convention refugees and their dependants to be granted permanent settlement or landing, even if they did not meet the usual medical criteria of admissibility, under s 46.04(8) of the *Immigration Act*, landing required possession of a valid and subsisting passport, travel document or identity card. Those who were discovered without such documentation before leaving Kosovo would have been automatically excluded from selection.

Another criticism, equally applicable to the Australian safe haven legislation, was the possibility of cancellation of the Kosovars' status, at the Minister's discretion.

Section 37(4) of the *Immigration Act* allowed the Minister, at any time, in writing, to extend the terms of the permit, or to cancel it. Despite this, in the case of the Kosovars, the operations memorandum stated that 'it is expected that most cases will be proceeded to landing within the 12 month validity of the Minister's permit and that few extensions will be required' (CIC 1999b para 10.5). However, where a permit expires or is cancelled, the Minister may make a deportation order against the holder, or order that the holder leaves Canada within a specified period (s 37(5)).

Part 5: Australia and Canada's treatment of the Kosovars compared — international obligations

Within the context of these philosophical, procedural and legal frameworks, the actual treatment accorded to the Kosovars once they arrived, and the rights they obtained upon entry, were also remarkably different. A measure of the two responses to the crisis was the manner in which they treated the Kosovars once they had arrived in terms of the standard of accommodation provided, quality of service delivery, work rights and medical benefits. Article 7 of the Convention states that refugees should be accorded at least the same treatment as is accorded aliens generally. Article 17 of the Convention provides that states shall accord to refugees lawfully within their country the most favourable treatment accorded to nationals of the country in relation to the right to work. Chapter IV makes similar provisions regarding housing,[4] public education[5] and social security.[6]

Accommodation

Perhaps it is in the area of housing that the discrepancy between the treatment of the

---

4 *Convention Relating to the Status of Refugees 1951*, Art 21:

> 'As regards housing, the contracting states in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.'

5 *Convention Relating to the Status of Refugees 1951*, Art 22: 'The contracting states shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.' The clause goes on to state that in respect to education other than elementary education, the contracting state shall accord to refugees treatment as favourable as possible, and not less favourable that treatment accorded to aliens generally in the same circumstances.

6 *Convention Relating to the Status of Refugees 1951*, Art 23:

> 'The contracting states shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.'

Kosovars in Canada and Australia is most apparent. The Canadian sponsorship program allowed for the active facilitation of resettlement and integration of the Kosovars into their ethnic communities and Canadian society at large. Although the Kosovars who arrived in Canada were initially sent to military barracks, these were located near Albanian communities and the residents had complete freedom of movement to meet and interact with their new neighbours. The Kosovars were removed from the barracks and integrated into the communities as soon as all medical checks were completed and sponsors had been found. In fact, at one point, 250 refugees sent a petition to the Federal Government asking that they be allowed to remain in Trenton Camp in Ontario on the ground that they had made wonderful friends in the local community and felt very comfortable there. The planned move had been caused by the relocation of refugees at another base to sponsoring communities, so that there were less than 600 refugees in both locations, making it redundant to keep both sites operational (Malette 1999).

In discussing the Canadian response, Immigration Minister Lucienne Robillard stated: 'While the refugees will be taken to military bases initially, because some of them may need emergency medical aid or counseling, they will have complete freedom of movement in Canada' (Thompon 1999). The departmental attitude was that '[e]xperience shows that refugees prefer as much as possible to control their own lives which generally means having their own accommodation. It is important for refugees to be able to lead as far as possible normal lives ...' (CIC Kosovo). Priority was given to locations where there were existing Albanian communities and where required support services were available. Where there was not already an existing Kosovar community, significant numbers of refugees were settled together 'in order to allow the refugees to give each other mutual support'(CIC Kosovo).

In contrast, the 'safe haven' sites chosen for the refugees in Australia — disused and semi-used military barracks, usually in remote locations — was far more insensitive than the accommodation provided by the Canadians. Sending traumatised victims of war to military bases, isolated from the Albanian communities, provoked criticism from the Ethnic Community Council of NSW and the Australian-Albanian Association (Head 1999: 281). In fact the poor conditions at one site — the Singleton military base, 230 kilometres north of Sydney — led three busloads of refugees to refuse to disembark on 14 June. They objected to the lack of toilet and bathroom facilities, inadequate heating and protection from the weather and the absence of privacy for family groups (Head 1999: 281).

Social security and work rights

Another measure of the fulfillment of international obligations by Canada and

Australia was the extent to which refugees were given the right to receive social security and to seek employment. International organisations emphasised that, regardless of the kind of scheme implemented by various governments, Kosovar refugees should be entitled to the right to work.[7]

However, in apparent disregard of such advice, the Australian Government emphasised that the provision of funds, clothes, meals, health care, counselling and schooling was confined to the barracks. Those who wanted to live independently only received $20 per week for living expenses per adult, plus $5 a child (this was increased to $27 and $10 respectively on 1 June 1999). On 30 June, the Minister announced that the refugees could only work a maximum of 20 hours per week, but would then lose their allowances (Head 1999, 281). In contrast, the Canadian Joint Assistance Sponsorship Program provided up to 12 months government financial assistance to the Kosovars. They were encouraged to find permanent employment, and were not required to pay for employment authorisations (CIC Kosovo).

Medical benefits

While the Kosovars in Australia were not entitled to any Medicare benefits, and could only receive medical treatment while in the barracks, the Kosovars in Canada were entitled to the same medical benefits as Canadian citizens and other Convention refugees (CIC 1999). These benefits included essential health services for the treatment and prevention of serious medical/dental conditions, contraception, prenatal and obstetrical care, essential medications and emergency dental services covered to a maximum of $350 during the patient's eligibility period (CIC 1999 Appendix D).

Return

Perhaps the most important issue relating to the treatment of the Kosovar refugees in Canada and Australia was the method and manner in which they were returned. In July 1999, the UNHCR assessed the situation in Kosovo as being secure enough

---

7 Amnesty International 1998 p 19:

> 'Although Amnesty International is of the view that the nature of the flow of asylum-seekers from Kosovo does not justify any such [temporary protection] programs, in the event that programs for temporary protection are established, they must be guided by standards of international refugee law. It is of primary importance that no temporary protection program should prejudice the interests of those who qualify for Convention refugee status and who seek to exert their rights to a determination according to that status. Furthermore, temporary protection programs must not limit the other rights that flow from the UN Refugee Convention, such as the right to work ...'

for most of the Kosovar evacuees to return home. Australia immediately began arranging for the repatriation of the Kosovars, arguably breaching the refoulement principle enshrined in Article 33 of the Convention.

Article 34 of the Convention provides that states shall facilitate the naturalisation of refugees. This suggests that states have an obligation to provide individual determination of refugee applications in order to find a durable solution for refugees. While the Canadian program was based on the principle that this was a resettlement movement (CIC 1999b para 1.2) and provided the recipients with the choice to decide whether they wanted to apply for permanent residency or return to Kosovo, the Australian legislation seemed to be motivated by a desire to discourage the Kosovars from seeking to remain in Australia.

While the international community had mobilised substantial resources for the reconstruction of Kosovo, at the time Australia began repatriating Kosovars to the region, the question of the province's status remained unresolved. The impact of the Balkans crisis was still making itself felt in neighbouring Albania and Macedonia, both of which remained fragile.

Many Australian welfare groups and NGOs claimed that many Kosovars would be placed at risk if returned. Those at risk included: ethnic minorities and people from mixed marriages; draft age males who could have been considered to have evaded KLA conscription; people who could be perceived as having supported the Serb regime; female headed households without male support; people from areas in which ethnic Albanians are a minority, including southern Serbia; and victims of extreme violence (Refugee Council of Australia 1999).

Despite this, return was justified by Australian Immigration Minister Ruddock on the basis of the undertakings of the Kosovars who said they would return. Having regard for the extra difficulties likely to be encountered by people returning to the Kosovar winter, the Government made available a winter reconstruction allowance of $3000 per adult and $500 for each child under 18 for those who returned to Kosovo between 31 August and 30 October 1999 (DIMA 1999). On 28 October 1999, the Minister wrote to the approximately 500 Kosovars still remaining in Australia asking those who wished to stay in Australia to make a written request to that effect, providing reasons. The Minister undertook to consider all such requests. All of the remaining Kosovars chose to make such requests. While the requests were being considered, the Kosovars were given month to month extensions of their safe haven visas. However, medical support and other facilities previously made available to the Kosovars were progressively reduced and eventually those who refused to return were placed in immigration detention centres (Taylor 2000: 79).

Australia failed to provide the Kosovars with an individual determination process, in breach of art 34 of the Convention.

> As a result of the communal nature of the letter writing which took place to request permanent status in Australia, some of the Kosovars may have refrained from divulging facts which, while relevant to the making of a treaty-based protection claim, may well have alienated other safe haven residents and/or members of the Albanian community in Australia (Taylor 2000: 80).

In several cases, Department of Immigration and Multicultural Affairs (DIMA) officers conducted an interview with the 'head of family' as part of the process of assessing the requests put to the Minister.

> The fact that only heads of family were interviewed raises serious concerns about the extent to which facts relevant to the making of treaty-based protection claims by other members of the family emerged through the interview process, and was in breach of art 34 of the Convention, which requires individual determination to occur (Taylor 2000: 80).

However, the main goal of repatriating the Kosovar refugees, other than approximately 200 who were granted visas on various grounds including medical, de facto as well as protection grounds, was achieved.

In contrast, the Kosovars in Canada were provided with the choice of either leaving or remaining. Immigration Minister Lucienne Robillard stated:

> Just like the refugees who have already arrived in Canada through a separate and ongoing family unification scheme, the airlifted refugees will enter the country on a Minister's permit, to expedite the process. But they will be immediately granted refugee status ... That means they will be able to benefit from the social assistance money and medical coverage extended to all refugees who live in Canada and will be eligible to apply for permanent residence in Canada, if they so chose (Thompson 1999).

Three chartered flights carried 868 of the refugees taken to Canada back to Kosovo by early August 1999 and the Federal Government promised to buy aeroplane tickets for anyone who wanted to return within the following two years (Lawton 1999). In early 2001, Canadian Immigration wrote to each of the Kosovars who had arrived under either the family reunion scheme or the Humanitarian Evacuation Program, outlining their options upon the termination of the Kosovo Project. For those who wished to repatriate, the Federal Government offered to pay for the costs of repatriation to Kosovo. For those who did not wish to repatriate, they were permitted to apply for 'landing' or permanent residency in Canada. Where

Kosovars made a formal application to apply for landing, their Minister's permit could be extended for an appropriate amount of time to allow for the processing of their application. Those who decided to stay in Canada were eligible to apply for Canadian citizenship once they had resided in Canada for three years as landed immigrants (Lawton 1999).

Despite this prima facie generous scheme of providing the option of applying for permanent status, welfare groups and NGOs criticised the Canadian scheme. Since 1995 the Federal Government charged every adult, including refugees, $975 to become a permanent resident (this 'right of landing' fee is commonly known as the 'head tax'). This also applied to the Kosovar refugees, so that if they wanted permanent residence, they either had to find $975 per adult or take out a loan. The refugees had to demonstrate the need for and ability to repay the loan, and were required to begin repaying the loan in monthly installments upon gaining employment. Despite this hurdle, it is clear that none of the Canadian returns to Kosovo were uninformed or involuntary, without individual determination having occurred, as in the Australian case.

Conclusion

Within the context of the current climate of restrictionism both in Australia and Canada, the implications of the response to the Kosovar crisis are wide ranging. The use of the safe haven visa in the case of the East Timorese later in 1999 and the Ambonese in 2000 suggests a manipulation by the Australian Government to avoid its Convention obligations.

Considerations such as these reduce the desirability of the safe haven visa as a future response to international humanitarian crises. While prima facie the policy provided safe haven from immediate persecution, the real Australian motivation was clearly self-interest and the desire to be seen as acting as a responsible international citizen. This is evidenced by the increasing restrictionism engaged in by the Australian Government since 1999. In regard to the Canadian response, the debates over recent immigration and refugee legislation, which greatly diminishes the rights of refugees in Canada and imposes restrictions on their ability to settle, suggests that although the response to the Kosovar response reached a much higher standard than Australia, in terms of international obligations and humanitarian treatment of those involved, the use of such a program in the future is highly questionable. With the withdrawal of financial assistance to those who arrived under the humanitarian evacuation program and family reunion programs in May 2001, many Kosovars were forced to decide whether they could afford to stay in Canada or whether they would have to return to Kosovo (CIC nd).

Whatever its future use, it is interesting to speculate on the reasons why the two countries, with their generous humanitarian records, vast resources and similar refugee determination structures, would chose to enact such different programs in reaction to the same situations, with diametrically opposed outcomes for the refugees involved. To some extent, one could compare the provision of temporary protection with the granting of a Minister's permit, for both were subject to the Minister's discretion. However, the difference in outcome for the Kosovar refugees clearly reflected the respective Governments' attitude both towards its international obligations and the function of its own refugee legislation and policy. While the Canadian response provided Minister's permits to facilitate fast arrival and permanent status in Canada, the intention of the Australian response was clearly the opposite — to limit the rights and abilities of those Kosovars selected to remain in Australia in any capacity. ●

References

Amnesty International (1998) *Human Rights Crisis in Kosovo Province: The Protection of Kosovo's Displaced and Refugees*, Document Series B#4 AI Index: EUR 70/73/98.

Birrel R and Birrel T (1981) *An Issue of People: Population and Australian Society* Longman Cheshire, Melbourne.

Bursten M, Hardcastle L and Parkin A (1997) 'Immigration management control and its policy implications' in Adelman H, Borowski A, Bursten M and Foster L (eds) *Immigration and Refugee Policy: Australia and Canada Compared, Vol. 1* University of Toronto Press, Toronto and Buffalo pp 187-226.

Campbell, Senator I (1999) Migration Legislation Amendment (Temporary Safe Haven Visas) Bill Second Reading, 21 April, p 3957 at <www.aph.government.au/hansard/index/htm>.

Carens, J (1991) 'States and refugees: a normative analysis' in Adelman H (ed) *Refugee Policy: Canada and the United States* York Lanes Press, Toronto pp 18-29.

Citizenship and Immigration Canada (2001) 'Operations Memorandum: Guidelines for the Termination of the Kosovo Project' 21 February at <www.cic.gc.ca>.

Citizenship and Immigration Canada (1999a) 'Kosovo Emergency Humanitarian Evacuation Program: Questions and Answers' April 30 at <www.cic.gc.ca>.

Citizenship and Immigration Canada (1999b) 'Operations Memorandum: Fast Track

Processing For Kosovo Refugees' April 30 at <www.cic.gc.ca>.

Department of Immigration and Multicultural Affairs (2001) *Discussion Paper: Consultations on the 2001-2002 Migration and Humanitarian Programs* AGPS Canberra.

Department of Immigration and Multicultural and Indigenous Affairs (1999) 'Fact Sheet 62: Operation Safe Haven: Kosovars and East Timorese' at <www.immi.gov.au/immigfactsheet 62>.

Galloway, D (1997) *Essentials of Canadian Law: Immigration Law* Irwin Law, Concord.

Hardcastle L and Parkin A (1994) 'Immigration policy' in Parkin A, Summers J and Woodward D (eds), *Government, Politics, Power and Policy in Australia* Longman Cheshire, Melbourne.

Hawkins F (1999) *Critical Years in Immigration: Canada and Australia Compared* New South Wales University Press, Kensington, NSW.

Head M (1999) 'The Kosovar and Timorese "safe haven" refugees: a test case for democratic rights' *Alternative Law Journal* No 6 Vol 24, 270-283.

Illingworth R (2000) 'Finding durable solutions: the refugee, the international protection system and Australia', paper presented at Conference on Refugee Issues, Perth, November 2000.

Immigration Act 1976 (Can) at <www.canlii.org/ca>.

Lawton V (1999) 'Kosovar refugees prepare to start new lives' *The Toronto Star* August 10 1999.

Malette C (1999) 'Refugees at Trenton don't like prospect of Kingston transfer', *Globe and Mail* July 2 .

Migration Act 1958 (Cth) at <www.austlii.edu.au>.

Migration Legislation Amendment (Temporary Safe Visas) Act 1999 (Cth) at <www.austlii.edu.au>.

Refugee Council Of Australia (1999) 'Return of Kosovars' Media Release 13 April.

Refugee Council of Australia (2000) *The Size and Composition of the 2000-20001*

Humanitarian Program: Views From the Community Sector February.

Schmeidl S (1999) 'Humanitarian intervention in the wake of the Kosovo crisis: Introduction' 3 *Refuge* 18, 1-4.

Senate Legal and Constitutional References Committee (2000), *Inquiry Into the Operation of Australia's Refugee and Humanitarian Program: A Sanctuary Under Review*, 28 June at <www.aph.gov.au/senate/committee/legcon_ctte/refugees/index.htm>.

Taylor S (2000) 'Protection or prevention: a close look at the temporary safe haven visa class' *University of New South Wales Law Journal* Vol 23 No 3, 75-102.

Thompson A (1999) 'Canada revives refugee airlift' *The Toronto Star*, May 1 1999.

United Nations (1951) *Convention Relating to the Status of Refugees* 28 July 1951 at <www.hri/ca/uninfo/treaties/83.shtml>.

United Nations (1967) *Protocol Relating to the Status of Refugees* 4 October 1967 at <www.hri/ca/uninfo/treaties/83.shtml>.