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## **GLOBAL MIGRATION PERSPECTIVES**

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**Beyond the bounds of responsibility:  
western states and measures  
to prevent the arrival of refugees**

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## **Global Commission on International Migration**

In his report on the 'Strengthening of the United Nations - an agenda for further change', UN Secretary-General Kofi Annan identified migration as a priority issue for the international community.

Wishing to provide the framework for the formulation of a coherent, comprehensive and global response to migration issues, and acting on the encouragement of the UN Secretary-General, Sweden and Switzerland, together with the governments of Brazil, Morocco, and the Philippines, decided to establish a Global Commission on International Migration (GCIM). Many additional countries subsequently supported this initiative and an open-ended Core Group of Governments established itself to support and follow the work of the Commission.

The Global Commission on International Migration was launched by the United Nations Secretary-General and a number of governments on December 9, 2003 in Geneva. It is comprised of 19 Commissioners.

The mandate of the Commission is to place the issue of international migration on the global policy agenda, to analyze gaps in current approaches to migration, to examine the inter-linkages between migration and other global issues, and to present appropriate recommendations to the Secretary-General and other stakeholders.

The research paper series 'Global Migration Perspectives' is published by the GCIM Secretariat, and is intended to contribute to the current discourse on issues related to international migration. The opinions expressed in these papers are strictly those of the authors and do not represent the views of the Commission or its Secretariat. The series is edited by Dr Jeff Crisp and Dr Khalid Koser and managed by Rebekah Thomas.

Potential contributors to this series of research papers are invited to contact the GCIM Secretariat. Guidelines for authors can be found on the GCIM website.

I earned my bread and ate it just like you.  
I am a doctor; or at least I was.  
The colour of my hair, shape of my nose  
Cost me my home, my bread and butter too.

She who for seven years had slept with me  
My hand upon her lap, her face against my face  
Took me to court. The cause of my disgrace:  
My hair was black. So she got rid of me.

But I escaped at night through a wood  
(For reasons of my mother's ancestry)  
To find a country that would be my host.

Yet when I asked for work it was no good.  
You are impertinent, they said to me.  
I'm not impertinent, I said: I'm lost.<sup>1</sup>

## Introduction

In last lines of his *Emigrant's Lament*, Bertholt Brecht contrasts two perspectives on experience of the refugee. In the first, the view of the person forced from his country, to be a refugee is to be "lost". The refugee is forced to eek out an existence in a place where the social and political markers that enable orientation in the world are alien and difficult to decode. In the second, the perspective of the receiving country, the refugee is an interloper, someone from whom any request is "impertinent", or to employ a word closer to the one Brecht uses in the original German, "shameless". He is someone who, betrayed by his own state, is forced to rely on the sufferance of others.

Fifty years since Brecht wrote, refugees in Western nations have gained very clear entitlements. Shamed by the experience of Jews who failed to find refuge from Nazi persecution in the 1930s, and desiring to reckon with rising numbers of people attempting to flee the Soviet Bloc in the aftermath of World War II, Western nations drafted and signed the United Nations Convention Relating to the Status of Refugees in Geneva in 1951.

In addition to defining in legal terms just what a refugee was—an individual with a well-founded fear of persecution on the grounds of nationality, race, political opinion, religion, or membership of a particular social group—the Convention carefully spelt out just what refugees were owed by the states that hosted them. Under the Convention, states were obligated to allow refugees to work, gain travel documents, travel freely, and a range of other things. Most importantly, states committed themselves under Article 33 (the non-refoulement clause) not to send refugees back to countries where they would face persecution. As the immigration lawyer David

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<sup>1</sup> Bertholt Brecht, "Emigrant's Lament", translated by Edith Rosevanne and reprinted in A. Motion, *Here to Eternity: An Anthology of Poetry*, Faber and Faber: London, 2002.

Martin has pointed out, to be recognized as a refugee is now to take on something of a privileged status (1988, 9). For refugees are entitled to a range of protections and rights that set them apart from normal immigrants.

If the claims of refugees can no longer be dismissed as impertinent, one could be forgiven for thinking that, at least in Western states, there are no refugees left to claim anything. Everywhere it seems they have been replaced by “asylum seekers”—mere pretenders to the title of refugee. Of course, in a neutral reading, the term asylum seeker simply refers to people claiming refugee status whose eligibility for asylum has yet to be decided. But it is not the neutral reading that has been taken up by anxious governments, the populist press, opportunistic governments, anti-immigrant groups, and large swathes of the public over the last fifteen years. It is rather a view in which asylum seekers are widely characterized as welfare cheats, competitors for jobs, security threats, abusers of host state generosity, and even as the killers of swans.<sup>2</sup>

Just how the asylum seeker has come to displace the refugee is something I will take up briefly below. But my main focus here will be less on why this transition has occurred than on what it has enabled states to do in policy terms. Few people could be unaware of the way willingness to implement tough measures on asylum has become a touchstone for Western governments of all hues recently. Buoyed by rising numbers of asylum seekers since the early 1980s, as well as widespread public concern over illegal migration, governments in countries as different as Germany and Australia, the US and Ireland, and Italy and the UK, have implemented a raft of measures designed to make life very uncomfortable for those applying for asylum.

While variations remain across countries, in the last decade those seeking refuge have increasingly faced the prospect of detention, denial of the right of work, limitations or exclusion from welfare benefits, diminishing rights to appeal negative decisions, and, ultimately, deportation. To be a refugee, it seems, may be to have access to important rights, but woe betide those who arrive in Western states claiming to be a refugee.

This paradoxical situation has not gone uncontested. Human rights groups, church leaders, academics, and some politicians have protested the restrictionist turn, challenging many aspects of it in the media and the courts. Harsh practices towards asylum seekers have been condemned as “deeply troubling” (World Council of Churches 2001) efforts to appease xenophobic and poorly informed publics. Concerns have been expressed that there is a “surging global rhetoric demonizing asylum seekers” (Dauvergne 2003) that may encourage growing levels of anti-immigrant hostility (Hansen and King 2000). Others worry that the retrenchment of the rights of those seeking asylum may ultimately erode the rights of citizens in liberal democratic states (Buchanan 2003).

Most concern with recent asylum practices has focussed on the treatment meted out to asylum seekers once they arrive. In Australia and the UK, the use of detention has led to public demonstrations and many legal challenges; detention centres for asylum

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<sup>2</sup> The British tabloid newspaper, *The Sun*, announced on its front page of 4 July 2003 that asylum seekers were responsible for stealing the Queen’s swans and barbecuing them for food. Despite the fact that no evidence was ever given to prove its truth, in an environment of general tabloid hostility to refugees, the story was widely repeated across London.

seekers like Woomera (in Western Australia) and Yarl's Wood (in Bedfordshire, England) have become household names, the former after inmates sewed their lips together to protest government policies. Other aspects of the treatment of asylum seekers, including more widespread deportation (as in the Netherlands), limitations on (or deprivation of) welfare payments (as in the UK) also generate vocal concerns by church and human rights groups, amongst others. The focus on how asylum seekers are treated upon arrival is understandable. Questionable uses of state power are more newsworthy and worrying when they occur under our noses, so to speak. I want to explore here another aspect of the architecture of exclusion, one that has generated less attention and controversy, but which, I think, poses an even more serious challenge to the institution of asylum.

My focus will be on the use of what have been called “non-arrival measures”. These measures can be differentiated from the other restrictive practices used in recent years by the fact that they aim directly to impede access to asylum. Not content with scaling back the rights of asylum seekers in the hope of deterring applications, states, through the use of visa regimes, carrier sanctions, and immigration pre-inspection, have moved to bar the arrival of foreigners who might claim protection. We have reached the *reductio ad absurdum* of the contemporary paradoxical attitude towards refugees. Western states now acknowledge the rights of refugees but simultaneously criminalize the search for asylum.

How could a paradox this sharp withstand public scrutiny? At least part of the answer lies in the fact that non-arrival practices have subtly transformed the nature of immigration control in recent years. They have shifted entrance decisions away from state borders to a range of new places (the high seas, consular offices, and foreign airports) and, in so doing, empowered new and sometimes unaccountable actors (airline officials, coast guards, and, ironically, smugglers and traffickers, etc). Most of the time, the paradoxical nature of state practice is thus conveniently out of the sight of domestic audiences. I want to bring it back into view.

My aim will be to highlight the techniques states use to prevent arrivals, as well as evaluate ethically how they are justified and what their significance might be. I will also propose ways in which non-arrival measures might be operated so that they are not radically in conflict with the provision of protection for refugees. But before embarking on these tasks, let me say a little bit more about the context in which these measures have developed.

### **The rise of the asylum seeker and the fall of the refugee**

When the 1951 Refugee Convention came into existence soon after the end of World War II, Western states had a relatively clear idea of who was a refugee and who was thus eligible to the entitlements of the Convention. The refugees that concerned Western states were ones congruent (in large measure) with their foreign policy objectives. From the early 1950s to the mid 1970s the status of refugee overlapped almost completely with that of defector. Refugees were those who fled communist states in Eastern and Central Europe.

These people not only could be relatively easily incorporated into Western countries hungry for large supplies of unskilled and semi-skilled labour, but their very desire for asylum provided much needed ideological evidence of the superiority of Western liberal democracy during the Cold War (Loescher 1993; Gibney 2004). The motivations of escapees from the Eastern bloc were, consequently, rarely the subject of close examination.

In the 1960s and 1970s, however, the face of the refugee began to change. The volume of people leaving European countries under communist control was far outstripped by refugees in Africa and Asia, emerging as a result of painful struggles for decolonisation. With over a million refugees in Africa alone by the early 1960s, the assumption that refugees were an intra-European phenomenon was dramatically called into question (Zolberg, et al. 1992). At the same time, other important changes were taking place.

After the onset of stagflation in the early 1970s, most Western countries wound down programmes for accepting immigrant labour, thus closing off the major avenue through which the denizens of the world's poorer countries could enter the West (Castles and Miller, 2003). Finally, beginning in the 1960s the contemporary revolution in transportation and communications took off. Relatively fast and cheap modes of intercontinental commercial transportation (particularly but not exclusively by air) had begun to come within the reach of much larger proportions of the world's population. The effect of these changes on asylum began to be felt in the early 1970s, with the growth of people from Africa and Asia claiming to be refugees arriving by jet in European capitals (Martin 1988).

How asylum was understood in the West was profoundly changed by these developments. In combination, they suggested the prospect of a truly "globalized" system of asylum seeking, driven as much by economic disparities between North and South, as by refugee generating events, strictly defined. Ugandan refugees were now able to claim asylum in London; Sri Lankans in Amsterdam; and Chinese in New York. Moreover, the prospects of improved access to asylum did not apply to refugees alone. Government elites expressed concern that North-South inequalities were becoming a reason for migration in their own right. The British Prime Minister, John Major, warned his EU colleagues in 1992, that "we must not remain open to all comers, simply because Paris, Rome and London seem more attractive than Algiers".

Some evidence for such a transformation could be found in a sharp rise in asylum applications. Whereas total asylum claims across Western Europe averaged no more than 13,000 annually in the 1970s, the annual totals had grown to 170,000 by 1985, and to 690,000 by 1992. Between 1985 and 1995, more than five million claims for asylum were lodged in Western states (UNHCR 1997). The numbers were, however, also buoyed by the end of the Cold War which, as well as lifting emigration restrictions on the citizens from Eastern and Central Europe and leading to the brutal war in the former Yugoslavia, deprived Western governments of their traditional rationale—the need to support those fleeing communist regimes—for offering asylum.

These changes, along with low rates of acceptance for refugee status in most European countries, transformed public and official attitudes to those seeking asylum.

Increasingly, the term asylum seekers became shorthand in public and media discourse for “economic refugees”, people taking advantage of the asylum route to escape normal immigration control; immigrants in pursuit of the benefits of welfare state at the expense of citizens; or, especially after September 11, 2001, as potential terrorists or security threats. Many of these views were ungenerous and a thin veil for xenophobic attitudes and political scapegoating. Yet they did point to real changes. Economic migration and movements of refugees fleeing conflict had become increasingly entangled (Van Kessel 2001); the incentives for people with implausible claims to asylum were strong given the chances of being removed if their claim was unsuccessful were exceedingly low (Gibney and Hansen 2003); and there were a number of high profile events in the US and the UK where asylum seekers were linked with terrorist activities (Zolberg 2001).

From the early 1990s, Western countries seemed to fall like dominoes to the problem of asylum: Germany in 1992/1993; the US in 1994/1995; Australia in 2001; the UK from 1999 to 2003. In each country a period of panic over rising numbers was greeted by tough new measures: Germany neutered its liberal right of asylum in 1993; the US introduced mandatory detention for asylum seekers until they could show a “credible fear of persecution” in 1996; Australia redrew its territorial boundaries for immigration purposes in 2001 in order to limit refugee claims; and Britain introduced a raft of measures including dispersing asylum seekers, increasing detention, paying welfare benefits in kind and reducing avenues of appeal from 1999 on (Gibney 2004). In the midst of these new restrictions, governments continued to reaffirm the moral importance of assisting genuine asylum seekers.

By the middle of the 1990s, the number of asylum applicants in Western countries had started to decrease. While approximately 675,000 people applied for asylum in the EU in 1992, the number of applications had dropped to 375,000 by 2001 (BBC News 2002). This fall was partly due to a reduction in the number of refugees worldwide, but not to this alone. The volume of asylum seekers across the West fell faster than the number of the world’s refugees (Gibney and Hansen 2005, 86). Through the use of new restrictive policy measures, the potentially liberating effects of globalization on intercontinental movement for those seeking asylum were undercut. Western states had, it seemed, limited the globalization of asylum.

### **Measures of exclusion<sup>3</sup>**

Measures to prevent people arriving at the borders of Western countries have been an important part of these new restrictions. The measures concerned have been many and varied. They have ranged from visa regimes, the use of which is almost as old as immigration control itself, to truly novel measures, like the excision of parts of state territory for immigration purposes, as recently used by Australia. Some measures have been implemented unilaterally; others are subject to coordinated action, often at the level of the European Union. I want now to look more closely at some of these measures, before considering the way in which states have attempted to justify them.

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<sup>3</sup> I borrow freely in this section from Matthew Gibney and Randall Hansen, “Asylum Policy in the West: Past Trends, Future Possibilities” (2003). I would like to thank Randall Hansen for permission to do this.

Perhaps the most ubiquitous tool used to prevent arrivals is the visa: a document that provides pre-arrival permission to enter a foreign country. The use of visas to control the movement of individuals from specific countries or categories of entrant (e.g., criminals, the penurious) can be traced back virtually to the beginnings of immigration control itself. In recent years, visa controls have been used directly to prevent the arrival of asylum seekers.

In the UK, for example, rising numbers of Tamil asylum seekers in 1987 led the government to require for the first time visas of all Sri Lankan nationals. While all Western states used visas against some groups of asylum seekers, variations abound in the extent of their usage. Australia, for example, requires visas of all foreign nationals. By contrast, Canada, the US and most EU states usually require visas from citizens of countries that produce large numbers of asylum seekers or illegal migrants (for example, Afghanistan, Somalia, Sudan and Iraq) (Sianni 2003, 26).

Under the Schengen Agreement, member countries of the EU have harmonized visa requirements in recent years, leading to a situation where the citizens of around 136 countries require visas to enter Europe (Sianni 2003, 26). It is a mistake to think that visas are only used to control asylum seekers and illegal immigrants. Concerns about security and the entry of individuals with criminal records have been other justifications for their use. But the growth in the number of countries to whom Western states apply visa restrictions since the 1980s, closely tracks rising concern over asylum.

Visas are most effective when they are used in conjunction with another tool of arrival prevention, carrier sanctions. Carrier sanctions are fines (or other penalties) imposed by states on airline, train and shipping companies for bringing foreign nationals to their territory without required documentation (e.g., a valid visa or passport). These sanctions effectively transfer migration management to private carriers, who, if they wish to avoid substantial fines, must make decisions on the possession and authenticity of appropriate documents.

As Elspeth Guild has recently observed, “between the possibility to seek protection from a foreign state and the individual fleeing persecution in his or her home state, the private transport company ...[has now been] inserted” (2004, 36). Refugees forced to flee their homeland often lack the time or ability to access required documentation. Profit-conscious airlines are reluctant to risk incurring fines for carrying those who may or may not be refugees, especially when legislation makes no express allowance for asylum seekers to be treated as special cases (Sianni 2003, 27).

The result is a barrier to the entry of asylum seekers which the state has no need directly to police. Since the late 1980s, carrier sanctions have been adopted by most Western states. Australia, Austria, Belgium, Canada, Denmark, France, Germany and Italy and the US impose fines ranging from Euro 100 for each individual brought to state territory (in the case of Italy) to a fine of around Euro 7000 (in the case of Germany for negligent carriers). A directive harmonizing carrier sanctions across EU states was formally adopted in June 2001.

The desire to prevent arrivals has also led immigration officials to operate beyond state territory. Pre-inspection agreements enable countries to post an advance guard of

immigration officers at the airports, train stations, or ports of foreign countries so that aspiring entrants can be screened for suitability and correct documentation before they arrive. By the end of the 1990s, the UK, Canada, the US, Sweden and France had employed immigration staff (“immigration liaison officers”) at selected foreign airports. Australia, the Netherlands, and Norway, on the other hand, have sent immigration officials abroad to train airline staff at foreign airports to recognize fraudulent or incomplete documentation.

Early in 2001, the EU established, on the initiative of Greece, a network of Immigration Liaison Officers to coordinate its immigration control activities. While the implication of such practices for asylum seekers is generally dire, few states have been as brazen as the UK in the use of such measures to stop those seeking protection. As I will discuss in more detail later, in 2001 it sent immigration officials to Ruzyně airport in Prague to prevent Roma from boarding airplanes to the UK where, it was believed, they would claim asylum.

While pre-inspection regimes extend migration boundaries, some states have also contracted their boundaries to evade asylum claims. Switzerland, France, Germany and Spain have all declared parts of their airports international zones. Such zones are established to function as areas in which officials are not obliged to provide asylum seekers or foreign individuals with some or all of the protections available to those officially on state territory (for example, the right to legal representation, or access to a review process) in order to enable speedy removal from the country. In a similar vein, the US has used Guantanamo Bay for the processing of Haitian and Cuban asylum claims in order to obviate the need to grant them the constitutional protections held by foreigners on US sovereign territory (Jones 1995).

Arguably the most radical development along these lines was the Australian government’s redefinition of the status of its island territories for immigration purposes. A 2001 law ‘excised’ Christmas Island, Ashmore Reef, the Cocos Islands, and other territories from its migration zone, so that the landing of asylum seekers on these territories did not engage most of the country’s protection obligations. While Australia’s obligations under the 1951 Refugee Convention still applied, the more extensive protections and entitlements associated with the country’s domestic asylum laws, including the right to seek review of negative decisions, were no longer available to individuals on these territories (USCR 2002).

Finally, states have resorted to interdiction to prevent asylum seekers from accessing national territory. While all interdiction aims to prevent asylum seekers from reaching the territory (or waters) of the repelling country, the implications for asylum seekers differ between cases. In some cases, asylum seekers are indiscriminately turned back to the country from which they departed; in others, some attempt is made to separate out refugees through a preliminary screening procedure, thus reducing the chances of *refoulement*.

Throughout the first half of the 1990s, US policy towards Haitian boat people moved back and forth between these two responses (Perusse 1995). In other cases still, interdicted asylum seekers are taken to an off-shore territory or to a safe third country with or without the intention of resettlement in the interdicting country if determined to be refugees. Australia used the latter response during the *Tampa* incident of 2001.

The island nation of Nauru was enlisted to host asylum seekers while their eligibility for refugee status was assessed (Howard 2003). In a scene worthy of Jean Raspail's *Camp of Saints*, the UK government, faced with rising numbers of asylum seekers in 2001, prepared a plan that considered deploying naval carriers in the Mediterranean to apprehend illegal immigrants to "deliver a radical reduction in the number of unfounded asylum applications" (*The Guardian* 2002a). The announcement had, to be sure, the flavour of a publicity stunt for the consumption of the highly restrictionist British electorate. But the government's willingness even to float the idea illustrates how the bounds of acceptable discourse and practice has been shifting.

The list of measures I have outlined above hardly constitutes a complete inventory of non-arrival practices. I do not have the space here for such an accounting and, anyway, new techniques are constantly emerging to satisfy what sometimes seems like an insatiable appetite for control. The list does however give an insight into what those who wish to claim asylum in the West are now up against. A globalized world, in which opportunities of intercontinental movement have increased, has been met by an expansion in the sphere in which entrance controls work.

The traditional view of entrance control as something operated at the state's territorial borders, train stations and airports by domestic immigration officials increasingly appears quaint and outdated. It is now *beyond* the boundaries of the state, on the high seas, in foreign countries, or in vaguely defined territories (like Australia's excised zones) that exclusion from admission occurs.

The implications of this development for the institution of asylum are baleful. Efforts to prevent arrivals strengthen the hand of the state *vis à vis* actors that might normally be expected to publicize and challenge rights violations. With the simultaneous export and dispersal of immigration control, the exercise of power becomes extremely difficult for domestic groups to track and oversee. Try as they might human rights groups lack the resources to observe what goes on at airport counters across the world, let alone to access US Coast Guard cutters or British naval carriers, or the visa sections of foreign consulates. Courts may lack the information, the jurisdiction or the legal basis to question off-shore practices that occur at one (or two) steps remove from actual government officials.

Asylum seekers who never arrive cannot recount their experiences. With only mild exaggeration one might say that a thousand little Guantanamos have been created in the last two decades<sup>4</sup>: centres of power where states (and their formal and informal agents) act free from the constraints imposed on their activities by the courts, international and domestic law, human rights groups, and the public at large.

When asked in 2002 whether there existed any legal avenues by which legitimate refugees might enter the UK, the minister of state for immigration, Lord Rooker, answered bluntly, "No" (House of Lords, January 23, 2002). One recent estimate claimed that in Germany access to asylum is for 98 per cent of entrants impossible

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<sup>4</sup> If this analogy seems extreme, it is important to remember that the use of the military base at Guantanamo Bay as a holding place for aliens in US custody began when asylum seekers from Haiti and Cuba were sent there in the early 1990s. Criticisms of the territory as a lawless zone where foreigners lack the kinds of protections they would have on US soil were aired long before fighters from Afghanistan arrived in January 2001. See, for example, Jones (1995).

without entering illegally and concealing one's access route (Bosswick 2000, 51). Those desperate for protection are driven to take even great risks to evade controls. One recent report found that, on average, 4000 asylum seekers drown at sea every year (*The Guardian* 2004, 18). Many more seek help with entrance from the one group of entrepreneurs have profited (albeit illicitly) from the changing boundaries of immigration control, smugglers and traffickers.

### **Justifying exclusion**

Despite these efforts to export border control, non-arrival practices have occasionally received great publicity. When the Australian government refused to let a Norwegian ship, the M.V. *Tampa*, land on its territory in August 2001, a storm of controversy was unleashed; more recently, in 2004, George W. Bush's statement that the US "will turn back any [Haitian] refugee that attempts to reach our shore" generated an outcry from human rights organizations (Human Rights Watch 2004). Because the blocking of asylum seekers cannot always be hidden from view, governments have had to offer some justifications for non-arrival measures—ways, that is, of addressing the paradox of simultaneously supporting asylum but denying access to asylum seekers. I want now to consider the adequacy of three of the major justifications offered in defence of non-arrival measures.

#### *Beyond the bounds of responsibility*

The most direct route to justifying non-arrival measures is to claim that states have no responsibilities to guarantee the protection of refugees who have not reached their territory. Implausible as this claim might seem, the policies of Western states sometimes appear to be built on this premise. Furthermore, governments have recently argued that it accurately encapsulates their legal responsibilities.

For example, in a 1994 case before the US Supreme Court, *Sale vs. Haitian Centers Council*, the US government claimed that its practice of intercepting boatloads of people fleeing Haiti (in the midst and aftermath of a military coup) in international waters and returning the occupants (without assessing their claims to asylum) to Haiti was not a violation of the 1951 Refugee Convention or international law generally. In a controversial decision, the Court accepted (by an 8-1 margin) the government's case that the US government's duty not to return refugees (the *non-refoulement* principle) applied only to refugees within US territorial waters.

Under slightly different circumstances, deliberate action to prevent the arrival of asylum seekers by the UK has also passed judicial muster. In *European Roma Rights Centre & others vs. The Immigration Officer at Prague Airport* (2003) in the UK Court of Appeal, the British government successfully defended its practice of stationing immigration officials at Prague Airport in the Czech Republic in order to prevent Roma boarding flights to Britain where, it was believed, they would claim asylum. In this case, the judges reasoned that the impediments were lawful in part because the 1951 Refugee Convention contains "no right of access to [the UK]... or any other country to claim asylum" (s.37).

Moreover, since the Roma concerned had not been able to leave their country of residence, the non-arrival practice in question could not be said to involve “returning” refugees, and thus could not be considered a violation of the *non-refoulement* principle. The Convention, the judges found, is concerned “not with permitting access to asylum seekers but with the non-return of those who manage to gain such access” (s.37).

Morality is, of course, not the same thing as law. And I shall not enter into the issue of whether judges were right (in the law) to rule in the way they did. The question I want to ask is whether this (supposed) legal limitation on state responsibilities coincides with a moral one. Can a state evade moral responsibility for refugees simply by preventing their arrival? To answer this question it is helpful to begin by considering from where the responsibility to assist refugees comes.

Many observers have argued that the duty to aid refugees can be derived from a more general humanitarian responsibility binding on everyone to provide assistance to individuals in need when the costs of doing so are low (Grotius 1925; Rawls 1971; Walzer 1983; Gibney 2004). In the case of refugees, this general duty falls to states because only they control the good that refugees are in need of—access to a secure and protected territory. Most of the early theorists of international law believed that a state’s right to sovereign control carried with it a correlative duty to provide asylum to refugees (Kant 1991; Grotius 1925; Vattel 1916).

Yet there are many states and many refugees. Unless an account of responsibilities can show how a *particular* state incurs an obligation to a *particular* refugee, one is left in a situation where refugees are the responsibility of all states in general, but no state in particular. The first natural law theorists of asylum, writers such as Grotius, Kant and Vattel, seemed to have assumed that geographical proximity offered an answer to this question.<sup>5</sup> A state had a duty to aid those refugees who arrived at its own borders. A similar assumption was arguably also built in to the 1951 Refugee Convention. The obligation not to return (*refouler*) refugees was commonly interpreted as applying to those refugees who were at or in a particular state’s territory. Neither the early theorists of natural law, nor the Convention’s framers, could have foreseen that this allocation mechanism might be evaded by measures to obstruct arrivals.

Non-arrival measures have rightly been criticized because of the appalling implications they have for the institution of asylum. If every state operated the way Britain and the US claim to be legitimately entitled to in relation to all refugees, access to asylum would no longer exist (except perhaps through resettlement programmes). Dire as this situation would be, it is hard to blame states if one believes that it is the location of a refugee at (or within) the borders that creates a special responsibility between a particular state and a claimant for asylum. But should we accept this premise?

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<sup>5</sup> This seems, for example, to be the implication of Kant’s statement in 1791 that foreigners in need of “resort” are “entitled to present themselves *in* the society of others by virtue of their right to communal possession of the earth’s surface” (Kant 1991, 105-106; my emphasis). Kant did not address the question of the morality of measures that prevent needy individuals from *accessing* “the society of others”, though such a right seems to follow from his statement.

I think that territorial location is best viewed simply as a shorthand way of expressing a broader idea: that we have a special responsibility to those whose fate lies uniquely<sup>6</sup> in our hands. Obviously, a state has the fate of refugees in its hands when they arrive on its territory (what else could sovereignty mean?) But the relationship between territorial location and controlling a refugee's fate is a contingent one, especially in a world where states are increasingly able to project their power across borders. It is significant that the most influential recent defence of the *non-refoulement* principle (written in 1983 before the introduction of most non-arrival measures) argues that what is wrong about returning refugees is that it involves the state using "force against helpless and desperate people" (Walzer 1983).

While its author, Michael Walzer, assumes that the refugees concerned will be at the borders of the state, the grounds he gives for the principle are detachable from this assumption. States also use force on "helpless and desperate people" when they intercept boats on the high seas or block asylum seekers (with the help of local police) from boarding flights in foreign airports. One can go even further. It is obvious that when a state uses physical force against asylum seekers it controls their destiny, and thus ought to shape it in ways that are morally defensible. But it is not only through force that a state controls a refugee's fate. When it considers the visa application of a foreigner in need of refuge a state is equally (and presumably, uniquely) implicated in the person's plight. It makes little difference that the refugee's life chances are being determined by a pen rather than a gun.

If we accept, as I think we should, this broader account of how responsibilities to refugees are formed, then the act of exporting immigration control cannot offer states an escape route from their moral obligations.<sup>7</sup> As states move immigration control outwards across the globe, they become implicated in new ways in the fate others, and in ways that it is wrong for them to ignore. The irony of this situation has recently been expressed by the political theorist Joseph Carens: "if we deliberately take steps to make it difficult for potential legitimate asylum claimants to reach our shore", we establish the very "moral connection we seek to prevent" (1992, 39).

### *Preventing abuse*

A second and perhaps less dramatic claim is that non-arrival measures prevent "abuse of the asylum system and illegal migration".<sup>8</sup> It is often claimed that public confidence in asylum requires a reduction in the number of "bogus asylum seekers" or economic migrants arriving to claim protection. Many scholars and refugee activists

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<sup>6</sup> In using the concept of "uniqueness" I wish merely to capture the fact that the relationship must be one that differentiates the state concerned from other states (in its paradigmatic form, the refugee is our responsibility because he or she is at *our* border).

<sup>7</sup> I do not have the space here to consider the important question of whether different degrees (or modes) of moral connection might give rise to different degrees of responsibility to address a refugee's plight (for example, whether in some circumstances states might be obliged to allow a refugee access to asylum on its territory, but in other cases required only to ensure that a refugee is not returned to face persecution).

<sup>8</sup> The Government spokesman in the House of Lords, Lord Falconer, explained that "reducing abuse of the asylum system...is not just about legislation. We are [he said] making progress in moving border controls to the Continent, in extending the use of biometrics on visas and ports, and in agreements with other countries to return failed asylum seekers". (House of Lords, 15 March 2004).

have argued that allegations of asylum abuse are greatly exaggerated by populist media outlets and self-serving politicians (Schuster 2003; Refugee Council 2004). In the UK, for example, where cries of abuse have been widespread, around one-third of asylum seekers were given Convention refugee status (or another humanitarian status) in 2002 (Refugee Council 2004).

The accuracy of the characterization is also called into question by the countries from which most asylum seekers arrive. Across Europe since the early 1990s, the largest groups of asylum seekers have consistently come from the former Yugoslavia, Afghanistan, Iraq, Iran, Romania, Turkey and Sri Lanka, countries notable for civil conflict or widespread human rights violations (UNHCR 2000, 325). Of course, not everyone leaving these countries is a refugee. But lack of success in gaining refugee status is as often attributable to the narrow interpretation of eligibility for refugee status as it is a desire to abuse asylum systems.

There are, then, good reasons, for being sceptical about abuse claims. Nonetheless, let's put these doubts aside for the moment and take the argument at face value. Can non-arrival measures be justified if they prevent asylum abuse? Visa regimes, carrier sanctions, and pre-inspection at foreign airports all work to prevent the arrival of genuine refugees every bit as much as aspiring immigrants with dubious intentions.

While it is not known how many actual refugees are prevented from accessing asylum by these measures, the effects of non-arrival policies are in themselves completely indiscriminate. Most refugees who do arrive at Western states now are forced to break the law to do so, usually with the help of traffickers or smugglers (Brolan 2003; Morrison & Crosland 2001).<sup>9</sup> The best that could be said in defence of states is that refugees are a kind of “double effect”<sup>10</sup> resulting from the legitimate targeting of economic migrants. They are unintentional casualties in a war to preserve asylum.

But if this is true, one would expect states concerned about asylum to strive to minimize the harm done to refugees, just as we expect civilian casualties to be minimized by states in a time of war. In both cases, the security and bodily integrity of innocent people is on the line. What steps might be taken? The European Council on Refugees and Exiles has recently suggested that states make people fleeing countries marked by “civil wars or systematic abuses of human rights” exempt from visa requirements to enable them to access European countries (Canadian Council for Refugees 2003, A9).

Another, different, possibility is for the overseas embassies of Western countries to process (or pre-screen) asylum claims *in situ*, in the refugee's country of origin; asylum seekers with a credible claim would then be given a visa to travel to Western countries. This latter suggestion is a poor substitute for direct access to another country. Refugees often have to flee their country and have no time patiently to wait

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<sup>9</sup> The 1951 Refugee Convention requires (art. 31) that states not “impose penalties, on account of their illegal entry or presence, on refugees”, as long as they come directly from a country where their life or freedom is threatened and present themselves to the authorities giving good cause for their illegal presence. Arguably, many recent practices implemented by government (including mandatory detention in Australia and the US) are in contravention of this article.

<sup>10</sup> For a discussion of the idea of the “double effect”, see John Finnis (1977, 141-145).

out bureaucratic formalities. Yet such a move would at least improve access to protection for some.

Few states have made any real attempt to disentangle refugees (or those with plausible asylum claims) from the web of restrictions. No state that I am aware of applies a general policy of allowing refugee producing countries visa-free access. Many European countries, including Belgium, Germany, Finland, Spain and Sweden do not allow asylum to be claimed at their embassies (Noll 2000, 181). Indeed, the claim that refugees constitute unintended consequences in efforts to reduce abuse seems an overly generous interpretation of the Western state behaviour.

The implementation of visa restrictions closely tracks rising refugee numbers in many countries. Britain, for example, introduced visas for Sri Lankans in 1987, people from the Former Yugoslavia in 1992, and Sierra Leoneans and citizens of the Ivory Coast in 1994 (Stevens 2004, 92-93). A visa regime was implemented for Zimbabweans in 2003, over the public protestations of UNHCR (UNHCR 2004). Other countries, including Canada, Germany, and Australia (which, as I noted, has a visa requirement for all foreigners), have equally dubious track records. Non-arrival measures may aim to prevent the arrival of economic migrants, but clearly that is not their only aim.

Another reason the “abuse defence” does not ring true is because governments do so little to inform the public of the downside of non-arrival measures. One would expect that a government reluctantly pushed into using these measures would be keen to highlight the way they harm genuine refugees. After all, even a highly restrictionist public might be prepared to tolerate a little “abuse” in their asylum system, if they knew the price paid by refugees for stamping it out. But in their eagerness to impress us with falling asylum numbers, governments edit out of their public pronouncements the consequences of non-arrival practices.<sup>11</sup> The widespread public assumption that there is nothing inconsistent about providing asylum for real refugees and strict exclusionary measures for bogus ones is thus never called into question.

### *Rectifying injustice*

A third and final justification for non-arrival measures has been to prevent countries becoming unfairly burdened. As asylum numbers have risen in recent years, politicians in countries like Germany, Britain and Australia have complained that their country is taking more than its “fair share” (Oliver Letwin quoted in *The Guardian* 2002c) of those in need of protection, pointing to the need for “more just” (Manfred Kanther quoted in *Immigration Laws* 1994) arrangements. These feelings of injustice commonly reflect more widespread public concerns, and fuel the desire to prevent the arrival of asylum seekers.

There are indeed substantial differences in the number of asylum seekers and refugees that states host. Under current international law, the state responsible for protecting (or at least not returning) refugees is determined primarily by where an asylum seeker

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<sup>11</sup> This point is, I think, reinforced by the way the British government now publicly sets targets for the reduction of asylum seekers numbers. If the number of refugees needing protection is determined by world events (wars, human rights violations), how can any state know in advance the number of asylum seekers it will need (or be required by law) to accept? See *The Guardian* (2003).

arrives to claim protection. This, in turn, is influenced by a range of factors including a country's proximity to a region of refugee outflow, its reputation for welcoming immigrants, etc. As a result, some countries prove more popular destinations for asylum seekers than others. For example, Germany's liberal asylum laws, long land borders, and large population of ethnic Yugoslavs, made it a common destination for refugees fleeing events associated with the break-up of Yugoslavia in the early 1990s (much to the chagrin of the Germany's leaders). Similarly, Cuban and Haitian asylum seekers and refugees have tended to head for the US and a range of other countries in the Caribbean region (like the Dominican Republic), largely because of proximity, the presence of compatriots, and because other avenues for asylum are not open.

Are these inequalities across states unjust? There are a number of different standards for assessing asylum "burdens".<sup>12</sup> In terms of raw volume, Germany and the US are the only wealthy Western countries in the world's top ten refugee hosting states. All the remaining countries (with one exception) are in either Africa or Asia. If, however, one factors in other considerations, such as the proportion of refugees in relation to GDP, or the size of the national population, Western states have even less to complain about. According to UNHCR figures, in terms of proportion of GDP or of population density, only one wealthy industrial society makes it to the top ten most burdened states. Moreover, adjusted for GDP, the list of largest refugee hosting countries reads like a roll call of some of the world's poorest (and in some cases, most unstable) states: Armenia, Guinea, Tanzania, DRC, and Congo (figures cited in Castles and Loughna 2003).

This is not to say there is no basis to some of their complaints. The UK and Germany have had fairly high asylum levels compared to other European countries. Germany, for example, took around two-thirds of all asylum seekers arriving in EU states throughout the 1990s (Gibney 2004). Yet, if these countries have legitimate complaints against their neighbours, they still appear to be in debt to states in Africa and Asia. Indeed, when refugees leave refugee camps in Iran and Pakistan to travel to wealthy western states, like Australia, considerations of interstate justice (the equalization of burdens across states) would appear to require that they be allowed in.<sup>13</sup>

The discussion so far suggests that, considered globally, Western states are going to find it difficult to defend non-arrival measures on the grounds of justice. But the case against these measures is even stronger because their use tends merely to exacerbate current unfair distributions. Non-arrival measures lock refugees into their region of origin by ensuring that they do not have the documentation or permission (e.g., visas) necessary to leave. As most refugee-producing countries are in the South, and as these are already the countries with the highest refugee burdens, non-arrival measures merely cement existing injustices. To paraphrase the words of one recent observer, they contribute to "burden shifting" rather than "burden sharing" (Guy 1998).

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<sup>12</sup> I am, of course, assuming here that refugees constitute a "burden" for the states that receive them. This assumption is not meant to deny the important economic, social and cultural contributions that refugees can make to their host countries.

<sup>13</sup> In practice, however, Australia has claimed bitterly about what it considers "secondary movers" and used them as part of its justification for restrictive asylum measures. See Human Rights Watch (2002).

## Humanizing non-arrival measures

I hope now to have shown that the major justifications for non-arrival measures used by states do not resolve the paradox I identified at the beginning of this chapter. States have moral duties to asylum seekers that they have prevented from arriving at their borders. Furthermore, non-arrival measures promote neither the interests of genuine refugees, nor lead to greater justice in the provision of asylum across states. Yet it might be said that there is another defence open to states: dismantling non-arrival measures would lead them to incur costs in excess of what could be demanded by the humanitarian principle. States have tended not to emphasize infrastructural, social and political costs as a justification for recent restrictive practices. They have largely preferred to concentrate on questioning the integrity of claimants for asylum. Might it be, however, that getting rid of non-arrival measures is above and beyond the call of moral duty?

While we cannot know for certain what consequences would result from the demise of non-arrival measures, there is a real possibility the number of asylum seekers would rise substantially (if not, why should we be so concerned with these measures?<sup>14</sup>)

There are a number of reasons for this: demand for entry into Western states currently far outstrips the availability of legal places; most Western states have highly unsuccessful at removing failed asylum claimants, more inclusive policies might thus serve as a magnet for people with weak or baseless claims; and it is unlikely that other states could be brought to agree on simultaneously dismantling control measures. If numbers did rise substantially, so would asylum processing costs and pressure on public infrastructure (schools, housing, health services, etc.) Public anxiety over asylum and immigration would also be likely to increase, especially if the growing number of entrants appeared uncontrolled or demand driven.

Of course, before most of these costs began to be felt, relaxed control measures would have become politically unfeasible. Any government in the current political environment presiding over large, short-term increases in asylum numbers would find itself dangerously unpopular with large sections of the electorate.

This is, it should be stressed, only one possible scenario for what would happen if non-arrival measures were dismantled. It is, however, the outcome that most concentrates the minds of governments in Western states, and it is a highly plausible one. It suggests that possibility of an impasse: non-arrival measures mock the principle of asylum, but states have powerful reasons not to dismantle them.

Yet even if we accept that this scenario is credible, there are good reasons for believing that things are not as deadlocked as they might at first seem. To begin with, the “costs” faced by states are partly a social and political construct that governments play an important role in shaping.<sup>15</sup> For example, public attitudes towards asylum

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<sup>14</sup> One reason might be that they force those seeking asylum into using more dangerous routes to bypass control measures to enter the West.

<sup>15</sup> I elaborate on this issue in Gibney (2004, 243-249). There I argue that the principle of humanitarianism requires Western states to work towards creating a domestic and international environments where the amount of protection available to refugees at “low cost” will be maximized.

seekers (and thus the likelihood of social conflict) can be influenced by the way political leaders characterize asylum seekers. When exaggerated, alarmist and, frankly, racist portrayals of asylum seekers in the electronic and print media are reinforced (or even left unchallenged) by political elites, it is not surprising that governments find themselves dealing with intolerant publics. In a different vein, governments may have some control over demand for entry from economic migrants.

Policies that increase economic opportunities and living standards in poorer countries can address people's need to migrate, and thus pressure on asylum systems from those with weak claims. No government, it is true, has the power in the short-term simply to eliminate the costs associated with the entry of asylum seekers. The changes mentioned will take long-term commitment to bear fruit. Nonetheless, an understanding of costs as constructed provides a reason for not succumbing to fatalism in terms of what states can do.

Another reason to be dubious of the description of deadlock is that it relies on a dramatic contrast between the current state of affairs of growing use of non-arrival measures and an alternative scenario involving their complete abolition. At the risk of stating the blindingly obvious, there may be choices falling between these two options: ways of operating non-arrival measures that ensure that avenues to asylum are kept open.

I have already hinted at some of the elements of a compromise. States could, first of all, allow refugees to apply for asylum at their foreign consulates. This would enable those prevented from leaving their state still to seek protection.

Since this will not be a suitable option for many refugees, Western states should, secondly, consider supporting, through financial and logistical help, the establishment of asylum processing centres in safe countries within major regions of forced migration outflow. These centres would allow those facing problems reaching Western states an opportunity to present their case for entry in a secure environment without having to make long, difficult and dangerous journeys. A Western state could then arrange to resettle (with or without the help of other states) those who receive refugee status.<sup>16</sup>

It is important to emphasize that I am *not* suggesting the establishment of places to which asylum seekers who reach Western states could be deported. This would simply add another non-arrival measure to the mix (albeit one that held out the opportunity of eventual asylum). Rather, I am proposing sites that would provide a non-compulsory alternative for those asylum seekers who otherwise would incur the expense and danger of long voyages to Western states with the dubious help of smugglers or traffickers. There are benefits to Western states, too, in this proposal. Refugees would arrive pre-screened, and the problems associated with the arrival of asylum seekers with weak claims would be reduced.

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<sup>16</sup> It is undeniable that off-shore processing raises difficult legal and ethical problems: Are the countries proposed really safe and secure sites for asylum seekers? What will happen to those who make unsuccessful asylum claims? Under what conditions will those applying for asylum be kept? But the benefits of allowing many refugees to seek asylum in the West without having to travel intercontinentally provide strong reasons to look for ways around these difficulties, if at all possible. For a discussion of some of these questions, see Loescher, et al. (2003).

Thirdly, states should waive visa requirements on those countries that face serious human rights violations and produce refugees on a large scale. In order to achieve this task, the international refugee organization, UNHCR, could provide a regular list of eligible countries, adjusting it to reflect the situation therein. States could, if they agreed, also construct principles for the distribution of responsibilities between themselves. They might decide, for example, which state would create visa openings for which refugee generating country (say, the UK for Somalia, or France for Algeria).

These openings could reflect historical or cultural affinities between the refugees and the potential host state. They could also be operated so as to acknowledge considerations of fairness in the distribution of refugees and asylum seekers between participating states (by ensuring proportional numbers of asylum seekers entered participating states). The new attitude to visas would not mean that everyone who arrives with a visa would be granted asylum. But it would provide more people currently excluded by non-arrival measures with a chance to claim refugee status.

Taken together these three changes would challenge the most morally dubious aspects of non-arrival measures. Their implementation would not require a commitment to the complete dismantling of non-arrival measures with the full (social, political and financial) costs of such a move. Those in need of asylum would be provided with new avenues for access to the West. States would probably find themselves facing *more* refugees and claimants for asylum than they current do (that, I think, is the point!) But they could be reasonably confident that those arriving would be refugees because their status was determined before stepping on the state's soil, or because they would come from countries well-known to be refugee source countries.

Rather than building up walls that indiscriminately block unwanted economic migrants from poor countries, asylum seekers and refugees, Western states would have established something more akin to a sieve<sup>17</sup>: control procedures that offer states the chance to sift through aspiring entrants before arrival to identify refugees and asylum seekers. The paradox at the heart of current Western policies—the simultaneous recognition and undermining of the rights of refugees—would thus be lessened, if not eliminated.

## **Conclusion**

Is there any reason to believe that states would actually make these changes? If states currently have a powerful interest in minimizing the number of people claiming asylum, why should we expect this to change?

There have been numerous attempts to explain why states have adopted restrictive policies towards asylum seekers in recent years. Some observers have stressed the diminishing value of refugees with the end of the Cold War (Loescher 1993; Chimni 1998), others have emphasized popular pressures for restriction stemming from changes in the way refugees arrive at state territory (Gibney 2003), and others still

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<sup>17</sup> I have (shamelessly) stolen this excellent simile from Elisabeth Guild (2004, 41), who uses it to make a somewhat different point about EU border controls.

have pointed to the desire of political elites to distract the public's attention from their limited ability to control the economic forces central to the destiny of the citizens they rule over in a globalized world (Turton 2002; Bauman 1998). While each of these explanations helps us to understand restrictionist pressures, they offer little insight in themselves into why measures to control asylum have taken the *form* they have: why, that is, states have increasingly expanded border control outwards.

The answer to this question, I believe, lies in large part in the desire of Western states to escape constraints on their treatment of asylum seekers within their territory imposed by domestic actors: the courts, non-governmental organizations, human rights groups, and sections of the public. These actors are, along with liberal norms these groups articulate and appeal to, part of a broader "culture of rights" that has developed in Western states, particularly since 1945.

This culture has not prevented harsh measures being implemented on those asylum seekers who have arrived. But it has slowed down their implementation, and made practices such as detention, deportation, and the removal of welfare rights, extremely expensive for states and liable to legal challenge under domestic and international law (Gibney 2003a). The exportation of border controls is thus a kind of backhanded compliment to those domestic actors that have challenged the restrictionist direction of policies toward asylum seekers.

If this is an accurate explanation for the proliferation of non-arrival measures, then the way forward for those interested in protecting refugees seems clear. They need simultaneously to spread the culture of rights abroad and to work to create a political environment more receptive to asylum seekers and refugees at home. This may be a clear task but no one could pretend it is an easy one. Human rights organizations, the courts, and national media often lack the resources, authority or ability to act beyond the territory of their own state. Public discussions of asylum and migration, more generally, often degenerate into prejudice, political manoeuvring and unfounded anxiety. I have no special insight into how these problems might be resolved. But I do believe that a key step in the creation of this culture both abroad and at home must involve the relatively simple step of shining the light of publicity on what states do beyond their borders.

Publicity may not in itself offer an answer to key social and political questions. It provides no way of resolving the genuine difficulties states face in responding to forced migrants in a world characterized by grave injustices and huge inequalities. But by revealing the inconsistencies between how refugees are treated at home and abroad; following the transfer of power from state officials to private actors; and tracking the fate of those individuals turned away or prevented from entering, it can inform us of the hypocrisies and true costs of current courses of action. Forty years on from Brecht's observations, the refugee has once again become lost—this time from our sight. Exposing the reality of non-arrival measures may be one way of bringing the refugee back into view.

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