BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 18 2000 NUMBER 2

CONTENTS

Articles

WELCOME TO THE BERKELEY JOURNAL OF INTERNATIONAL LAW STEFAN A. RIESENFELD SYMPOSIUM 2000
Jawad Salah 205

PRESENTATION OF THE FIRST STEFAN A. RIESENFELD SYMPOSIUM LECTURE AND MEMORIAL AWARD
Lauren Gerber 208

ANNOUNCEMENT OF THE STEFAN A. RIESENFELD SYMPOSIUM AND MEMORIAL AWARD
Damir Arnaut 212

STEFAN A. RIESENFELD SYMPOSIUM KEYNOTE ADDRESS- SECURING INTERNATIONAL PEACE: LEGALITY VS. POLITICS
Muhamed Sacirbey 215

THE KOSOVO CRISIS: IMPLICATIONS OF THE RIGHT TO RETURN
Eric Rosand 229

THE CHECHEN REFUGEES
Johanna Nichols 241

A HALF-CENTURY OF INTERNATIONAL REFUGEE PROTECTION: WHO'S RESPONSIBLE, WHAT'S AHEAD
Bemma Donkoh 260

THE STRUGGLE FOR PROTECTION OF THE RIGHTS OF REFUGEES AND IDPS IN AFRICA: MAKING THE EXISTING INTERNATIONAL LEGAL REGIME WORK
Zachary A. Lomo 268

STEFAN A. RIESENFELD SYMPOSIUM CLOSING ADDRESS: LESSONS FROM THE PALESTINIAN DIASPORA
Khalid Abdallah 285

STEFAN A. RIESENFELD SYMPOSIUM AND MEMORIAL AWARD - SPRING 2000
..... 289

Berkeley Journal of International Law

Volume 18 | Issue 2 Article 1

2000

Welcome to the Berkeley Journal of International Law Stefan A. Riesenfeld Symposium 2000

Jawad Salah

Welcome to the Berkeley Journal of International Law Stefan A. Riesenfeld Symposium 2000

I.

OVERALL WELCOME BY JAWAD SALAH, SYMPOSIUM DIRECTOR, BERKELEY JOURNAL OF INTERNATIONAL LAW

On behalf of the Berkeley Journal of International Law, good evening, and welcome to the first Stefan A. Riesenfeld Symposium. My name is Jawad Salah and I am the Director of the BJIL symposium this year. We are delighted to have you all here. Tonight's keynote address opens what we are confidant will be an engaging and informative symposium about an unfortunately all too timely issue. The twenty-first century has inherited in the area of human rights the history of this last marvelous and terrible century. Humanity has advanced in at once unimaginable leaps but has not yet overcome its tragic capacity for cruelty and, too often, profound self interest and disregard by its individuals of the rights of their fellow men and women and, sadly, children. From Africa to the Middle East and the Indian sub-continent, to the Balkans and Eastern Europe; from Latin America and countless other places, nearly fifty-two million people still suffer under the status of refugee or internally displaced unable, in most cases, to enjoy basic human rights that should be granted to all. And though IDPs surely suffer no less than refugees, most are considered ineligible for international refugee aid.

Our goal in this symposium is to enrich the debate in this important area of international law and human rights, the fate of those internally displaced persons and refugees, who are a constant reminder of the sad effects of conflict and gross violations of human rights across the earth and of our collective unmet obligations towards them. We must question the proper methodology for resolving refugee and IDP issues. We must ask whether it is time for bold new measures by the international community, or merely a faithful return to existing obligations or minimum standards. Is it time, as Ambassador Richard Holbrooke, U.S. Ambassador to the UN, has recently said before the Security Council, to expand the definition of who is a refugee; erode if not erase the distinction between a refugee and a person who is internally displaced; deal with these problems; fix the responsibility more clearly in a single agency; and not fall back on one of the worst of all euphemisms—"we are coordinating closely"?

This symposium brings together lawyers, scholars and activists to discuss the effectiveness of existing international law and legal institutions and to elicit important new ideas to ensure that humanity learns, in this expectant century, to stem the tide of these unfortunate, ever-increasing masses.

I would like to thank all those at the Berkeley Journal of International Law who have worked so hard since the initial conception of this event to bring our ideas into fruition. Specifically, my thanks go out to Damir Arnaut, Hannah Garry, Lauren Gerber, Michael Lysobey, Anne Mahle, Debbi Quick, Denise Whittaker, and Nancy Xu, each one of whom took on a discrete set of tasks and accomplished it in a thorough and timely manner.

It is my pleasure to introduce to you now, incoming Dean John Dwyer, a 1980 Boalt graduate and professor since 1990. After clerking for Judge Harry T. Edwards of the U.S. Court of Appeals, D.C. Circuit in 1980, and for Supreme Court Justice Sandra Day O'Conner, the year after that, Professor Dwyer was a Staff Attorney at the D.C. Public Defenders Service between 1982-84, and served as Associate Dean of Boalt Hall from 1992-94. Professor Dwyer has a Doctorate in Chemical Physics from the California Institute of Technology. He has published and spoken widely on a variety of legal topics, most frequently on environmental legal issues. And, not only is he an outstanding scholar, he is a much appreciated educator. He was the recipient of the 1997 Rutter Award for teaching. Professor John Dwyer.

WELCOME TO BOALT HALL BY INCOMING DEAN JOHN DWYER, UC BERKELEY

Thank you very much. I really just wanted to take a couple of minutes to welcome all of you to this important conference and to talk to you a little bit about the international law program. This is one of Boalt's oldest and most eminent programs. It has a long lineage that dates back to eminent scholars such as Stefan Riesenfeld through Richard Buxbaum, one of our senior colleagues here on the faculty, and now under David Caron's leadership followed by younger faculty such as John Yoo and Andrew Guzman.

It is not only a program that consists of eminent faculty who are respected in their fields of research and teaching, but also a remarkable group of people who are our students and I think that in every great school, it is the great students we have who make the school really function. The students of course have put on this program that we are going to have today and tomorrow. The students do much more. One of the important things that this Journal does of course is to put out a Journal. It just had a recent issue that just came out. They've got an issue coming out in June which covers such topics as the Bosnian judicial system; a report on the international disability conference; a report on the WTO conference in Seattle; and so forth.

The program is more, though, than just the faculty, students, and the Journal, it also consists of a Clinic in International Human Rights which Patty Blum and Laurel Fletcher are in charge of and which trains our students working on matters involving refugees and the INS. And thus, the program offers a range of

things from clinical experience through placements outside the school, through a curricular program and through research programs to train students to go out and do important things. So, I want to welcome you to Boalt and to all that it has to offer.

Berkeley Journal of International Law

Volume 18 | Issue 2 Article 2

2000

Presentation of the First Stefan A. Riesenfeld Symposium Lecture and Memorial Award

Lauren Gerber

Presentation of the First Stefan A. Riesenfeld Symposium Lecture and Memorial Award

I.

Introduction of the 2000 Stefan A. Riesenfeld Memorial Award

by Lauren Gerber, Editor-in-Chief, Berkeley Journal of International Law

I would like to begin by thanking the individuals who made this symposium and this award a reality. Our deepest gratitude to Ambassador Sacirbey. I would like to thank Damir Arnaut, the Journal's incoming Symposium Director, who first envisioned a Riesenfeld Memorial Award to be given by the Journal to one outstanding scholar or practitioner in the field of international law each year. Damir has devoted countless hours to this end, and we are proud to be able to present the first Riesenfeld award tonight at the Journal's first symposium since Professor Riesenfeld's death last year. Thank you also to the faculty members who expressed such heartfelt enthusiasm to the idea of paying tribute to the memory of Professor Riesenfeld in this way. Professors Harry Scheiber, David Caron, John Yoo, Dean Herma Hill Kay, and Louise Epstein, were all eager to help in any way they could, and their support and guidance made this award possible. Finally, thank you to Mrs. Riesenfeld who is here with us tonight as we pay tribute to her husband.

Professor Riesenfeld left an indelible imprint in the minds and hearts of all at Boalt who knew him as a professor, mentor and colleague. In his more than fifty years at Boalt Hall, first as a student and then as a professor, Professor Riesenfeld had a profound influence on this institution. Generations of Boalt graduates, including many of our current professors, studied under him. In the fields of international and comparative law in particular, Professor Riesenfeld helped Boalt Hall achieve worldwide recognition. Professor Riesenfeld's scholarship was both prolific and diverse. Professor Riesenfeld wrote over forty books and well over 100 articles on topics ranging from protection of coastal fisheries under international law to the power of Congress and the President in international relations, to anti-trust law in the European Economic Community.

Unfortunately, for those he left behind, the one piece Professor Riesenfeld failed to write was an autobiography. Professor Riesenfeld's life was as extraordinary as was his publishing output. Professor Riesenfeld escaped Nazi Germany in 1934 at the age of twenty-six and came to Boalt Hall as a research assistant for then-Dean Edwin Dickenson. Although upon his arrival he did not speak English, Professor Riesenfeld mastered the language in time to graduate from Boalt with distinction only three years later, all the while having earned a

living through his research for Dean Dickenson. Following graduation, Professor Riesenfeld earned his J.S.D. at Harvard and then began a teaching career at the University of Minnesota, where he met and married Phyllis Thorgenson, and as I mentioned earlier, we are honored to have her with us here tonight. While teaching law and publishing the first of his numerous, profoundly influential legal works, Professor Riesenfeld earned an undergraduate degree in engineering and then voluntarily enlisted in the U.S. Navy during WWII. In 1952, Professor Riesenfeld and his family moved to Berkeley where he began teaching at Boalt Hall. His career at Boalt lasted until his death. Professor Riesenfeld taught at Boalt Hall for forty-six years, avoiding mandatory retirement through continuous annual reappointment. Professor Riesenfeld's other countless accomplishments include a teaching post at Hastings College of Law, a post as Counselor for Public International Law at the U.S. Department of State under President Carter, and two appearances before the International Court of Justice in the Hague. This year's symposium addresses a topic with which Professor Riesenfeld was particularly familiar both personally and as a scholar. It is with utmost pride that the Berkeley Journal of International Law establishes the Stefan A. Riesenfeld Memorial Award in his memory.

At this time it is my privilege to introduce to you the presenter of the first Stefan A. Riesenfeld Memorial Award. Professor Harry Scheiber is a particularly appropriate person for this task as he is the Stefan A. Riesenfeld Professor of Law in History at Boalt Hall. Professor Scheiber joined the Boalt faculty in 1980. He has held Guggenheim, Rockefeller, American Council of Learned Societies, National Endowment for the Humanities, and Social Science Research Council Fellowships. He was a distinguished Fulbright lecturer in Australia and has been President of the Agricultural History Society, the Council for Research and Economic History, and the ACLU of New Hampshire. From 1994-95, he served as Chair of the UC Berkeley Academic Senate, and in 1998, he received an Honorary Doctorate of Laws from Uppsala University in Sweden. He was elected in 1999 an Honorary Fellow at the American Society for Legal History. I present to you Professor Scheiber.

II.

PRESENTATION OF THE 2000 STEFAN A. RIESENFELD MEMORIAL AWARD

by Professor Harry Scheiber, Boalt Hall, UC Berkeley

Thank you. Your Excellency, thank you for a very moving and wonderful presentation. Mrs. Riesenfeld, it is especially wonderful to see you here joining these familiar surroundings with your old friends and with so many students to whom your husband was so important. It is a great honor for me in my life to have been named to the Riesenfeld professorship. Steve was a mentor of mine from the day I arrived at Boalt like so many, literally hundreds of others, on the faculties of American institutions and in the law firms, and in government. He was someone who was always available to advise and to help. And his wisdom was extraordinary. It is a wonderful thing that the students have done to organ-

ize this; Ms. Gerber, Damir and others who have worked so hard to honor his memory in this very, very appropriate way. They really are owed great thanks. And, I'd just like to ask once more that they be appreciated for all they've done here to make this possible. Please applaud them.

Professor Riesenfeld loved nothing more than students who brought energy and thoughtfulness, and zip to a project with some intellectual content. He would have appreciated this moment. The award to be given tonight is a surprise to the recipient. Normally, an award of this kind is announced in advance to the recipient so that he or she has time to absorb it and to prepare a few remarks. But, for reasons that will become obvious, this was not done. I'm going to give a long introduction to this person so that he can recover from the shock and the pleasure, I am sure of this.

Professor Riesenfeld's ideals and values are cited here and the students have said that this award is given to someone who represents those ideals and values. When you think about it, Steve had an intellectual toughness that was just remarkable, phenomenal. His analytical powers were just beyond belief. I know there are others in academic life, in diplomacy, and in other realms of life who have similar qualities; but, he did to the enormous range of subject matter in which he was profoundly learned. His erudition was just remarkable, and I know literally of no one, who matches that, at least, in our field. And then again, he linked it to a commitment to humane values which was as profound as could be and which he conveyed in his unique way to his students, his friends, and his colleagues. I don't know how anyone can match all that.

We do have an awardee tonight whose own values do reflect those of Professor Riesenfeld whose qualities of intellect linked with humane concerns, devotion to teaching, devotion to the law, and intellectual distinction do speak to the terms of this award very eloquently. I'll say a few more words, but let me just say that this first Stefan A. Riesenfeld Memorial Award goes to Professor David Caron.

Professor Caron is a dear friend and I really want to ask you to take a few minutes to share with me something about David's background, which you may not know. I'm sure that nothing would have pleased Professor Riesenfeld more than to have David as the first recipient because in every way, he was confidant that Professor Caron would fulfill the tremendous promise that he showed when he was a student of Professor Riesenfeld's at Boalt. Before coming to Boalt, coming out of as he mentioned today, a French Canadian background out of New England, he graduated from the Coast Guard Academy with high honors in physics and political science. He was then, as he is now, a great leader of his peers, and was commander of the corps of cadets there. And, he served with distinction in the U.S. Coast Guard as a regular officer as Professor Riesenfeld served in WWII in the maritime services, in that case the Navy.

After service in the Coast Guard in which he did environmental work, which of course relates to his later career, he decided to pursue a different course and resigned from the rank of Lieutenant and was named a Fulbright Scholar to the United Kingdom and earned a Master's Degree in Marine Law

and Policy at the University of Wales. He then studied law at Berkeley, graduated Order of the Coif, and was co-recipient of the Stellan Merin Prize for outstanding student scholarship here. Perhaps most important of all, he was research assistant and teaching assistant to Professor Riesenfeld and like Dean Dwyer, he was Editor-in-Chief of the Ecology Law Quarterly. Following which, Professor Caron served in the Hague as a judicial clerk in the Iran U.S. Claims Tribunal and at Leiden University he received a Doctorate in Law at the time, also receiving a certificate from the Hague Academy of International Law, a very significant honor. Only twenty-five Americans had received that. He served at the Max Planck Institute as a Senior Research Fellow, another mark of great distinction for a young scholar. And went on to practice in the San Francisco firm of Pillsbury, Madison, and Sutro and then came to the Boalt law faculty in the Fall 1987. Since coming to Boalt, David has been a Visiting Professor at Cornell. He served as Director of Studies and Research at the Hague Academy. Very importantly, he received the Deak Prize of the American Society of International Law for Outstanding Scholarship bringing great honor upon himself as he did upon our school.

He has shown scope in a way that Professor Riesenfeld admired, that the rest of us look at with some awe, with regard to the very many different aspects of international law and organization that he examines. Like Professor Riesenfeld, he has a deep commitment to international legal institutions and to the United Nations. I think Ambassador, you would appreciate the way he has looked at the United Nations critically and the Security Council critically. He has also served in recent years on the Precedents Commission as a Commissioner of the United States, a Commissioner to the UN, on precedents with relation to the war in the Gulf. A very important kind of service and very taxing.

Professor Riesenfeld's last public appearance except for in his classroom was at a conference which we held at Berkeley on the Law of the Sea in November of 1998 and he spoke of his activities on behalf of the United States government which he loved and served nobly. And, one got the sense, though he didn't speak of it, of the tremendous taxing physical demands that this kind of service makes and of course the same has been true of the kind of service that Professor Caron has been active in. He brings a knowledge of science to environmental law giving it a very special kind of character. Like Professor Riesenfeld, he is pretty much as much at home in Europe as he is in the U.S. He's traveled in the Pacific and been an advisor in the Pacific. And like Professor Riesenfeld, he has served as a counselor on public international law to the State Department's Legal Counsel. So, one could go on. I've co-taught with Professor Caron and engaged with him in both national and California policy advising and activities and interaction. There is no end to what one could say to his achievements at this stage of his career—just extraordinary. Making it especially appropriate on all counts then that he should be the first one to whom this award is given setting a very high standard for future awardees.

Berkeley Journal of International Law

Volume 18 | Issue 2 Article 3

2000

Announcement of the Stefan A. Riesenfeld Symposium and Memorial Award

Damir Arnaut

Announcement of the Stefan A. Riesenfeld Symposium and Memorial Award

By
Damir Arnaut[1]

The BERKELEY JOURNAL OF INTERNATIONAL LAW is pleased to announce that the Spring 2000 Symposium, "A Legacy of War: Displaced Masses in the Twenty-First Century," marks the beginning of the Stefan A. Riesenfeld symposium series focusing on notable issues in international law and held at Boalt Hall, the University of California at Berkeley School of Law. Additionally, each year the Board of Editors, with the approval of the Dean of Boalt Hall, will present the Stefan A. Riesenfeld Memorial Award to a distinguished scholar or practitioner who has made outstanding contributions to the field of international law. The purpose of the award is both to honor the memory of Professor Riesenfeld, who devoted much of his life and career to the study and practice of international law, and to recognize an individual who has demonstrated a commitment to the values and ideals that Professor Riesenfeld espoused and advocated.

The Spring 2000 Symposium is the first symposium that the BERKELEY JOURNAL OF INTERNATIONAL LAW hosted without Professor Riesenfeld's presence among us. By dedicating the symposium and an award in his honor, the Journal has taken a small, but appropriate, step to thank him. This year's symposium focused on refugees and displaced masses, a topic with which Professor Riesenfeld was particularly familiar, both personally and professionally. The Journal is privileged and honored to recognize so great a man and scholar and to continue his legacy and commitment to the study and development of international law at Boalt Hall.

Professor Stefan Albrecht Riesenfeld was born on June 8, 1908 in Breslau, Germany. He studied at the University of Breslau, now University of Wroclaw, Poland, and received a Dr. iur., *summa cum laude*, in 1930 for his dissertation on the law of mutual insurance companies. Professor Riesenfeld then practiced with a Berlin commercial law firm and became a research associate of the Kaiser-Wilhelm Institute, founded by Ernst Rabel, Professor Riesenfeld's mentor,

1. Symposium Editor, Berkeley Journal of International Law. B.A., University of California at Berkeley, 1997; M.A. University of California at Berkeley, 1998; J.D. Candidate, University of California at Berkeley School of Law (Boalt Hall), 2002.

who later escaped the Nazi regime by coming to teach at the University of Michigan.[2]

Professor Riesenfeld himself escaped Nazi Germany in 1934 at the age of twenty-six and came to Boalt Hall to work as a researcher of comparative law for then-Dean Edwin Dickinson. Speaking little English on his arrival, Professor Riesenfeld nevertheless managed to graduate from Boalt Hall in 1937 with distinction and to earn a J.S.D from Harvard in 1940. Professor Riesenfeld began his academic career at the University of Minnesota, simultaneously teaching law and earning an undergraduate degree in engineering. Soon after starting at Minnesota he voluntarily enlisted in the U.S. Navy during World War II, and served as an LST commander in the South Pacific, returning to his teaching post at Minnesota in 1946.[3]

In 1952, Professor Riesenfeld joined the Boalt faculty, where he remained until 1976 when school regulations required him to retire. Nevertheless, Professor Riesenfeld received continuous annual re-appointments at Boalt Hall until his death on February 17, 1999 at the age of ninety. During his academic career, Professor Riesenfeld wrote numerous books and articles on a wide range of international law topics, including maritime law, trade and development law, the European Economic Community, treaty law, and labor law. He also served as Counselor for Public International Law at the U.S. Department of State, and was twice engaged to argue major cases before the International Court of Justice in the Hague. Professor Riesenfeld's public interests ranged from reform proposals of the German Civil Code during the Weimar Republic through participation in the drafting of Germany's Basic Law during the allied occupation to the United States Bankruptcy Commission's second reform effort.[4]

Professor Riesenfeld had a profound influence on Boalt Hall during his more than fifty years as both a student and a professor here. Generations of Boalt graduates, including several current professors, studied under him and, in the fields of international and comparative law in particular, Professor Riesenfeld helped Boalt achieve worldwide recognition.

One of Professor Riesenfeld's students and then colleague is David D. Caron, the C. William Maxeiner Distinguished Professor of Law at Boalt Hall, and the first recipient of the Stefan A. Riesenfeld Award. During his study of law, Professor Caron began a close relationship with Professor Riesenfeld, serving both as his Research and Teaching Assistant, and becoming his colleague in the fall of 1987 when he joined the Boalt faculty. Given Professor Caron's close personal and professional relationship to Professor Riesenfeld, and his outstanding academic and professional achievements, the Journal was honored to recognize that no person could be more deserving of the first Stefan A. Riesenfeld Award.

2. *See* Richard M. Buxbaum and David D. Caron, *Stefan A. Riesenfeld, International Law and the University of California*, 16 BERK. J. INT'L L. 1 (1998).
3. *See id.* at 3.
4. *See id.* at 1.

Professor Caron attended the United States Coast Guard Academy in New London, Connecticut, graduating with High Honors in Physics and Political Science and as Commander of the Corp of Cadets in 1974. He received the Coast Guard's Achievement Medal and left the service with the rank of Lieutenant in 1979. In that year, Professor Caron was named a Fulbright Scholar to the United Kingdom, and attended the University of Wales, where he received a Masters' degree in Marine Law and Policy.

In 1980, Professor Caron embarked upon the study of law at Boalt Hall, graduating Order of the Coif and as co-recipient of the Thelen Marrin Prize for outstanding student scholarship in 1983. Following graduation, Professor Caron served as a legal assistant to Judges Richard M. Mosk and Charles N. Brower at the Iran-United States Claims Tribunal in The Hague. While there, Professor Caron began his association with the Hague Academy of International Law, becoming the twenty-fifth American to receive its prestigious Diploma, and with the University of Leiden, where he received his Doctorandus in law for a dissertation addressing the Iran-United States Claims Tribunal and the evolving structure of international dispute resolution. Professor Caron later served as a Senior Research Fellow with the Max Planck Institute for Comparative Public and International Law in Heidelberg, and practiced with the law firm of Pillsbury Madison & Sutro in San Francisco.

Before starting his academic career at Boalt Hall in 1987, Professor Caron was a visiting professor at Cornell Law School and Hastings College of the Law, and he also served as Director of Studies and Director of Research at the Hague Academy of International Law. Professor Caron's scholarship encompasses numerous aspects of international law with a focus on public and private dispute resolution, the United Nations, the law of the sea, international environmental law and general theory of international law. Among his public service commitments, Professor Caron has served as Counsel to the Marshall Islands Nuclear Claims Tribunal, the Governments of Cyprus, Kuwait, Malaysia, Peru, and the Commonwealth of the Northern Marinas Islands. He is also a founding director of the Ocean Governance Study Group and the University of California Marine Council. Professor Caron is Chair-elect of the International Law Section of the Association of American Law Schools, and he serves as a Vice President of the Institute of Transnational Arbitration of the Southwestern Legal Foundation.

In addition to all of the above mentioned accomplishments, Professor David Caron is an outstanding teacher, advisor and mentor. His presence at Boalt bolsters the school's reputation in and sparks the enthusiasm of its students for international law. Professor Riesenfeld's legacy at Boalt will continue through this award, and Professor Caron is a most appropriate choice to begin that process.

Berkeley Journal of International Law

Volume 18 | Issue 2 Article 4

2000

Stefan A. Riesenfeld Symposium Keynote Address - Securing International Peace: Legality vs. Politics

Muhamed Sacirbey

Stefan A. Riesenfeld Symposium Keynote Address— Securing International Peace: Legality vs. Politics

By
His Excellency Muhamed Sacirbey,
Ambassador Extraordinary and Plenipotentiary,
Permanent Mission of Bosnia-Herzegovina
to the United Nations*

Rapporteur: Ms. Hannah Garry**

I.
KEYNOTE ADDRESS

Good evening. First of all with all of the eminent educated personalities, in view of the recent history in my country and in our region, I am glad to see that there are no psychiatrists in this group. As you know, Mr. Karadic and others have left their legacy on us. But indeed, I am honored to be among such a distinguished group. And lest we don't take ourselves all too seriously, I thought it would be appropriate to start in that direction. Mrs. Riesenfeld, it is my pleasure to be here at this forum. Dean, I think you've moved in the back, and, Professor thank you for the introduction and welcoming me so much. And particularly, I'd like to thank the student organizers.

---

* Upon admittance of the Republic of Bosnia-Herzegovina to the United Nations on May 22, 1992, H.E. Sacirbey was appointed Ambassador and Permanent Representative. In 1995, he served as Foreign Minister of the Republic of Bosnia-Herzegovina for one and a half years where he was a key player in the Dayton Peace talks. Later, in 1996, he resumed his current post as Ambassador and was also named Special Envoy for the Implementation of the Dayton Peace Agreement. He was most recently also appointed as Vice-Chairman of the Preparatory Commission for the International Criminal Court. Born in Sarajevo, H.E. Sacirbey fled as a political refugee in 1963 with his family to Europe and North Africa before settling in the U.S. H.E. Sacirbey earned his J.D. from Tulane University Law School specializing in comparative, corporate, and international law, and his M.B.A. from Columbia University, New York. He has worked at the law firm, Booth and Baron; as Vice President and manager with Standard and Poore's Corp.; as Senior Vice President of Security Pacific Merchant Bank; as manager of Mortgage-Structured Real Estate Finance Group; and as principal in the Princeton Commercial Corporation dealing with real estate and structure finance.

** 1999-2000 Managing Editor, Berkeley Journal of International Law.

This has been often stated as a significant dialogue. I will sound a little bit too much like I am speaking from a Bosnian perspective, but I think it is only appropriate that I should present you with that expertise, that personal knowledge that is closest to me. But, by no means should you view this as a Bosnia only discussion. In fact, I'd like to extend it well beyond Bosnia, particularly when we get into the questions and answers and, it is my intention to move quickly to that point, because I suspect that most of you are pretty familiar with the issues. So, I don't want to lecture to long, I'd like to have a dialogue, and I'll get on with it.

While the work of the United Nations (UN) over its first half century is a story of a valiant vision, courageous efforts, and mixed results the end of the Cold War brought about new hopes and even higher expectations. The stage was no where more appropriately set than in Bosnia-Herzegovina, the old fault line of the east and west rivalry, for these expectations and reality to collide. The UN suffered its most visible and humbling setback with CNN and all the world's media focused in Bosnia-Herzegovina. It seemed all that remained was for the UN burial fire to be prepared and set ablaze among the many eulogies prepared by the world's global leaders. Maybe the oft-repeated statement that anything or anyone over half a century of life has become obsolete, lost the capacity to make the necessary changes for survival. Maybe this statement was proving to be true at least with respect to the UN. Certainly as someone who is now approaching my fifties, I would like to think that this is not the case.

However, just as the UN was being discarded in the rubble of history, it just as amazingly found rejuvenation actually within Bosnia-Herzegovina, in effect, a new hope and a new vision. But the story is not that simple. Between the ashes and the rising of the phoenix, there is a much more complex tale. Maybe the failure was not in the half-century old institution or even the code of laws that are the basis of international humanitarian law. Maybe the fault lies with the application of those laws and institutions and those men and women vested with the responsibility of leadership. Too often there was a weakness of commitment and a prevalence to manipulate legality and these institutions for short-term political benefits. It was often stated, and I'm glad Professor that you mentioned WWII in your own personal legacy, that international legal norms, particularly international humanitarian norms like the Geneva Conventions, were built on idealism that in fact were not realistic. But, if you really think about the history, they were built upon the very real experiences of WWII. In fact, I think many of those who kind of questioned the applicability of those legal standards that were adopted immediately after WWII, I think they missed the point. That, in fact, they were the premises, and the real teachers were those very personalities who survived those horrid examples of WWII and particularly the Holocaust.

Under the UN Charter, the Security Council is vested with responsibility for maintaining international peace and security. However, is this a particularly good choice? Well, first of all, I think we should point out that this is a coincidence of history—a historical accident. The fact that we have fifteen members

and five permanent members is nothing more than a consequence of how the spoils were being divided after WWII. Of course, the Security Council is very much a political body; it is not meant to be a representative body of the world's citizens, it is not meant to be a judicial body—a legal body. If you look at the way it operates, it acts out of self-interest rather than its responsibility to the international community as its primary motive. When you look at the permanent members in particular, the human rights record and the record of democracy in these countries is at best spotty. In effect, what most of these countries tend to do is try to preserve their primacy within this UN system and, in effect, they are doing everything that they can to maintain their privileged position. Too often they are usurping the power of other UN and international institutions that have just as valid a reason for being there to try and preserve international peace and security. Worst of all, there is no accountability to the world, to the UN; the veto can be exercised with or without explanation. Frequently, the Security Council will apply measures, but only half-measures; take a problem to only, in effect, say that it is "vested" with a problem, and to leave it hanging, without a real solution. And, unfortunately it is often too frequently about personalities—leaders who of course see it fit to exercise their visions of political and diplomatic stardom in front of the UN press corps.

Well, Bosnia-Herzegovina gave a test both to the Security Council and, of course, the UN system as a whole. Faced with the Yugoslav conflict in its beginnings and particularly Mr. Milosevic's plan for a greater Serbia, the UN's Security Council first decided that it was clearly to point a finger at Mr. Milosevic, particularly as it relates to what was going on in Bosnia-Herzegovina. For instance, there is a report, actually two reports, dated in April and May of 1992, which squarely say that in fact it is the Milosevic regime and its cronies in Bosnia who were practicing what was then called ethnic purification. Sanctions were imposed upon the Belgrade regime. But as soon as, in effect, these initial steps failed, the Security Council backed off and it actually backed off to the point of equivocation, in effect trying to find as much fault with the victims in order to justify why it wasn't completing the necessary steps to bring about a real peace in Bosnia-Herzegovina. What it also did was to provide humanitarian assistance, food, in order to alleviate the public pressure, the outcry, that something must be done to save civilian lives. But, in effect, it always failed to confront those who were killing, besieging, and creating the humanitarian catastrophe that was in this instance the methodology of genocide, of ethnic cleansing. There obviously seemed to be a clear contradiction in saying that one would attempt to feed a civilian population and use all necessary means to do that but one would not use any military force to defend this civilian population when it came under direct attack. And the end result of this, of course the most shameful event, was Srebrenica.

But, beyond that, we had something that was called the arms embargo that was imposed on the former Yugoslavia. But, once it was imposed, it was not judicially applied, in effect, it was applied both to the Victim and the Victimizer. It happened that the Victim had no weapons to defend itself while the Victimizer

had the weapons of the third or fourth largest army in Europe at that time. Now, frankly, I was one of the architects of this strategy calling for the lifting of the arms embargo; half of it was real, and half of it was bluff. What was real is if no one would defend this, we wanted, obviously, at least the capacity to defend ourselves even if it was to the grave. I mean, no one wants to go down without at least the capacity, the ability, to try to defend themselves. But more importantly, we were in effect saying, if you have denied us the opportunity, the weapons to defend ourselves, then, I think, you have already intervened to a point where you now have an obligation to complete the intervention and to bring the war to an end. And once again here, of course, that intervention was not forthcoming for three and a half years.

But, I think something else was happening here, which was the UN itself was being made into a scapegoat. It was given a job it really couldn't do. It didn't have the necessary resources. Effectively, it was told to take care of what was perceived of as a dying patient, that is my country Bosnia-Herzegovina, but to make sure that the dying was as graceful as possible with minimum civilian life which was almost a contradiction in terms again. And, of course, when the patient wouldn't die, then this kind of befuddled all the strategists of this graceful death, and, once again, they found more fault with those who managed to keep this country alive by whatever means. In effect, we became not only the victims, but the villianized. Peacekeeping was provided for Bosnia, but in effect, there was no peace to keep. Peacemaking was what was necessary but no one was to even interpret generously worded resolutions in such a way that peace keeping would be an option, a real option.

And finally, we have the many stories of what was then the birth of UN preventative diplomacy and its initial failures in Bosnia-Herzegovina and the former Yugoslavia. I remember in 1992, before the war broke out in Bosnia, but in effect was already blazing in Croatia, we went to see, that is, President Izetbegovic and several Bosnian leaders, we went to see the Secretary General Cyrus Vance. We said that we are very much afraid that the next step of this war in Croatia will be in Bosnia-Herzegovina. Will you please do something that will in effect deter the war from occurring? Now, some of you may have questions about what happened in terms of Bosnia's declaration of independence at that time. We were working with Cyrus Vance as the mediator in Bosnia's transition to independence and, actually, Mr. Vance and all those working with him were very supportive of the idea of Bosnia holding a referendum for independence, which was held in February and March 1992. And of course, on this basis, Bosnia declared its independence. So, on the one hand there was support in the international community for independence. But, when we said why don't you deploy some peacekeepers within Bosnia, they said, well, uh Mr. President, you don't quite understand the way the UN works. You first have to have a terrible war, you have to have a lot of people dying. Then the world takes notice, and then we have a peace agreement, and then we send in UN troops to separate out the sides. Obviously a highly inefficient way, both from a UN

perspective, but particularly from the civilians involved, in terms of addressing the conflict.

I think though that when we talk about the international community at that time, particularly the Security Council, there was, I wouldn't say a conspiracy of action, but there was a conspiracy of omission. I don't wish to tell you that somehow back in 1990, a group of people got together and decided that they were going to see Bosnia extinguished—its mostly Muslim population murdered or expelled. I think what happened is basically that some people started going down the wrong road. They had neither the foresight nor the courage to address the problem. And, the more that their policies were shown to be ineffective, inadequate, and wrong, the more they were determined to in effect, against all evidence, make sure that their position was somehow absolved. Several good examples. Even though on several occasions, Belgrade was clearly, clearly pointed out as the culprit, the word "aggression" was never used in any Security Council resolution. Why? Because the word aggression demands action, affirmative action by the Security Council in stopping it. The word "genocide" was never used in any UN Security Council resolution, basically for the same reason, even though the International Court of Justice, at our request, as early as 1993, had declared that there was sufficient basis to believe that genocide was occurring in Bosnia-Herzegovina.

When I had taken up my post relatively recently at the UN, frankly, there was already information coming in to us in April and May, that terrible things were happening; that people were being murdered in mass, that concentration camps were being set up . . . I remember speaking to Haris Silajdzic and saying, Haris, can we actually say these things? I mean we're going to sound like we are nuts, this can't be happening in modern-day Europe! Nonetheless, we had this information, we had a list of camps, and we took it to the Secretary General and said we don't want to be alarmist, but we have this information. Will you please deal with it? Low and behold, in August of 1992, some very capable people like Roy Gutman and ITN film crew happened to kind of cross paths with a concentration camp. At that same time, through personal channels, I received two UN communications dated April and May 1992. In these first two internal communications that I got my hands on, there is in one mention of "mass murder" and in the second, of "camps being set up for large segments of the population." I made this available to the media who asked the Assistant Secretary General for Peacekeeping why this information was not made public? And the answer was well, it was made public to those who need to know—i.e. the Great Powers. And then, shortly thereafter, I received a phone call demanding how did I receive these two pieces of paper? Demanding that I reveal my sources. Obviously, I said, I demand to know why you haven't made this information public. I mean, these are crimes against humanity and not making these crimes available as information to those who in fact have an affirmative responsibility to stop these crimes could in and of itself be viewed as certainly serious "intrusion," and I used the word intrusion here, into international humanitarian law.

Even when the war crimes tribunal that now exists for the former Yugoslavia was created, I frankly do not believe that initially when this idea was floated, that this was a serious attempt at justice, that there was ever the intention to make it a reality. I think there was the idea that somehow if you were not willing to intervene, to stop these types of crimes, then you would tell the world that we will punish these bad guys sooner or later and that somehow this would serve as an excuse as an alternative to intervention. That is, if you don't confront them today, you will punish them tomorrow, and the public will somehow feel secure that justice and international peace and security have been maintained. I'm glad that Professor Meron is here tonight; frankly, he is one of the very small handful of personalities that worked, against all odds, to make sure that in fact the tribunal did happen. I'll mention two other names that I think are very instrumental here and that is Professor Cherif Bassiouni, and at that time, Ambassador Madeline Albright. I know that there are many others, but there are certainly those who I think surprised the rather cynical, mostly cynical factors, who intended to promise a tribunal but never in effect have it realized.

And then, of course, a series of events began to unfold which I think demanded a response from the very powers that for so long tried to avoid the proper response. There were UN soldiers that were chained in order to deter NATO from using air strikes to protect civilian populations. The mass murder at Srebrenica occurred which actually, I believe, some people—international factors—had forewarning on but, in effect, did not take that forewarning seriously and felt muddied, probably soiled as much as anything, by the fact that they did not address Srebrenica in advance. On the day that Srebrenica fell, I was in Strasbourg. And, I remember meeting with Carl Bildt who happened to be there at the same time and was rather upset. Carl Bildt says in his book that I was rather calm and accepted certain statements that he made which is contrary to the truth. And I'll tell you what he said to me. There were several "safe areas" at that time, Srebrenica was one of them, Zepa was a smaller one, next to Srebrenica. Gorazde, Bihac, Sarajevo, and Tuzla. Before Srebrenica was even completely overrun, Carl Bildt said to me, well we are not going to liberate or take back Srebrenica and by the way, we are not going to defend Zepa either. On a political level, this has far-reaching consequences because it says basically that the map that was drawn by the Contact Group for the division of Bosnia along internal lines needed to be somehow changed and some people were only willing to accommodate Mladic and others who wanted to change it and Srebrenica and Zepa were not convenient to a new map. Of course, it also shows how seriously or not so seriously the UN commitment was taken to defend something designated as a safe area for refugees.

But I think somehow things began to unfold somehow beyond Mr. Bildt and other people's hands who thought they could continue to manage the drama of a dying country. And that was that NATO's own reputation, its own survival, was on the verge. If you had NATO, but no longer the Soviet Union as a threat—what was its raison d'etre except to address a situation like Bosnia-Herzegovina, to confront a warmonger like Milosevic? And, in fact, intervention

that is peace-making did happen, I think primarily because so many reputations were put on the line, including that of Jacques Chirac, whom, I believe, felt ultimately betrayed by how far events went in Srebrenica.

After the intervention and after the Dayton peace agreement, the major peacekeeping job was given to NATO and the UN was given a very minimal role initially, in effect confirming the marginalized role of the UN as the major institution for international peace and security. So, how does the UN, that is the international legal order, how is it now on the verge of its greatest triumph in Bosnia? How all of a sudden do we see once again, a large number of UN peacekeeping missions being demanded? Why again are people looking to the UN as a source of hope?

Well, within Bosnia, they have done the right things on a small level. They are helping reform the police. In effect, Bosnians now will be participating in UN peacekeeping efforts, starting with the police, in places like East Timor, maybe Sierra Leone, and others. We are prepared. That is good for us, its good for the UN, and it's good for the international community. They are also helping us reform the judiciary which is tainted not only by the years of war but also in fact by the old communist system. And, of course, it is helping us to implement what I think is one of the most important Dayton provisions, which is that regardless of what the Dayton document looks like—the Dayton peace agreement, the Dayton Constitution of Bosnia-Herzegovina—it needs to be made compatible with the European Union Charter, that is, Bosnia's place is in Europe and therefore Bosnia's Constitution must be compatible with the Council of Europe Charter.

But, I think there is more that UN institutions are involved in right now. The International Court of Justice is still in fact vested with the case of Bosnia-Herzegovina vs. Serbia and Montenegro for genocide; the case that was started in 1993. This case is not about the collective guilt of a people, it is about the guilt of a regime that many in fact had tried to exonerate, to make a false partner in peace. It is about confronting historical revisionism; as much as there is an attempt to revise events of the Holocaust, you can bet there is a heck of a lot of revisionism going on about what happened in our region. And then of course there is the tribunal. We must remember that this is a UN body—financed and supported by UN States. And, this institution is not about just finding individuals accountable, it is in fact at the very heart of justice, of reconciliation, and of peace. Without identifying and prosecuting the guilty, then one cannot also exonerate, reconcile the innocent. And of course, the tribunal has now also given birth to something called the International Criminal Court, which, in a few decades I suspect, will serve as the primary focus of justice for those involved in significant violations of international humanitarian law. But, I think, when we go to the tribunal, we need to understand it as also providing the impetus for peace. Is it just that simple though? Is it just that simple that in fact the tribunal is about reconciliation; that it is about satisfying the yearning for vengeance and is it about getting rid of the bad apples? Locking them away so that in fact once again Bosnia can prosper? Is it about deterrence? Is it just about our sense of

decency, about our sense of personal security in a world we'd like to think is a lot more civilized than I think we really know is not?

I think there is a point here to be made by relating to you a slightly longer story, so I hope you will excuse me. When I was in Dayton as Foreign Minister, I remember that Mr. Milosevic was one night sitting in his apartment; he was of course being honored as one of the keystones, fundamental for peace. He invited me to come have coffee with him. I was a Foreign Minister, a young man. He had a heck of a reputation, and certainly was very charismatic. One should never mistake that on a one-to-one level, Mr. Milosevic can make you like him, quite easily. He said, well, would you like to have a drink? And, I said, well, no, thank you, I just wanted to relay to you some information about our negotiating position. And he said, well, maybe you don't prefer alcohol, maybe you'd like some coffee. Just sit down, let's talk a little awhile. I said, no thank you, I think I need to go. I understood that this was an attempt at seduction. Unfortunately, too many others have succumbed. A few weeks before this event, I was having dinner with Madame Manelli, the Foreign Minister for Italy at the time. This was in preparation for Dayton and I was making the rounds around Europe to understand better various negotiating positions. And, she said at the end of the dinner, by the way, downstairs, in my brother's apartment, Henry Kissinger is also having dinner with him, and would you mind if he comes up and has a little bit of a discussion with you about what is going on with the peace talks and so on? I said, oh no problem, I met Mr. Kissinger before, but we've never had an extensive discussion. So, we proceeded to have a discussion but at the end of this discussion, Mr. Kissinger looked at me and he said, you know, by the way, don't you think that Mr. Holbrooke is becoming a bit of a media monster? And I of course, remembered all of these scenes of Richard Holbrooke in that loveseat with Mr. Milosevic, and rather than fall into the temptation and just agree, I said, but Mr. Kissinger, don't you know that they are calling him the Kissinger of the Balkans?

I was wondering if Mr. Milosevic was the one who was indispensable for peace or was in effect indispensable for people's egos. We've had Mr. Milosevic indicted since Dayton, and we've had actually another gentleman indicted and arrested by the name of Krajisnik who was also at Dayton and who also used to be a part of my Presidency in the post-Dayton years. He was elected under the terms of the Dayton peace agreement. But these people, particularly Mr. Krajisnik, were known for their crimes when they came to Dayton. And, one of the reasons peace in Bosnia suffers so much is because in effect it was given to bloody hands to mold, and did this have to be so?

I think there is a more uncomfortable side which I have to emphasize to you in addressing the issue of justice, the tribunal and the forthcoming international criminal court. Too frequently in the Security Council, sometimes in public, but mostly in private, I hear about how room must be given to the peacemakers, to the Security Council, to deal with criminals for the sake of peace. To in effect make the necessary deals. Let's make deals with the world's greatest mass murderers because after all, this will in fact, stop the killing. Un-

fortunately, when this idea is brought about, it is generally about those mass murderers, those dictators, which happen to be further from the West, that the West doesn't have any direct stake with. So a country like Sierra Leone has in fact been forced to make a deal, one that most people do not believe will survive, with that leader of a so-called guerrilla force that had no other agenda than to say we want a piece of the diamond action and lets cut off the limbs, the arms and feet of little children so that the government in power gives us our piece of the action.

Peacemakers are good, they are necessary, but who are they accountable to? In effect it is us, the peacemakers, the public, who give impunity to war criminals particularly those at the very top, because we seem to be sometimes too intent on short-terms solutions and to not have to pay the price. And, to somehow be able to say, isn't wonderful, they are all hugging each other? In effect, there is of course, expediency at stake and there is the ego of those who would be Nobel Peace prize winners because they brought bad guys together to the peace table. In effect, I would argue to you, that institutions like the Tribunal and the International Criminal Court are to protect us from ourselves. But, in effect, this is the greatest triumph of the 21st century, of the UN system in the international legal order. If I may just end with these words, justice is not a threat to peace, peace is a product of justice, of legality.

II.
RESPONSE TO THE KEYNOTE: QUESTIONS AND ANSWERS

A. What can be done to strengthen the State institutions of Bosnia-Herzegovina?

Dayton is a compromise not only between two parties, but between justice and injustice, between democracy and a rather awkward non-democratic system. We have right now, an ethnically stratified political system. Basically, if you are a Bosnian Muslim, you only vote for Bosnian Muslims; if you are a Serb, you only vote for Serbs; if you are a Croat you only vote for Croats; and if you are a Jew, well then, you've got to choose one of these. That is a major problem because I heard Senator Mitchell speak once on Northern Ireland where he said, I don't know how in the heck we are ever going to have peace in Northern Ireland, if the only people that a political leader has to appeal to are those of the same ethnic or religious group. That is, a leader has nothing to loose, by being ever more demanding on behalf of that so-called, ethnic or religious constituency that he represents. Therefore, that is the most basic flaw of the Dayton peace agreement. The idea of fixing these institutions to make them stronger only becomes a technical problem which I don't really want to get into now because it will take too much time and drag us into too much detail.

B. What can the UN do to avoid the mistakes of neutrality that occurred in Bosnia-Herzegovina or of the reluctance or omission as you described it?

It has already done the most important thing . . . if you would like to take a look at the Srebrenica report, you can, and it is on the Internet. It says in this report that one of the major mistakes that the UN made was neutrality. Impartiality is necessary, but too often, those two concepts (neutrality and impartiality) are confused. And, I have to tell you right now, that if I saw two people fighting right outside this door, my initial reaction would be to walk in there and to be a peacemaker and to say, guys cut it out. Not knowing that maybe one is pummeling the other for no reason. It is our human reaction to view two combatants as somehow being both victimized and somehow both culpable, and I think it is the last point that worries me. Impartiality means that you understand the situation from a fair perspective and that then you begin to address it. Neutrality means that in effect it becomes an end to itself, that I don't want to get involved too much so therefore, I'll try to help them, but if both of them don't want to work with me, so be it, and I'm going to let one continue to pummel the other.

Pacifism has been abducted by some of the world's great villains. They expect that the world will do everything it can to avoid confrontation and by that time, they will have done their dirty deed. Pacifism, I think, needs to be revisited as a philosophy as an ideology simply because I'm afraid we cannot assume that conflicts are just a matter of parties that do not understand each other in good faith. There are too many political leaders who use confrontation, who use war, who use genocide as tools to promote their own ends. That is their power, their economic needs, and simply their ability to control the political system of a political country or region.

C. At the opening of your remarks, you refer to the political dynamics of the UN Security Council. To create a more effective UN system, would you recommend revamping the structure of the Council, what specifically would you recommend as a representative of a State, and how would that affect the UN ability to enforce its own resolutions?

There are easy ways and hard ways to reform the Security Council so let's try to be pragmatic rather than idealistic. Because, if we all accept the idea of the UN as something which has value, which I do, then, let's not have the UN cease to exist just because some countries pull out. Which means, first of all, it will be very difficult to deprive any country which now has the veto from having the veto in the future. But, I think that we can demand that countries explain their veto and that this in effect almost establishes a precedent where down the road, precedent would have to be invoked when countries use the veto, or for that matter, vote in a certain way within the Security Council.

Second, I think it is important to broaden the membership of the Security Council to reflect the fact that there are many more countries now than when the original Security Council was originally envisioned. And, frankly, to increase transparency because greater numbers mean greater transparency and also to give other countries the opportunity to bring new ideas, fresh ideas into the Council. The permanent members are frankly not interested in revising the system and maybe for good reason in terms of their own self-interest. That's why

you need to have more countries as elected members, not permanent members, coming through and, in effect, I think that would make it more difficult to exercise the veto if there is an overwhelming majority instead of say 14-1, of 24-1 or 20-1, in any particular vote. Yes, there may be some problems in efficiency with a larger Council, but frankly, I don't think that is the problem that is keeping the Security Council from being reformed. Ironically, we have some would-be members of the Security Council competing among themselves. The "wannabes" as one would call them, who seem to have some of the characteristics of the "haves" and who somehow would like to use those characteristics to promote themselves into a position of permanent member and even veto-wielding member, I would very much resist the idea of new veto countries. And, I'm not sure I'd like the idea of too many more permanent members.

D. Could you please comment on the idea that Izetbegovic, Tudjman and Milosevic are all leaders cut of the same cloth, i.e. they were all out of the former communist regime who latched onto nationalism as a way of staying in power as communism and socialism collapsed. Also, as there is globalization of information about conflict, and as we become inundated with information about a conflict and hear representations from many sides about the evidence, how are we at a distance to think about the important differences, the subtle differences of what is going on, how do we assess all that?

I think that there is an assumption being made on the surface of the question which is incorrect at least in one point—that is that Izetbegovic actually was never a Communist and was in jail on numerous occasions due to the Communist rule. Tudjman himself at one time was a Communist but walked away from it in favor of becoming what we have now learned to be a Croat nationalist. Milosevic in effect has never relinquished the title of socialist but of course he has adopted the new title of nationalist—nationalist socialist—sounds somewhat familiar. But maybe rather than argue about the theory of it, let's get into the substance of what stands behind this question. And, I'm not assuming anything about the person asking this question.

I think there is a tendency to try, once again, to equivocate. There are many Bosnians who may not be supportive of President Izetbegovic in terms of his overall political positions or his vision of where the country goes. But, by no means, could he ever been accused of initiating a nationalist war. I think that there is a tendency particularly in the West to somehow say that if we throw out everything that is old and start out with something that is completely fresh, that this is for the good. Maybe there is something to that. I think though that with throwing out the old they are trying to get rid of their guilt, their own responsibility. Because if somehow you take the three leaders of what are perceived to be the three major warring elements in the former Yugoslavia, and you identify all of them as somehow being culpable, then that means you really didn't have the responsibility to step in and help anyone, that really no one was a victim. It just happened that some were a little bit stronger. But if Izetbegovic had the means, he would have been doing this to Tudjman's guys and Milosevic's guys

and this is frankly not true. This was not an ethnic war where somehow it just happened that Serbs had more weapons and they first took it out on the Croats and the Croats got strong and they took it out on the Bosnians as well. It was much more about I think, at one level, the question of maintaining power. But remember, Izetbegovic and Tudjman, to their credit, were elected in the post-Communist period, while Milosevic was elected in the period before Communism collapsed, and in fact, he very much adopted nationalism as a way to transition the period from Communism to this new brave world. And he understood something, I think, which is very clear. That, the idea that somehow the far left and the far right are somehow at opposite ends of the spectrum is not accurate. This is a three-dimensional picture and the far left of socialism and the far right of nationalism in effect meet in the back in the methodology of a totalitarian system. So, he understood that he could easily go back and forth between socialism and nationalism as he needed with one objective, to maintain the methodology of a totalitarian State. I cannot lay that on President Izetbetovic's shoulders, and although I find much fault with Mr. Tudjman's rule, I'm afraid he cannot be somehow cited as the initiator of this conflict because he was somehow trying to hold onto power as an old communist leader.

E. Could there have there been any possible compromises between Yugoslavia and Bosnia-Herzegovina rather than the results which followed?

First of all, Bosnia-Herzegovina was committed to the notion that the old Yugoslavia should survive. We thought for all sorts of reasons that it was best. We thought that the reigns of central authority would have to be weakened and that what was a federalist system might have to become a confederalist system. But, there were forces on one side or the other that were not willing to let it happen or weren't really willing to make the necessary compromises. In the end, let me just speak from a Bosnian perspective, what was left to Bosnia-Herzegovina was either to choose independence as did the other ex-republics, like Macedonia, like Croatia, like Slovenia, or to in effect become like Kosovo. And, as we all know, Kosovo went along for awhile, and then inevitably, the ethnic cleansing came to visit Kosovo. So, I don't think it was a very realistic possibility, and I don't think that most Bosnians, certainly the non-Serbs, wanted to accept the notion of living in a new Yugoslavia dominated by Mr. Milosevic who not only was obviously a leader from the Communist times, but who was now using Serbian nationalism as his major tool to maintain power. The notion that somehow Bosnians couldn't live with Serbs, though, I don't accept. Because, of course, Bosnia is made up of many Serbs. So I can't tell you that somehow we can live with Serbians within Bosnia but we can't live with Serbs in the context of a rump Yugoslavia. I think the problem was that we couldn't live with this political leadership in Belgrade and everything is about timing.

I'll tell you just a little interesting point. Just a few days ago, I hosted the Crown Prince of Yugoslavia, Prince Alexander, at the United Nations for lunch. And I hosted Mr. Panic, the former Prime Minister. Simply because I want to get the notion across that we actually can very well find common ground. We

don't have to agree on everything, but we can find common ground. The problem is we can't find common ground with the Milosevic regime. And as much trouble as I have with the Milosevic regime, people like Crown Prince Alexander and Milan Panic and the opposition has as much problem with it. So, I think, to be very fair to that question, ethnically, the problem did not exist or was not there to the point that disintegration was necessary. But, political realities dictated that Bosnia had no choice but to go as an independent country.

F. During your presentation, you commented in part that you were critical of the idea that one should deal with those with unclean hands, those who created the conflict. There are a number of conflicts around the world where there are substantial displaced populations; the situation is now static and those people face a substantial amount of time in the future outside of their homelands. What about them?

We all politicians and diplomats have unclean hands; lets be clear about that. I think I used the term bloody hands. And, there is a big distinction. When someone initiates genocide, when someone is chopping off the limbs of innocents, then I think you've crossed the road. I'm not suggesting that morality and somehow self-righteousness should be the basis for diplomacy. But I think we cannot lose the moral compass. And when that moral compass is clearly pointing in the opposite direction, do not believe that making peace with a mass murderer is either consistent with justice or is consistent with peace, that is long-term security. I believe that this has been the case with Mr. Milosevic. I believe that there are other instances around the globe which are worthy examples. But let me again use Mr. Milosevic's example. In Dayton, he was hailed as the peacemaker. He walked out of Dayton as someone who basically stood on the same platform as Bill Clinton. And what did he do? He ended up doing what he did in Kosovo, but just as importantly, which most people forget, he basically undermined the whole concept of transition towards democracy in Serbia itself. One of the first acts he did when he went back to Serbia was close down many of the independent press, make the whole university system very much accountable to the regime, so that now the opposition in Serbia itself is much, much weaker and much more divided because of the credibility and opportunities that Mr. Milosevic was given during Dayton immediately prior and after.

G. In your remarks you mentioned that the lawsuit before the International Court of Justice and its use in its judgment of the word genocide though the Security Council had not. What role do you think the ICJ could and should play in facilitating transparency within the Security Council?

Most of you have, I'm sure learned the experience of the U.S. judicial system, the U.S. Supreme Court, in Marbury vs. Madison and other similar examples. I think a court sometimes has to assert its position. So far, if you look at the international legal order, the weakest part in fact is the legal system. It is not because the laws are weak; it is because the application of the laws is weak. From giving these laws a chance to be adjudicated or debated in the context of

the legal system to the implementation of the decision of the Court. For instance, it is always interesting in the Security Council, you hear diplomats debating legal standards and just totally using them for political arguments. And, if someone ever suggested that this matter should be taken to the ICJ, they would say well, that is not their authority. I would say, quite to the contrary. And, the United Nations organs, all of them, do have the right, and I would also say the responsibility, to ask for advisory opinions on matters of importance to the international community. For instance, when we talk about the issue of aggression or genocide, lets say in Rwanda, the Security Council, the General Assembly and other international, that is UN bodies, could have asked for an advisory opinion and I think this should have been done more extensively. But, a lot of it has to do with money and who will eventually enforce the judgment. Money, because the Court will tell you that they can hear only very few cases a year. And finally, what happens is if they do have a ruling where one of the big powers doesn't like it, effective enforcement of the ruling is blocked and makes the Court look rather silly as has happened on some occasions. But, it is not because the judges are silly or the Court is silly, it just obviously doesn't have the necessary respect. And, I'm not sure what is the complete answer to this question except that it is a step-by-step process and I think advisory opinions in these types of situations are in fact a good way to go.

Berkeley Journal of International Law

Volume 18 | Issue 2 Article 5

2000

The Kosovo Crisis: Implications of the Right to Return

Eric Rosand

The Kosovo Crisis: Implications of the Right to Return

By
Eric Rosand*

In the Washington Post of May 14th, Secretary of State Madeleine Albright and British Foreign Secretary Robin Cook wrote that the NATO campaign against Serbia was initiated in response to the ethnic cleansing in Kosovo because:

> it was the right thing to do. We will not stop [they declared] . . . until we have created the conditions under which the ethnic cleansing of Kosovo can be reversed . . . . We are fighting to get the refugees home, safe under our protection. Their homes have been destroyed, villages burnt, their lives ruined by a regime determined to achieve ethnic purity and prepared to use cruel and violent means to achieve it.[1]

Two days earlier, President Clinton defended the military intervention to a group of veterans, stating that the central imperative of the NATO air campaign was that "the Kosovars must be able to return home and live in safety."[2]

In fact, throughout the 78-day NATO conflict, and in the days following its cessation, Western leaders cited as one of the main reasons for NATO involvement the return of the hundreds of thousands of Kosovar Albanians who had been driven from their homes and expelled from their homelands by the Serbian military and paramilitary forces. The bombing was to ensure, among other things, that the dislocated could return home and that any initially successful attempts at "ethnic cleansing" would be reversed. In short, an agreement to allow the safe and free return of Kosovar Albanian refugees and displaced persons was one of the prerequisites for a halt to NATO bombing.[3]

---

* Eric Rosand is an Attorney-Adviser in the U.S. Department of State's Office of the Legal Adviser. The views and opinions expressed are those of the author and do not necessarily represent those of the Department of State.

1. Madeleine Albright and Robin Cook, *Our Campaign is Working*, WASH. POST, May 16, 1999, at B7.

2. President Clinton's remarks in defense of military intervention in the Balkans, N.Y. TIMES, May 14, 1999, at A12.

3. On May 6, 1999, the G-8 Foreign Ministers adopted a number of general principles on the political solution to the Kosovo crisis. These included the establishment of a "safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees" and the "[s]afe and free return of all refugees and displaced persons" to their homes. Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on May 6, 1999, reprinted in U.N. SCOR, 54th Year, Res. 1244, U.N. Doc. S/Res/1244 (1999), Annex 1. On June 3, 1999, Slobodan Milosevic, President of the Federal Republic of Yugoslavia, accepted this proposal to end the conflict. *See, e.g.*, Steven Erlanger, *Milosevic Yields on NATO's Key Terms; 50,000 Allied Troops to Police Kosovo*, N.Y. TIMES, June 4, 1999, at A1.

During the conflict, however, many were skeptical regarding the feasibility of NATO's aim.[4] Speaking shortly after the bombing had commenced, the United Nations High Commissioner for Refugees, Sadako Ogata, stated that it was "difficult to even think of the future when the refugees and internally displaced persons will—as they firmly wish—return to their homes."[5]

The majority of the significant displacements of the 20th century have never been reversed. As a result of the Second World War, as many as ten million people were dislocated and while most were eventually absorbed by other countries. Hundreds of thousands of Palestinians and Cypriots still remain dislocated decades after their initial displacement. In addition, the recent conflicts in Croatia and Bosnia, which resulted in the dislocation of more than two million people, and were characterized by "ethnic cleansing" campaigns similar to the one carried out by Serbian forces in Kosovo, have taught us that "there may be no such thing as fast, voluntary return in the wake of war and ethnic cleansing."[6] Much to the surprise of the international community, less than two months after the fighting stopped in early June, 1999, the vast majority of Kosovar Albanian refugees and displaced persons had in fact returned to their pre-conflict homes.[7]

Although NATO intervention paved the way for this mass return, the return of the survivors of the "ethnic cleansing" was explicitly supported by Security Council resolutions providing that those expelled from and displaced within Kosovo had the *right* to return under international law.[8] The Security Council, in dealing with situations following mass displacement caused by successful ethnic cleansing campaigns, *e.g.*, Georgia/Abkhazia, Croatia, and Bosnia, had consistently reaffirmed the right of large groups of refugees and displaced persons to

4. *See, e.g.*, Judith Miller, *The Test: Getting the Refugees Home*, N.Y. TIMES, April 25, 1999, Sec. 4, at 1 and Jules Crittenden, *Kosovo Crisis: Sad Return Awaits Refugees—Homecoming a Logistical Nightmare*, BOSTON HERALD, April 11, 1999 at 7 (quoting Professor Hurst Hannum, "I am skeptical that it will be feasible to return even a portion of these people to their homes, because of the cost as well as the political implications").

5. Statement by Sadako Ogata to the Humanitarian Issues Working Group of the Peace Implementation Council, Geneva, April 6, 1999.

6. International Crisis Group, *The Balkan Refugee Crisis: Regional and Long-Term Perspectives*, at 2 (June 1, 1999) <http://www.intl-crisis-group/projects/sbalkans/reports/ba02rep.htm.>.

7. UNCHR estimates that by July 28, 1999, some 737,000 Kosovar Albanians returned to Kosovo. UNCHR: News, *Kosovo Crisis Update*, (July, 28, 1999) <http://www.unchr.ch/news/media/kosovo.htm.>. As of December 1999, nearly all Kosovar Albanians who wished to return had been able to do so. U.S. Dep't of State, *Ethnic Cleansing in Kosovo: An Accounting*, Overview, at 2 (Dec. 1999) <http://www.usia.gov/regional/eur/balkans/kosovo/hrreport/1299>. [hereinafter *Ethnic Cleansing in Kosovo*].

8. *See, e.g.*, S.C. Res. 1239, U.N. SCOR, 54th Year, U.N. Doc. S/RES/1239 (1999), at ¶ 4 ("reaffirms the right of all refugees and displaced persons to return to their homes in safety and dignity"); S.C. Res. 1203, U.N. SCOR, 53rd Year, U.N. Doc. S/RES/1203 (1998) at ¶ 12 ("reaffirms the right of all refugees and displaced persons to return to their homes in safety and underlines the responsibility of the Federal Republic of Yugoslavia for creating the conditions which allow them to do so"); S.C. Res. 1199, U.N. SCOR, 53rd Year, preamb., U.N. Doc. S/RES/1199 (1998) ("reaffirms the right of all refugees and displaced persons to return to their homes in safety and underlining the responsibility of the Federal Republic of Yugoslavia for creating the conditions which allow them to do so").

return.[9] As already noted, however, the vast majority have not been able to do so. The inability to reverse significantly the "ethnic cleansing" campaigns has proven a stumbling block in the international community's efforts to bring long-term stability to these regions. Thus, at the end of a decade that has seen a precipitous rise in the number of ethnically motivated internal conflicts, a corresponding dramatic rise in the number of refugees and displaced persons, and a repeated call for the millions of dislocated to exercise their right to return, it is quite significant that the international community, acting through NATO, was not only prepared to, but did use force to secure this right.

Nevertheless, the return of the Kosovar Albanians should not be seen only as part of a successful resolution of a political problem, brought about through unprecedented military intervention. Rather, it has significant legal implications as well: namely, it provides additional support for the developing principle that those dislocated during "ethnic cleansing" campaigns have the right to return to their home of origin under international law. It is in this context that I examine the Kosovo conflict. I will first briefly describe the "ethnic cleansing" campaign in Kosovo and how, in the aftermath of such situations, the right to return has come to be viewed as the appropriate remedy. After providing a general overview of this right under existing international human rights instruments, I will touch upon two important questions: whether the right to return can and should be universally applied to situations of mass displacement and whether the impact of the Kosovo situation on the development of this right is in any way diminished by the fact that the mass and speedy reversal of "ethnic cleansing" largely was the result of political and military intervention.

The "ethnic cleansing" campaign that Serbian and Yugoslav military and paramilitary forces waged against the Kosovar Albanian majority population between March 1998 and June 1999 has been well-documented. Over 1.5 million Kosovar Albanians, at least 90% of the estimated 1998 Albanian population in Kosovo, were forcibly expelled from their homes.[10] Many were herded onto trains and other organized transport and driven from the province. Serbian authorities often forced many of these soon-to-be refugees to sign disclaimers which stated they were departing Kosovo voluntarily.[11] Victims have described

9. *See, e.g.*, Bosnia: S.C. Res. 1088, U.N. SCOR, 51st Sess., at ¶ 11, U.N. Doc. S/RES/1088 (1996); S.C. Res. 1034, U.N. SCOR, 50th Sess., at ¶ 18, U.N. Doc. S/RES/1034 (1995) (reaffirming right of those dislocated during war in Bosnia to return to their homes of origin); Croatia: S.C. Res. 1145, U.N. SCOR, 52nd Sess., at ¶ 7, U.N. Doc. S/RES/1145 (1997) (reaffirming the right of all refugees and displaced persons originating from the Republic of Croatia to return to their homes of origin); Georgia/Abkhaiza: S.C. Res. 1225; U.N. SCOR, 54th Sess., at ¶ 7, U.N. Doc. S/RES/1225 (1999); S.C. Res. 1187, U.N. SCOR, 53rd Sess., at ¶ 3, U.N. Doc. S/RES/1187 (1998) (reaffirming right of all refugees and displaced persons created by the conflict in Abkhazia to return their homes in secure conditions in accordance with international law).

Since the end of the NATO air campaign, the Security Council, in addressing the situation in East Timor, has reaffirmed the right of refugees and displaced persons to return home. S.C. Res. 1264, U.N. SCOR, 54th Sess., at preamb., U.N. Doc. S/RES/1264 (1999).

10. *Ethnic Cleansing in Kosovo*, *supra* note 7, Summary at 2.

11. U.S. Dep't of State, *Erasing History: Ethnic Cleansing in Kosovo, Documenting the Abuses*, at 1, (May, 1999) <http://www.usia.gov/regional/eur/balkans/kosovo/hrreport/599/over.htm> [hereinafter *Erasing History*].

how Serbian forces confiscated personal belongings and documentation, including national identity cards, in the belief that without such identification return could be legally prevented.[12] The Serbs mockingly reminded the soon-to-be refugees to take a final look at the homeland they were leaving, supposedly forever. As a recent State Department report has documented, many of the places the Serbs targeted in Kosovo had not been scenes of previous fighting or KLA activity. This, the report concluded, indicates that the expulsions were not part of a legitimate security or counter-insurgency operation.[13] Rather, they were purely an exercise in "ethnic cleansing," part of an organized plan to rid the province of the vast majority of the ethnic-Albanian population.[14]

Although it has not always been the case, the method and objective of the Serbian offensive, namely, mass expulsion and the forcible transfer of the civilian population, are now clearly contrary to international human rights and humanitarian law.[15] The Universal Declaration of Human Rights ("Universal Declaration")[16] contains a number of fundamental principles relevant to mass expulsion that have become enshrined in customary international law. For example, Article 3 states that "Everyone has the right to life, liberty and security of person"; Article 5 provides that "No one shall be subjected to arbitrary . . . exile"; Article 9 reads, "No one shall be subjected to arbitrary interference with his privacy, family [or] home"; and Article 12 states that "No one shall be arbitrarily deprived of his nationality." All of these principles are set forth in widely ratified universal and regional human rights instruments,[17] and all are violated when a state expels or forcibly deports/transfers its citizens or residents. The United Nations Subcommission on the Prevention of Discrimination and Protection of Minorities has stated that "practices of forcible exile, mass expulsions

12. *Id.* at 5.

13. *Id.* at 1.

14. *Id.*

15. *See, e.g.*, the U.N. Subcommission on the Prevention of Discrimination and the Protection of Minorities [the Subcommission], the U.N. Commission on Human Rights [UNCHR], and the International Law Commission have all reached that this conclusion. Basing its work on customary law, the Subcommission concluded that expulsion from ones homeland was unlawful. *See* E.S.C. Res. 1994/24 U.N. ESCOR 49th Sess., U.N. Doc. E/CN.4/Sub.2/1994.L.11/Add.3 (1994). The UNCHR concluded that expulsion constitutes a gross violation of human rights. *See Human Rights and Mass Exoduses*, Res. 1995/88, art. 3, U.N. ESCOR, 50th Sess. *See also* Report of the International Law Commission on the Work of the Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10 at 250, U.N. Doc/ A/46/10 (1992). *See also* Eric Rosand, *The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091, 1117 (1998); John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. J. INT'L. L. 171, 221 (1998); J.M. HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE (1995); RESTATEMENT (THIRD) OF THE LAW: FOREIGN RELATIONS OF THE UNITED STATES § 702 cmt. m (characterizing "mass uprooting of a country's population" as a human rights violation).

16. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR or *Universal Declaration*].

17. *See, e.g., International Covenant on Civil and Political Rights, entered into force* March 23, 1976, 999 U.N.T.S. 171, Arts. 6, 7, 9, 12, 17 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, 1950, arts. 2, 3, 5, 8 [hereinafter *European Convention*]; Protocol No. 1 to the *European Convention, entered into force* May 18, 1954, art. 1; Protocol No. 4 to the *European Convention, entered into force* May 2, 1968, arts. 2-4.

and deportations, populations transfer, 'ethnic cleansing' and other forms of forcible displacement of populations within a country or across borders deprive the affected population of their right to freedom of movement" and are therefore contrary to international law.[18]

One could also view the "ethnic cleansing" campaign against the Kosovar Albanians as a violation of international humanitarian law under Article 49 of the Fourth Geneva Convention (the convention relating to the protection of civilians) which prohibits expulsion of a people by a belligerent occupant.[19] Some commentators have asserted that, in addition to violating widely recognized provisions of international human rights and humanitarian law, the forcible expulsion of a people constitutes a crime under international law.[20] Cited in support of this proposition are the1945 London Agreement establishing the Nuremberg Tribunal, the Allied Control Council Law No. 10, the Statutes of the International Criminal Tribunals for the Former Yugoslavia (Article 5) and Rwanda (Article 3), and the Rome Statute of the International Criminal Court.[21]

Given the unlawful nature of the forcible mass expulsion carried out by the Serbian military and paramilitary forces, and that an internationally wrongful act imposes on the wrongdoing state the obligation to make complete reparation,[22]

---

18. *U.N. Subcomm'n on Prevention of Discrim. and Protection of Minorities*, Res. 1995/13, U.N. ESCOR, 50th Sess., at 20, U.N. Doc. E/CN.4/Sub.2/1995/L.11.Add.3 (1995).

19. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. This prohibition also appears in Additional Protocol II of 1977. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, art. 17, 1125 U.N.T.S. 609.

20. *See, e.g., Opinion: Legal Issues Arising from Certain Population Transfers and Displacements on the Territory of the Republic of Cyprus in the Period since 20 July 1974* (signatories: Georges Abi-Saab, Dieter Blumenwitz, James Crawford, John Dugard, Christopher Greenwood, Gerhard Hafner, Francisco Orrego Vicuna, Alain Pellet, Henry G. Schermers, Christian Tomuschat), at 4, (June 30, 1999) <http://www.attorney-general.gov.cy/english.htm>. [hereinafter *Opinion*]; Alfred de Zayas, *The Right to Return to One's Homeland and Ethnic Cleansing*, 6 CRIM. L. FOR. 257, 289 (1995). The International Military Tribunal at Nuremburg prosecuted the deportation of the native population and the implantation of settlers in occupied areas as both a war crime and a crime against humanity. 22 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITIARY TRIBUNAL: NUREMBURG 14 NOVEMBER 1945-1 OCTOBER 411 (1946).

21. For example, Article 7(1)(d) of the Rome Statute declares that "[d]eportation or forcible transfer of population" constitutes a crime against humanity "when committed as part of a widespread or systematic attack, directed against any civilian population."

22. Chorzow Factory (Ger. v. Pol.), 1928 P.C.I.J. (Ser. A) No. 17, 1928, *reprinted in* ANN. DIG. PUB. INT'L. L. CASES 258, 260 (1929). *See also, Draft Articles on State Responsibility, Pt. 1, art 43, adopted on first reading by the International Law Commission*, [1980] 2 Y.B. Int'l L. Comm'n, pt. 2 at 30-35; Covery T. Oliver, *Legal Remedies and Sanctions, in* INJURIES TO ALIENS, 71 (Richard Lillich ed., 1983).

Under traditional principles of State responsibility, a wrongdoing state was responsible for its conduct to the injured State, rather than to the injured individual(s). Some have argued, however, that this notion of State responsibility has been broadened in recent years to place obligations on the wrongdoing state toward the injured individual(s) and provide the injured individuals with corresponding rights against the wrongdoing state. *See* STATE RESPONSIBILITY AND THE INDIVIDUAL (Albrecht Randelzhofer & Christian Tomuschat eds. 1999) (discussing this trend); *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* ¶ 41, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 3, 1993) (final report submitted by Theo van Boven, Special Rapporteur, Commission on Human Rights); IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 512-13 (1990).

what then is the appropriate remedy under international law for such wrongdoing? *Restitution in integrum* appears to be the preferred and most far reaching remedy in such situations. This demands, most importantly, the return of all those dislocated to their homes, which would go a long way toward restoring the pre-expulsion demographics.[23]

The Security Council has emphasized the right to return as being the appropriate remedy in situations following violations of international law resulting from "ethnic cleansing." In the context of the Balkan conflicts between 1991-1995, the Security Council repeatedly reaffirmed the right of the over two million refugees and displaced persons dislocated during these conflicts to return home.[24] The Security Council similarly endorsed the return of large numbers of refugees and displaced persons in the aftermath of mass expulsions in Rwanda, Georgia/Abkhazia, and Tajikistan.[25]

Return is not simply the appropriate legal remedy. It has practical significance as well. The ability of the dislocated to return to their pre-conflict homes promises the survivors of "ethnic cleansing" a measure of justice that will contribute signigicantly to restoring stability to the conflict region. The failure to recognize and secure the right of return of the Kosovar Albanians would have simply exacerbated an already volatile situation. Scattered throughout Europe, these hundreds of thousands of refugees would have been an easily mobilized force that likely would have sought through military means to seize control of their homeland province of Kosovo. In May 1996, President Clinton noted that peace following brutal internal conflicts will not endure for long without justice, "for only justice can break the cycle of violence and retribution that fuels crimes against humanity."[26] The prosecution of war criminals, he added, is an essential element of this process, as it sends a strong signal to those who committed the terrible atrocities that underlie "ethnic cleansing" campaigns—namely—they cannot escape the consequences of their actions.[27] The prosecution of the perpetrators, although certainly important, is not enough to ensure justice, as it fails to provide any redress to individual victims. Guaranteeing individual survivors the right to return, however, will provide each refugee or displaced person with at least some measure of justice for wrongs suffered.

---

23. *See, e.g.*, Commission on Human Rights, Subcom'n on Prevention of Discrim. and Protection of Min., 49th Sess., U.N. Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Freedom of Movement: Human Rights and Population Transfer, Final Report of Special Rapporteur Mr. Al-Khasawneh, at para. 60.

Restitution in integrum may also require that the wrongdoing State provide just compensation to the survivors of "ethnic cleansing." This issue, however, is beyond the scope of this paper.

24. *See e.g.*, S.C. Res. 1034, U.N. SCOR 50th Sess., at ¶ 18, U.N. Doc. S/RES/1034 (1995); S.C. Res. 1019, U.N. SCOR 50th Sess., at ¶ 6-7, U.N. Doc. S/RES/1019 (1995); S.C. Res. 941, U.N. SCOR 49th Sess., at ¶ 3, U.N. Doc. S/RES/941 (1994); S.C. Res. 820, U.N. SCOR 48th Sess., pream. & ¶ 7, U.N. Doc. S/RES/820 (1993).

25. *See e.g.*, S.C. Res. 1097, U.N. SCOR, 51st Sess., at ¶ 8, U.N. Doc. S/RES/1097 (1997) (Georgia/Abkhazia); S.C. Res. 1078, U.N. SCOR, 51st Sess., preamb., U.N. Doc. S/RES/1078 (1996) (Rwanda); S.C. Res. 999, U.N. SCOR. 50th Sess., ¶¶ 8, 14, U.N. Doc. S/RES/999 (1995) (Tajikistan).

26. President Bill Clinton, Commencement Address at Connecticut College (May 1996).

27. *Id.*

From the start of the Serbian offensive in Kosovo, the right of those being dislocated to return did indeed assume a prominent role in the statements and resolutions of U.N. bodies and other international leaders. In a series of resolutions between September 1998 and June 1999, the Security Council reaffirmed the right of all refugees and displaced persons, dislocated as a result of the Serbian offensive in Kosovo, to return to their homes in safety.[28] In addition, Mary Robinson, the United Nations High Commissioner for Human Rights, stated at the opening of the final meeting of the 55th Commission on Human Rights, "[the] right of refugees and displaced persons [from Kosovo] to return . . . must be vindicated if we are to be true to the principle of human rights protection."[29] Thus, the international community made it quite clear that survivors of the "ethnic cleansing" campaigns had the right to return, regardless of NATO intervention.

First articulated in 1948 in Article 13(2) of the Universal Declaration of Human Rights, the right of return was tied to freedom of movement, providing that "Everyone has the right to leave any country, including his own, and to return to his country." The 1966 International Covenant on Civil and Political Rights codified this right and it now appears in nearly all international human rights instruments, although its formulation differs. This right is now widely viewed as a general principle of human rights law[30] and as a recognized norm of customary international law as well.[31] In fact, as I have already noted, the Security Council, in insisting upon the return of refugees following mass displacement in Abkhazia, Croatia, and Bosnia, has referred to an international obligation to allow for the return.[32]

In a resolution of May 14, 1999, in the midst of the Kosovo crisis, the Council reaffirmed the right of the refugees and displaced persons to return to their homes, noting in the preamble that their return should be guided by, among other things, the Universal Declaration and other pertinent international human rights covenants and conventions.[33] Some even assert that this right may rise to the level of a peremptory norm, that is *jus cogens*, from which states cannot derogate.[34] There is broad agreement, then, that this right should be regarded as a general principle of international human rights law, thus forming part of customary international law.

---

28. *See supra* note 2.

29. Statement by Mary Robinson, United Nations High Commissioner for Human Rights, to the *Final Meeting of the 55th Commission on Human Rights* (April 30, 1999) <http://unhchr.ch.>.

30. *See, e.g.*, John Quigley, *Mass Displacement and the Individual Right of Return*, XXXIV BRIT. Y.B. INT'L. L. 65, 70 (1998) [hereinafter, Quigley, *Mass Displacement*]; LEX TAKKENBERG, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW 234 (1998); 23 LOUIS B. SOHN & THOMAS BUERGENTHAL, THE MOVEMENT OF PERSONS ACROSS BORDERS 7 (1992); Bill Frelick, *The Right of Return*, 2 INT'L. J. REFUGEE L. 442, 444 (1990).

31. *See, e.g.*, Kathleen Lawand, *The Right to Return of Palestinians under International Law*, 8 INT'L. J. REFUGEE L. 532, 544 (1996); John Quigley, *Family Reunion and the Right to Return to Occupied Territory*, 6 GEO. IMMIG. L.J. 223, 234 (1992).

32. *See, supra* note 8 and 25.

33. S.C. Res. 1239, U.N. SCOR, 54th Sess., at preamb. & ¶ 4, U.N. Doc. S/RES/1239 (1999).

34. *See, e.g., Opinion, supra* note 20, at 5; *Quigley, Mass Displacement, supra* note 30, at 122.

There is disagreement, however, concerning the scope of the right and whether it should in fact be applied to situations such as Kosovo. Many commentators argue that the right to return as formulated in Article 13(2) of the Universal Declaration and codified in Article 12(4) of the International Covenant does not apply to situations involving mass displacements.[35] On this view, if Security Council resolutions had not explicitly provided for this right in the context of the mass dislocation within and from Kosovo (with such resolutions being binding on Member States of the United Nations) there is some question whether the dislocated would in fact have had the *right* to return. In the context of Kosovo, this question is more than simply a theoretical one.

According to the Office of the United Nations High Commissioner for Refugees, an estimated 230,000 Serbs and other non-Albanians, including some 40,000 Gypsies, have fled Kosovo since NATO troops entered the province in June 1999.[36] Serb officials charge that the fear of reprisal attacks by returning Kosovar Albanians and the failure of NATO troops to protect adequately the Serbs from such attacks are largely responsible for this flight.[37] The Security Council and other international organizations have so far largely remained silent concerning the rights of these dislocated people to return home. Such silence, which is often the result of political disagreements among the permanent members of the Security Council, should not, however, determine whether a particular mass dislocated group, in fact, has the right to return.

The dislocated's right should not depend on Security Council action. Rather, it ought to be viewed as a legal principle that can and should be applied to all situations of dislocation. Thus, the Serbs who have fled or been driven from Kosovo must have the same right to return that the Security Council has supported in the context of the Kosovar Albanians.

Those who assert that the international law of the freedom of movement, of which the right to return is an important part, was not intended to address claims of large groups of refugees and displaced persons would disagree. They would argue that absent Security Council resolutions (which are binding on Member States) stating otherwise, the right to return is not applicable to the mass dislocated. Some 25 years ago, Lord Denning, ruling in a case in which thousands of British nationals who had been expelled from Uganda sought admission to Brit-

35. *See, e.g.*, Eyal Benevisti and Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L. L. 294, 325 (1995); Donna E. Arzt, *Palestinian Refugees: The Human Dimension of the Middle East Peace Process*, 1995 PROC. AM. SOC. INT'L L. 372; HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 7-16 (1987); Ruth Lapidoth, *The Right to Return in International Law, with Special Reference to the Palestinian Refugees*, 16 ISR. Y.B. HUM. RTS. 103 (1987); Stig Jagerskiold, *The Freedom of Movement, in* THE INTERNATIONAL BILL OF RIGHTS166, 180 (1980) (Louis Henkin ed. 1981); Kurt Rene Radley, *The Palestinian Refugees: The Right to Return in International Law* 72 AM. J. INT'L L. 586 (1978).

36. Edward Cody, *Without a Home and Hope, Displaced Serbs Await Uncertain Fate*, INT'L HERALD TRIB., Feb. 18, 2000, at 7.

37. For a discussion of Kosovar Albanaian reprisals, *see, e.g.*, Timothy Garton Ash, *Anarchy and Madness*, N.Y. REVIEW OF BOOKS, February 10, 2000 (noting that "[i]t is entirely fitting to speak in this context of reverse ethnic cleansing . . . . Yet this ethnic cleansing has been carried out under the very noses and tank barrels of more than 40,000 international troop.").

ain, found them to have no rights under international law. He stated that "mass expulsions have never hitherto come within the cognizance of international law."[38] The argument set forth is that in situations of mass displacement there is insufficient State practice to support the application of the right to return. Indeed, those situations where large-scale returns have occurred have resulted from political solutions in which the international community was actively involved.

Many of those who would limit application of the right to return to individual cases believe that the more appropriate right in cases following mass expulsion, population transfer or "ethnic cleansing" is that of self-determination,[39] namely the right of a group of people "to determine, without external interference, their political status and to pursue their economic, social and cultural development."[40] But these rights are not mutually exclusive. Rather, the right to return should be understood as an individual right that applies regardless of one's group affiliation and the right to self-determination as a collective right. There is no reason not to consider both of these rights as applicable to the Kosovo situation.

To determine whether Article 13(2) of the Universal Declaration can indeed be used to support the return of mass displaced groups requires an analysis of the provision and its drafting history. At the time of drafting, the right of return was not recognized as a universally accepted principle of international law.[41] The main treatises published prior to or shortly after 1948 do not even consider the existence of such a right.[42] The issue of whether Article 13(2) applies to mass groups was not discussed during the drafting, nor does the text itself explicitly exclude mass displaced groups from its scope.[43] At that time, the right to return was viewed as merely an afterthought to the then more important "right to leave."[44] The drafting took place in the aftermath of World War II, when millions of displaced persons sought admission to countries where they might resettle. Soviet-bloc states maintained strict restrictions on movement, generally forbidding its citizens from leaving. Thus, the focus of the drafters was on guaranteeing the right to leave. This continued throughout the Cold

38. *R v. Secretary of State for the Home Department, ex parte Thakrar, [1974] 1 QB 684, 702.*

39. *See, e.g.*, Mubanga-Chipoya, C.L.C., *Analysis of the Current Trends and Development Concerning the Right to Leave Any Country Including One's Own, and to Return to One's Country, and Some Other Rights or Considerations Arising Therefrom*, Subcomm'n on Prevention and Discrim. Minorities., U.N. Doc. E/CN.4/Sub.2/1988/35 at 27 (1988); HANNUM, *supra* note 33 at 169 n. 175.

40. *The Declaration of Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations*, U.N. G.A. Res. 2625 (XXV), Oct. 24, 1970. A discussion of the right to self-determination is beyond the scope of this paper.

41. Stig Jagerskiold, *Historical Aspects of the Right to Leave and to Return, in* THE RIGHT TO LEAVE AND TO RETURN: PAPERS AND RECOMMENDATIONS OF THE INTERNATIONAL COLLOQUIUM, Upsaala, Sweeden, 19-21 June 1972 (Karel Vasak & Sidney Liskofsy eds.) at 10.

42. *Id.*

43. *Quigley, supra* note 30, at 76; U.N. GAOR, 10th Sess., Annexes (Agenda item 28-II), at 39, U.N. Doc. A/2929 (1955) (indicating discussion of the right of permanent residents and nationals to return, without mention of right of dislocated groups to do so).

44. Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091, 1130 (1998).

War, as the West often used the language of human rights in ideological battles against the Soviet Union and its satellites, encouraging dissidents to exercise their "right to leave" their country.[45] In this context, the right to return received little attention.

The drafters were responding to the crisis of an immediate situation. They could hardly have anticipated that internal conflicts and the consequent massive dislocation would be a transcendent problem some fifty years later. At a time when the international community was giving its tacit approval to the expulsion of some six million ethnic Germans from the Sudetenland, the drafters could not have conceived that, half a century later, the international community would strongly favor the opposite solution: namely, restoration of multi-ethnic societies, and a refusal to accept the results of successful "ethnic cleansing" campaigns.[46]

Thus, the "right to leave," which, at the time of drafting, had been the cornerstone of the right to freedom of movement encapsulated in Article 13, has little relevance in a post-Cold War world in which forced international migration, including refugee flight, has reached disturbing proportions.[47] If one accepts the argument of those who assert that the right to return is intended to apply only to cases where small numbers of individuals are seeking to re-enter their countries, and not to mass displacement, then Article 13 of the Universal Declaration would have little relevance for the 21st century. In an era characterized by a precipitous increase in the number of internal conflicts marked by brutal "ethnic cleansing" campaigns that result in mass expulsions, and by the international community's desire to maintain or reconstitute multi-ethnic societies, the "right to return" must be made applicable to all situations of displacement. Nothing in either the text of the Universal Declaration—or any other international human rights instrument, for that matter—or the *traveaux preparatoires* forecloses such an interpretation.

Even if one were to accept the notion that this right, first formulated in the Universal Declaration and later codified in the International Covenant, was not intended to apply to situations of mass displacement caused by internal wars, its application by the Security Council and other international bodies in these situations indicates that the right is, in fact, being interpreted to apply to them. Although these bodies have stated that the mass displaced have the right to return, some caution may be called for before asserting that this broadened right to return has risen to the level customary international law.[48]

45. *See, e.g.*, HUMAN RIGHTS THE ESSENTIAL PREFERENCE 91 (Hilary Poole, ed. 1998). *See also* Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain"*, 65 TULANE L. REV. 849 (1991).

46. For a discussion of these events, *see, e.g.*, ALFRED DE ZAYAS, A TERRIBLE REVENGE: THE ETHNIC CLEANSING OF THE EAST EUROPEAN GERMANS, 1944-1950 (St. Martin's Press, 1994).

47. Arthur Hetlon, *Essay: The Role of International Law in the Twenty-First Century: Forced International Migration: A Need for New Approaches by the International Community*, 18 FORDHAM INT'L L. J. 1623 (1995).

48. Customary international law is evidenced by a "general practice accepted as law" (Article 38 of Statute of the International Court of Justice) or a "general recognition among States of a certain practice as obligatory." IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 5 (5th ed. 1998);

First, all too often, return is effectively blocked. There are a number of long-standing situations of mass displacement where, despite the repeated statements by various organs of the international community reaffirming the right to return, the dislocated have been unable to exercise it. Two such examples are Israel and Cyprus, where decades after their initial dislocation, thousands of refugees and displaced persons have been unable return. As a result, few examples of State practice exist to support this right in situations of mass dislocation.

Second, where large-scale returns have occurred, it has often been as part of a comprehensive political resolution, rather than out of a sense of recognition of a group's right to do so.[49] For example, despite the fact that the Security Council has unmistakably indicated that all of those dislocated following "ethnic cleansing" campaigns have the right to return, some would argue that the Serbs acquiesced to the return of the Kosovar Albanians only as a result of the NATO bombing campaign, rather than in recognition of the existence of their right to do so. Thus, they would insist that the Kosovo situation can not be cited to support the right of mass groups to return following mass displacement. Based on this view, the return of the more than one million refugees and displaced persons to Kosovo should be viewed solely as a political and military success, without consequence for international law. Perhaps it is for this reason that the legal commentary on the Kosovo crisis has not addressed the right to return.

It is true that regardless of how many Security Council resolutions and other statements by the international community in support of the return of the survivors of "ethnic cleansing" campaigns or other gross human rights violations to the homes from which they have been driven, the actual returns, if they occur, will inevitably be part of a larger political solution. Large scale return has generally been possible only as part of comprehensive peace agreements and political settlements that resolve prolonged conflicts. For example, some 370,000 Cambodians returned to their country under a voluntary repatriation program that formed an integral component of the 1991 Paris Peace Agreement;[50] after the signing of a peace agreement in October 1992, almost 1.5 million people began to return to Mozambique;[51] and some one million of those dislocated during the Bosnian conflict have returned to their homes since the signing of the Dayton Peace Agreement in November 1995.[52]

Politics will determine whether the right to return is implemented or enforced in a particular mass displacement situation. Thus, it will be very difficult for the Serbs and Gypsies to return to the Kosovo province absent support from the international community, which appears at this time unlikely to materialize. This should not, however, be taken as a denial of their right to return. The fact

---

ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 18 (1994); BRIERLY, THE LAW OF NATIONS 61 (6th ed. 1963).

49. Customary law is evidenced by a general practice accepted as law.

50. For a discussion of the Cambodia settlement agreements, *see, e.g.*, Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AJIL 1 (1993).

51. For a discussion of the Mozambique repatriation, *see, e.g.*, PIRKKO KOURULA, BROADENING THE EDGES: REFUGEE DEFINITION AND INTERNATIONAL PROTECTION REVISITED 320-22 (1997).

52. *Supra* note 1.

that politics will likely be the determining factor as to whether large scale returns will occur does not mean that international law in general and the right to return in particular should not be applied. The political and, now with Kosovo, military nature of these solutions does not diminish the significance of such returns. It is only through the repeated reaffirmation of this that this important legal principle will continue to develop.

It is unrealistic to expect that "ethnic cleansing" and other campaigns that involve mass expulsion, and which produce massive refugee flows, can be reversed without the political or military participation of the international community. A key component of "ethnic cleansing" campaigns is the desire of the perpetrating group to gain territorial control of a that region. So long as this group maintains control of the particular region, those dislocated likely will be unable to return. The international community was willing to use force against the Serbs in an effort to take control over the "disputed" territory to reverse the "ethnic cleansing" and essentially enforce the right to return the Security Council and others in the international community had so clearly articulated. That willingness should be seen as an indication of the importance the international community places on upholding this right.

Although NATO's military intervention was widely welcomed, it has been severely criticized by international law scholars, their general consensus being that the NATO bombing campaign violated both the United Nations Charter and international law.[53] Much of the focus of legal commentators has been on the violations of international law that defined the Kosovo crisis, including the NATO air campaign itself, as a violation of both the United Nations Charter and the laws of war, the bombing of the Chinese Embassy in Belgrade as a violation of the Vienna Convention on Diplomatic and Consular Property, and the gross human rights violations that both precipitated and accompanied the mass expulsions. Little attention, however, has been given to its impact on the right to return to one's homeland generally, and, in particular, the right to do so following mass expulsion. The international community continues to struggle to find a solution to a number of seemingly intractable situations across the world, where millions of dislocated persons remain unable to exercise their right to return. Kosovo, however, may serve as an example of international practice where the right of mass groups to return to their homes has been clearly articulated and universally accepted.

53. *See, e.g.*, Editorial Comments: NATO's Kosovo Intervention, 93 AM. J. INT'L. L. 824 (1999).

Berkeley Journal of International Law

Volume 18 | Issue 2 Article 6

2000

The Chechen Refugees

Johanna Nichols

The Chechen Refugees

By
Johanna Nichols*

I.
INTRODUCTION

There were almost a million Chechens on earth in the early 1990's. Just over 700,000 of them lived in Chechnya (where in the 1989 census they comprised under 65% of the population). As of summer 1999, there were under 600,000 Chechens in Chechnya, perhaps considerably under that number. At present more than half of those people are *de facto* refugees, most of those remaining in Chechnya are trapped or imprisoned or displaced, thousands have been killed, and nearly every last surviving Chechen has been ruined and bereaved.

Prior to 1944, the great majority of Chechens lived in Chechnya. As of last summer probably closer to 60% of the Chechens lived in Chechnya. The other roughly 40% were for the most part an unwilling diaspora displaced by half a century of deportation, economic discrimination, war, economic chaos, and lawlessness. Since September 1999 over 325,000 more Chechens have fled Chechnya as war refugees and another 125,000 are internally displaced in Chechnya.[1] This article recounts the situations that have produced Chechen refugees and other displaced people over the last half century, gives estimates of their numbers, and describes the condition of the present wave of refugees. The term *refugee* will be used here of people who have fled war (though technically most of them are not refugees as they have not crossed a recognized international boundary). Others will be called deportees, forced migrants (if they have fled violence), and pressured migrants (if they have been squeezed out by economic duress and would probably return if they could). Generic terms covering all of these people and situations are *diaspora* (for the population), *emigrant* (for the individuals), and *exodus* (for the process and general situation).

As this terminology indicates, the usual terms *refugee*, *internally displaced*, and *emigrant* do not apply particularly well to the Chechen situation, and in any case they do not capture (and were not designed to capture) the variety of specific situations that can underlie the long-term gradual mass exodus of a pressured people. Analysis of the situation of the Chechens requires consideration

* Johanna Nichols is in the Slavic Department at UC Berkeley.

1. After this article had gone to press the Danish Refugee Council did a complete census of Chechens, finding their numbers in Chechnya much higher than expected, and questioned the 1996-99 exodus claimed in sect. II below. *See* <http://www.reliefweb.int> (country search for Russian Federation).

of whether the ongoing military action is or is not war, whether it is genocidal, and whether the larger Chechen exodus of the late twentieth century is genocidal. The Chechen refugee crisis will be compared below to the two most similar recent situations that have resulted in international sanctions and intervention: the crises of Kosovo and East Timor. It will be concluded that the prospects for the return of the Chechen refugees depend on the same factors as the more general prospects for peace in the Caucasus and for the development of civil society in Russia.

Russia is a country in which the rule of law is still fairly tenuous and corruption is widespread. In this situation high officials can violate human rights without technically bearing responsibility for these violations. A public statement by a high official containing hate language, but without specific legally binding claims or exhortations, signals implicit impunity for crimes committed against the target of hate. In August 1999, for example, anti-Chechen hate rhetoric emanated from public officials. This signaled to the police and the citizenry that framing, extortion, and eviction of Chechens would meet with impunity, resulting in raids and near-pogroms against Chechen and other Caucasian merchants in the markets of Moscow and St. Petersburg. Since the beginning of the military action against the Chechens in September 1999, Russian media have been required by state policy to use the terms "bandit" or "terrorist" when referring to Chechens. This language indicates implicit impunity for crimes against Chechens, and it implicitly sanctions actions such as looting, rape, massacres, and torture which are committed by Russian troops against ethnically Chechen civilians. Likewise, statements by high military officers to the effect that the Chechen refugees are fighters in disguise, resting and recuperating in refugee camps, or that there are no civilians at all in Chechnya but only fighters, carry the same implicit impunity for crimes against civilians. The prospects of refugees returning home, the prospects for civil society in Russia, and responsibility for violations of human rights need to be assessed for a full understanding of how implicit impunity functions in Russia. An analysis of implicit impunity is beyond the scope of this article, but its relevance will be pointed out below.

II.
THE CHECHEN EXODUS

The Chechens are one of numerous indigenous peoples of the central and eastern Caucasus who speak languages belonging to the Nakh-Daghestanian (or Northeast Caucasian) language family, a large and old language family with no demonstrated connection to any other language family (and certainly not to Indo-European, to which Russian belongs, along with English). The Nakh-Daghestanian family originated in the vicinity of the southeastern Caucasus over 6,000 years ago, and there is good archeological continuity from that area and time frame to the present peoples of the central and eastern Caucasus. The Chechens and their immediate western neigbhors, the Ingush, speak closely related languages and have nearly identical customs. They have a collective overarching term for themselves (*vai naakh*: 'our people'), but their identities as

respectively Chechen and Ingush are also traditional and—of all the levels of identity, from clan up to highlander and Muslim, which did and do attract loyalty in the northern Caucasus—are closest to national. The Chechen and Ingush were grouped into a single republic or ASSR by Soviet authorities, but chose to separate with the breakup of the USSR.

There has been much demographic change and population transfer involving the Chechens in the last two centuries.[2] The Russian conquest of the Caucasus, culminating in the mid-19th century, was prolonged and bloody, and many Chechens (and other nationalities) were killed or deported. In the first two decades of Soviet rule there were purges, slaughters, and highland clearances by the Soviet authorities among the peoples of the central and eastern Causasus, especially the Chechen and Ingush. These events of the early 20th century had significant demographic consequences but none produced appreciable numbers of refugees.

In 1944 the entire Chechen population, together with the Ingush and other nationalities (Karachay-Balkar, Kalmyk, Crimean Tatar, Meskhetian), was deported *en masse* to Siberia and Central Asia. Catastrophic numbers of deaths resulted from executions of those unable to travel or from transport: typhus epidemics and starvation enroute (the trip, with deportees packed into cattle cars, took nearly a month); starvation and exposure on arrival; and starvation and disease for the first several years of exile. Deaths are variously estimated as 20%-50% during removal, some 20% of the survivors during the first years of exile, and indirect population loss of about 200,000 as a result of deportation and exile.[3] Survivors began returning sporadically after Stalin's death, in large numbers after the "rehabilitation" of the deported nationalities in 1956, and in very large numbers after return was officially permitted in 1957. Soviet authorities tried in various way to urge and even coerce people not to return, but most did. Some stayed behind, however, and they and their descendants in Kazakhstan and Kyrgyzstan numbered just over 50,000 in 1989 (see Table 1).

The Chechens returned to a republic in which they were, by both policy and unofficial prejudice, second-class citizens. There was chronic poverty and high unemployment among them, while professional and technical work in Grozny's oil industry went primarily to Russians even when these fields experienced labor shortages. Many Chechens were forced to seek temporary employment in other republics. Although with *perestroika* the employment of Chechens in education and professional and technical positions in Chechnya increased, the two-sector economy[4] continued, with poverty, unemployment, and out-migration growing among Chechens. By the time of the 1989 census, only 735,000 of the 900,000

2. A recent overview in English of Chechen history is JOHN B. DUNLOP, RUSSIA CONFRONTS CHECHNYA: ROOTS OF A SEPARATIST CONFLICT (1998).

3. *See* N. F. Bugai, *The Truth About the Deportation of the Chechen and Ingush Peoples*, SOVIET STUDIES IN HISTORY, Fall 1991, at 67 (cited by DUNLOP, *id.*, at 70); V. A. TISHKOV, E. L. BELJAEVA, G. V. MARCHENKO, 1995. CHECHENSKU KRIZIS: ANALITICHESKOE OBOZRENIE [The Chechen crisis: Analytic overview] 8-10 (1995); ALEXANDER M. NEKRICH, THE PUNISHED PEOPLES 138 (1978).

4. The term is from TISHKOV ET AL., *supra* note 2 at 16ff.

Chechens in the RSFSR lived in the then Chechen-Ingush ASSR (at least 700,000 of them in what is now Chechnya); over 50,000 were in Kazakhstan and Kyrgyzstan, and over 50,000 in various parts of Russia. (See Table 1.) Most of the 58,000 Chechens in Daghestan were not part of the diaspora but residents of traditionally Chechen lands placed in Daghestan when the borders of the newly reconstituted Chechen-Ingush ASSR were drawn in 1956. The city of Khasav-Yurt is in this traditionally Chechen area.

After the election of Dzhokhar Dudaev as president and his government's declaration of independence, economic conditions in Chechnya worsened. Pensions, salaries of schoolteachers and other public servants, and other former government benefits ceased. Increasing numbers of people turned to trade in the marketplace to earn their living or joined the diaspora. Organized crime flourished in the former USSR after its demise and attracted the unemployed and underemployed, including Chechens. Relations with Russia worsened, and Russia initiated various destabilizing actions. People of all ethnicities—Chechen, Ingush, Russian, and others—left Chechnya. Of these, many Ingush moved to Ingushetia when it separated from Chechnya, in particular government workers and others moving to the new Ingush capital city; the others, including some Ingush, were pushed out by economic and/or political factors. The numbers of emigrants are unknown, but government statistics[5] indicate that the total aggregate population of Chechnya and Ingushetia was unchanged from 1991 to 1994, despite a traditionally high birth rate and a previously high rate of population growth.

The 1994-96 war between Russia and Chechnya produced hundreds of thousands of refugees and unknown numbers of civilian deaths. Estimates of deaths range from around 20,000 to 120,000; estimates by human rights groups tend to range up to 50,000. Of these, probably somewhat over half were Chechens. Some of the refugees from that conflict remain in the diaspora. Most of the Ingush still residing in Chechnya at the time left for Ingushetia when the war began, and most of them, as well as some Chechens, have remained there; the total is said to be in the tens of thousands, but I have seen no precise figures. On the other hand, the refugee influx, together with an original 64,000 refugees and forced migrants from the ethnic cleansing of Ingush from their traditional lands in North Ossetia in 1992, and an originally high population density in Ingushetia, have made housing expensive there, and in recent years some Ingush, including some of the refugees from the 1992 ethnic cleansing, moved to Grozny, where building or rebuilding was much less expensive. Russian government statistics[6] indicate total population losses of 284,000 in Chechnya for 1994-1996; this would include war deaths, other deaths, refugees, other emigrants, and the results of a presumably lowered birth rate and accelerated

5. Cited by Vladimir Grivenko, *O chislennosti naselenija Chechni v ijule 1999 g. (k nachalu novogo kavkazskogo konflikta)* [The population of Chechnya in July 1999 (before the present conflict)] (1999) following ROSSIJSKIJ STATISTICHESKIJ VESTNIK (1998) <http://www.memo.ru/hr/hotpoints/N-Caucas/habitants.htm>.

6. *See supra* note 4.

non-military-related death rate during the years of war. By the same figures Ingushetia's population growth during the war years was 98,000, of which I estimate that at least 70,000 must have originally been refugees or other war-related immigrants. If any of these people are being carried on the population rolls for the republic (and it seems that some are), they must have settled there, if only temporarily.[7]

The rest of the population growth in Ingushetia was due to births and the settling of some of the originally 64,000 refugees from the 1992 ethnic cleansing. Some of these refugees have managed to find housing and are no longer on the rolls of refugees or displaced. Others remain in temporary camps, some out of necessity, and some in the hope of gaining compensation for their destroyed homes (they lose their claim to compensation if they resettle). Some have presumably joined the diaspora.

The war ended in Russia's humiliating defeat by tiny Chechnya. The war had left Chechnya devastated, however, with much housing and nearly all infrastructure destroyed and much farmland mined or poisoned. Chechnya sank into lawlessness and economic chaos; some war veterans became leaders of paramilitary, radical fundamentalist, or criminal groups and fomented civil war, assassinating several high government officials. Reparations owed by Russia were diverted or never paid. Kidnapping gangs, secure in implicit impunity for crimes against Chechens and crimes committed in Chechnya, operated in and near Chechnya, terrorized the local population, and drove out nearly all international observers and aid agencies.[8] (About a thousand hostages are estimated to have been taken. Some were tortured or threatened with torture to extract ransoms from their relatives. Some were killed.) Unknown numbers of people fled this terror. In 1999 Grivenko estimated that up to 150,000 Chechens had emigrated from Chechnya between 1989 and summer 1999. People are said to have left Daghestan and Ingushetia as well. These were pressured migrants.

As of summer 1999, then, the total Chechen diaspora in the former USSR may have numbered between 200,000 and 300,000 people: the roughly 150,000 in Russia and Central Asia in 1989 (plus their descendants), another 100,000-150,000 by 1999, and some tens of thousands of settled war refugees in Ingushetia. (See Tables 1 and 2.) There are also over 60,000 non-diasporic Chechens living in traditionally Chechen lands in Daghestan and Georgia, and prior to 1992 there were over 2000 Chechens living in traditionally Ingush lands in North Ossetia, chiefly as a result of marriage to Ingush. There are also about

7. Neither the source nor the accuracy of the government figures is clear, as Grivenko mentions, *supra* note 4.

8. In cases covered by news reports, ransoms demanded for Chechens and other indigenous peoples tended to run in the tens of thousands of dollars, and those reported as actually paid were lower. Kidnapping at these rates was profitable not because income was high in the impoverished Caucasus but because implicit impunity made overhead (such as protection, bribes to police, losses due to criminal prosecution) low. A few foreigners, chiefly Europeans, were murdered and a few kidnapped. Ransoms demanded for them ran in the low millions. Some ended up being freed without prosecution of the kidnappers after Russian federal government intervention. Government officials and news reports generally stated that no ransom had been paid.

5000 Chechens in Jordan, the descendants of refugees and deportees from the Russian conquest of the Caucasus in the 19th century.

Even more than the 1994-96 war, the one which began in September 1999 is notable for its brutality towards civilians and its levels of destruction. The capital city of Grozny, formerly home to about 400,000 people, suffered unprecedented levels of destruction in 1994-96 and has been almost entirely reduced to rubble in the present war; this must be the greatest level of destruction ever visited on any urban area in any non-nuclear war. In both wars, but especially the present one, civilians have been the chief (and intended) targets of the Russian forces. There has been massive bombing of Grozny and many towns, including nearly every highland town or village. Despite a news blockade and a ban on reporting from the war zone, several massacres of civilians and bombings of refugee caravans have been documented.[9] A system of "filtration" camps in the Russian-occupied lowlands, ostensibly established to detain suspected guerrillas and individuals without passports, tortures and executes Chechens as young as 11, sometimes ransoming them to relatives. (The Russian human rights association Memorial estimated in mid-April that there were as many as 15 "filtration" camps holding several thousand people.)[10] Refugees flee the active bombings and the threat of massacre and torture. As of mid-April a total of 325,000 people were reported by the Ingush government to have entered Ingushetia as refugees, of whom 214,000 remained in Ingushetia (as of mid-May the latter figure is 215,000). Tables 2 and 3 show these and other relevant figures.[11]

III.
THE CONDITION OF THE PRESENT REFUGEES

A very few of those fleeing the current war are refugees in the technical sense of having crossed an international boundary: a few thousand highland Chechens were able to cross the border with Georgia in the autumn before the pass became snowbound, and perhaps a few hundred have joined relatives in Kazakhstan. The rest are technically internally displaced people. The Russian federal authorities deny even this status to as many as possible, in particular

9. For a massacre of 60 civilians in Aldi in early February see Human Rights Watch, *February 5: A Day of Slaughter in Novye Aldi* <http://www.hrw.org/reports/2000/russia_chechnya3/>.

10. As reported in an AFP (Agence France Press) release of April 14, 2000. A May 22 AFP release quoted Russian news agency Itar-Tass as quoting the Russian federal command to the effect that the Russian military had arrested more than 10,000 Chechens this year; this may be the number placed in "filtration" camps since January 1. That is, by the estimates of Memorial and the Russian military (organizations unconnected to each other), the number of people now held in "filtration" camps may be an order of magnitude greater than the number ever taken hostage. When "filtration" camp prisoners are ransomed to their relatives, the ransoms are an order of magnitude lower than those taken in the interwar period by kidnapping gangs: figures of $300, $700, and $3500 are cited in Amnesty International, *Continuing Torture and Rape in Chechnya, News Release EUR 46/36/00* <http://www.amnesty.org/news/2000/44603600.htm>.

11. For a chronicle of statements and information on the war see Human Rights Watch, *Chechnya: Renewed Crisis (1999-2000)*, <http://www.hrw.org/campaigns/russia/chechnya/>. For updated figures and other information on the refugees in Ingushetia see Johanna Nichols, *Chechen refugee crisis in Ingushetia* (1999-2000), <http://ingush.berkeley.edu:7012/human_rights.html>.

those individuals whose places of origin are deemed to be under Russian control.

The present war began with a blockade of Chechnya's and Ingushetia's borders. Ethnic Chechen and Ingush refugees are allowed exit only to Ingushetia, and only through one checkpoint. (People of other ethnicities can exit elsewhere, *i.e.* to Russia, North Ossetia, or Daghestan.) There are refugee camps only in Ingushetia. Initially, ethnially Chechen refugees were forbidden to leave Ingushetia. As of sometime in November they have been permitted to leave by train or plane, *i.e.* to distant destinations, as these vehicles do not pass through military checkpoints. The border blockade means that buses and cars must pass through a checkpoint with strict passport control, and in general people can pass these checkpoints only if they have a residence permit for their intended destination.

Access to refugee camps, or to refuge in Ingushetia more generally, is difficult in itself. From time to time the border checkpoint is arbitrarily closed, stranding refugees at the border. (For example, it was recently closed for three days to mark the March 26 Russian presidential election and for four days to mark the May 9 Russian national military holiday celebrating the end of World War II.) In late fall it was sometimes closed at the height of battle, stranding thousands at the border. (News reports at the time carried stories of refugees wounded by shrapnel or bombs developing gangrene as they waited at the closed border and requiring amputations as a consequence of the gangrene once they were allowed to enter Ingushetia.) At the border checkpoint refugees are often harassed, detained, and/or solicited for bribes by the guards.[12]

There are similar internal checkpoints along highways and major roads in Chechnya (12 of them, for instance, along the 25-mile stretch of highway from Gudermes to the border checkpoint at Ingushetia). Each of these too involves possible harassment, solicitation for bribes, and/or detention.

In November 1999, all Chechen males between the ages of 10 and 60 were decreed by the federal government to be potential fighters and forbidden to cross the border to Ingushetia. The restriction on border crossing was soon lifted in response to international outrage, but the policy still holds in Chechnya, where at any checkpoint and in any village with a Russian military presence men and boys down to the age of 10 are subject to arbitrary detention in "filtration" camps, torture and sometimes execution.

Not all who wish to flee are able to do so. The refugee entry point to Ingushetia is in the western Chechen lowlands, while the cities of Grozny and Gudermes are in the east, and the highlands that have seen most of the recent fighting are in the southeast. Travel to Ingushetia is difficult and dangerous for people from these areas, and the cost of transport by vehicle is prohibitive for many. Would-be refugees who have remained behind have lost their homes and possessions presumably in proportion to those now in Ingushetia. They receive

12. Human Rights Watch, *Displaced People in Ingushetia Face Life-Threatening Conditions* <http://www.hrw.org/press/1999/dec/chech1202.htm>; *Bribery and Abuse Along New Escape Route Out of Chechnya*, <http://www.hrw.org/press/1999/dec/chech1214.htm>.

little or no aid, have little or no access to medical care, and are not safe from battle. Their situation is thus worse on average than that of the refugees in Ingushetia. In mid-May, the UNHCR reported 125,000 internally displaced people within Chechnya.

Apart from the checkpoint risks, refugees must endure the risk of military action. There have been several cases of refugee convoys being fired on and even bombed. The Russian military authorities claim to set up humanitarian corridors for civilian escape from towns under bombardment, but refugees who have escaped say that they do not always exist, or are not always announced, or sometimes require bribes, or are not always honored.

Human Rights Watch describes the condition of the refugees in Ingushetia as follows:

> The conditions in the refugee camps in Ingushetia are dire, with inadequate shelter, food, clean water, heating, medical assistance and other essentials. Only a minority of refugees are housed in crowded tent camps or railway cars: the majority live in makeshift shelter in abandoned farms, empty trucking containers, or similar substandard shelter; because many are forced to pay large sums for private housing, they are often forced to return to what is still a very active war zone when they exhaust their resources. Russia is not allowing humanitarian organizations to operate freely in Ingushetia, and is virtually blocking any direct assistance to needy persons inside Chechnya. Displaced children in Ingushetia are not attending school, and their medical needs are more often than not severely neglected. Russian authorities have repeatedly attempted to force refugees to return to Chechnya by denying them food in the camps or by rolling their train compartments back to Chechnya.[13]

That is, the Russian federal government restricts aid to the refugees as far as possible: by denying them eligibility and by restricting or blocking access to them. As of last winter it was reported that international aid organizations are required to make any donations not to the refugees or the harboring republic of Ingushetia but to Russia, and that aid donated to Russia was distributed by Russian troops, which siphon off a considerable portion. At the time of this writing, the OSCE has just negotiated an agreement with Russia to send representation into Chechnya, which may improve matters. In recent months the UNHCR and other aid organizations have been sending more or less weekly aid convoys to refugees in Ingushetia. Still, aid falls short of needs, and the needs are made up by Ingushetia or not at all.

The Chechen refugee population places a burden on Ingushetia, which is notable in two respects. The first is its magnitude. The resident refugee population of 215,000 is two-thirds of Ingushetia's own population (and must outnumber the population less the refugees and settled refugees from 1992 and 1994-96). Table 4 gives some comparison figures relative to population, size, and population density of the receiving republic, for the Chechen refugees in Ingushetia and for two other recent conflicts that have produced large numbers of refugees: the crises of Kosovo and East Timor. The proportion of refugees to

13. Amnesty International and Human Rights Watch, *Joint Statement (to UNHCR) on Chechnya, April 11, 2000.* <http://www.hrw.org/campaigns/geneva/item4-oral.htm>.

population or area of the receiving republic is extremely high in the case of Chechens in Ingushetia.

Ingushetia is a tiny, impoverished, and densely populated republic and has been overwhelmed by the number of refugees. (The poverty is in large part a result of the history of deportation, disadvantage, and impoverishment that the Ingush share with the Chechen. The high population density is partly the result of refugees from previous conflicts.)

The second notable burden is the danger of Russian military action against Ingushetia itself. From time to time, the Russian military command issues statements that the refugees are fighters in disguise, or that the refugees are a ruse designed to gain world sympathy, or that the government of Ingushetia is harboring Chechen guerrillas and terrorists. These statements convey implicit impunity for actions against refugees or against Ingushetia, and they can probably be taken as threats.

It should be noted that ethnic Ingush in Chechnya are in the same danger of harassment, execution, and "filtration" camps as ethnic Chechens are. The Russian military and federal government seem not to make any distinction between Chechen and Ingush ethnicities during this war, though so far the war zone itself has been limited to Chechnya.

Not only refugees but also the diasporic Chechen population of Russia has been, for practical purposes, imprisoned and criminalized during the war. From August to October there were state-sanctioned and state-organized near-pogroms of Chechens in the larger Russian cities. People, especially men, who appear to be from the north Caucasus are harassed by police, and Chechens are often detained and beaten. These actions increased greatly beginning last August. International passports are now refused to Chechens who apply for them. Chechen residents in Russian cities live in fear. Except with difficulty they cannot rent apartments, find work, or send their children to school. They try to stay indoors and out of sight as much as possible, for going out risks police harassment. The harassment, prejudice, and denial of passports are not the law in Russia and probably not even official policy, but rather the consequences of implicit impunity for harassment of Chechens.

One should note that in official Russian pronouncements the ongoing military action is not a war, but an "anti-terrorist operation." The Russian government has not declared a state of emergency has been introduced, without which the massing of arms and forces and the military action are not legal.[14] By objective criteria, however, this is war. The armed forces and Interior Ministry forces massed in Chechnya and the nearby bases for this action number about 100,000, exceeding Russia's limits under the Conventional Forces in Europe agreement. They employ heavy armaments: tanks, surface-to-surface missiles, 1.5-ton bombs, mines, and, reportedly, fuel air explosives. Bombers and helicopter gunships fly up to 100 sorties per day, weather permitting. Both the Russian troops

14. Parliamentary Assembly of the Council of Europe, *Conflict in Chechnya*, recommendation 1444, point 9, (adopted Jan. 27, 2000).

and the Chechen defense army that was assembled in response to the invasion operate in standard military fashion, each under a unitary command.

IV.
Is This Genocide?

An issue that comes up often in discussions of the present war is whether it is genocidal. For the purposes of this symposium, then, are the refugees fleeing genocide and are they in danger of genocide?

The war is ethnically targeted and extremely destructive. Thousands, probably at least 10,000, civilian Chechens have been killed.[15] Nearly every ethnic Chechen who lived in Chechnya before the war has now been economically ruined. The bombardment of towns, cities, and villages has been massive and continuous, and the degree of destruction of Grozny, as noted above, probably unparalleled in non-atomic warfare. The conflict has destroyed urban and rural infrastructure. Farmland and pasture has been ruined by bombing, mining, and bombing of oil refineries, waste dumps, and other toxic sources. In February, the fighting shifted from the lowlands to the foothills and highlands, where the population is almost exclusively Chechen, construction is light and structures unprotected, and there are no escape corridors. The Russian forces are using larger bombs (up to 1.5 tons) in the mountains. The civilian death rate must be exceedingly high.

The bombing of Grozny, which had a significant non-Chechen (chiefly Russian) population, and lowland towns, which had some Russian population, was not strictly genocidal in outcome, as civilians other than Chechens were killed. However, it was ethnically targeted in intention, its purpose being to destroy the civilian population of Chechnya. Furthermore, statements by Russia's own military and government make it clear that the Chechen ethnicity is targeted in this war. Since before the war Russian leaders have regularly referred to Chechens as "bandits" or "terrorists," making no distinction between kidnapping gangs operating in or near Chechnya, the Chechen government, and the Chechen people. In war coverage and commentary, all Russian media are required by government policy to use the terms "bandit" and/or "terrorist" in reference to Chechens. For over a year, Russian government officials have occasionally maintained that there was virtually no civilian population left in Chechnya, nearly everyone supposedly having emigrated to Russia under economic pressure or in fear of kidnapping.[16] The military policy whereby all Chechen males over 10 years of age are officially viewed as potential fighters and are subject to detention is a clear indication that an ethnic group is targeted as enemy in the war. In late November, the Russian command stated that all occupants of Grozny would be regarded as enemy fighters and bombed, an ex-

15. The Chechen government estimated that 25,000–40,000 civilians had been killed or disappeared as of mid-May. *See* Chechen Republic of Ichkeria, Press Center, Reports: *Latest Data of Losses of Both Sides* (May 15, 2000). <http://www.chechengovernment.com/News.asp>.

16. *See* Grivenko, *supra* note 4, for the faulty analysis and suspect intentions behind such statements.

plicit identification of civilians as the enemy. More than once the high command has asserted that there was no civilian population in Chechnya, only fighters; this again amounts to a statement that the Chechen civilian population is the enemy.

The people held in "filtration" camps appear to be almost entirely Chechen (with a few Ingush). Treatment of refugees by the military and federal government is ethnically based; it is specifically Chechen (and Ingush) refugees who are required to exit only to Ingushetia and have faced restrictions on departure from Ingushetia. In October the Federal Migration Service announced plans to scatter the refugee population and resettle it in a number of different southern and eastern Russian cities; it was specifically Chechen refugees that were targeted for scattering and resettlement. Subsequent plans have varied; the current plan is for repatriation to Chechnya and direct federal presidential rule of Chechnya with military occupation and strict passport control.

In summary, the Russian military regularly, and the government less often identifies the civilian populace of Chechnya as the enemy, assumes the default ethnicity of the civilian populace of Chechnya is Chechen, and/or explicitly identifies the Chechen ethnicity as the enemy. The Russian forces fight back against Chechen forces in actual engagements, and in the fighting in Grozny there was one case where an exiting Chechen battalion was mined and bombed, but otherwise the Russian military has done very little to seek out actual Chechen fighters or the Chechen command. Not only in intention but in effect, this is a war against a civilian population ethnically identified, in which Russian civilian deaths are incidental and/or not recognized by the military and Ingush are not distinguished from Chechens by the military. These misanalyses and the officially mandated terms "bandit" and "terrorist" do not negate the fact that the war is primarily against a civilian population ethnically identified.

Is the war likely to destroy the Chechens? It is unlikely that any outcome of the war and its aftermath would lead to the physical extermination of all ethnic Chechens, but it is very likely that the present war, together with the results of the previous wars and pressures, will lead to the extermination of the Chechen language, culture, and intellectual heritage. The Chechen population has been scattered, first by economic pressures and now by war. Both within and without Chechnya, Chechens endure extreme economic and social disadvantage. Refugees and other emigrants generally have nothing to which to return. Adults who have left will continue to find it difficult to secure work and housing; state-sanctioned hate rhetoric and implicit impunity for extortion of Chechens are likely to endure for some time in Russia. The children of emigrants and the diaspora will grow up in a non-Chechen and non-Chechen-speaking context, receive schooling that includes state-sanctioned anti-Chechen, anti-Caucasus hate rhetoric in subjects such as history and the humanities, face discrimination if they seek higher education or employment, and face price gouging and even extortion when they try to secure housing. Chechen culture, language, and ethnicity will be associated with poverty and disadvantage.

When poverty, economic and social disadvantage, stigmatization, discrimination, scattering of population, cessation of literacy in that language prevail, languages and cultural heritages are lost through language shift and ethnic identity.[17] Under similar circumstances, in the 1944-56 deportation, the entire Chechen generation that was of school age grew up linguistically Russian-dominant and sometimes with a poor command of Chechen. On return from the deportation, many Chechens gained near-full fluency and their children were acquiring full fluency. Only in Grozny, where the large Russian population meant *de facto* scattering of the local Chechen population, education and media in Russian, and discrimination against Chechens, did the younger generation continue to grow up with partial or poor command of Chechen. However, transmission of language and culture rest on more than conversational fluency. A central feature of Chechen culture is the code of courtesy, honor, and formality holding between age groups and between kinship groups, and this is closely bound up with proper use of the language. The traditions and the requisite language use can be acquired only in a peer group and in the larger context of a multigenerational society including representatives of several clans. The children of the diaspora grow up within, at best, a poor approximation of this context. The peer group in general is essential to full language acquisition, and a stable group of peers in particular is crucial not just to fluency but to formation of a language and dialect identity and what might be called a personal identity in language use.[18] Thus, not only the language but the language-centered aspects of culture, notably the code of honor and dignity, are in grave danger of dying out as the Chechens are scattered, uprooted, and impoverished.

Among the important grammatical properties of the Chechen language is its use of elaborate clause chaining with long-distance reflexivization and same-subject constraints operating to link long series of clauses into complex sentences of paragraph-like length and function. Command of these structural properties is essential to constructing coherent narrative and coherent expository discourse in Chechen. My Chechen and Ingush colleagues and I have observed that many people younger than mid-adulthood, even if they have excellent colloquial fluency and vocabulary command, are no longer in full mastery of clause chaining. The language will cease to be used if the best educated people find Chechen inadequate for refined, precise, or deep expression. Transmission of these aspects of the grammar requires either a sizable community in which Chechen is the main vehicle of expression and communication, or education which can rely on sophisticated linguistic analysis, sophisticated pedagogy, and a good supply of excellent reading materials. In Soviet times, education in urban centers was primarily in Russian, and even in Chechen villages the teaching

17. The linguistic literature on language shift, language death, and languge endangerment is vast. *See, e.g.*, LENORE A. GRENOBLE AND LINDSAY J. WHALEY, EDS., ENDANGERED LANGUAGES: CURRENT ISSUES AND FUTURE PROSPECTS (1998); SARAH GREY THOMASON, TERRENCE KAUFMAN. LANGUAGE CONTACT, CREOLIZATION, AND GENETIC LINGUISTICS (1988); RONALD WARDHAUGH, LANGUAGES IN COMPETITION (1992).

18. Jane H. Hill, *Languages On the Land*, in ARCHAEOLOGY, LANGUAGE, AND HISTORY (John E. Terrell, ed., in press).

materials for most subjects other than Chechen language and literature were in Russian. Higher education was in Russian except that language and literature departments taught in the language studied (that is, Chechen language and literature were taught much as, say, French and English were). Publication in Chechen, as in other non-Russian languages, was essentially limited to literature (especially poetry) and newspapers (a highly Russified genre in any case). In the years of the Dudaev government, minimal attention and resources were given to production of teaching materials and curricular upgrading, and with teachers' salaries unpaid, the school system began to falter. Since 1994 the economic and political situation has further undermined education. In short, the language was threatened in Chechnya even before the current war began. The war has shifted the language from threatened to endangered. It culminates and hastens a decades-long process of slow genocide that will lead to extermination of the language, culture, and intellectual heritage if it is not reversed promptly.

V.
Comparison to Kosovo and East Timor

Last year's crises involving Kosovo and East Timor are important cases of state violence against internal provinces that created many refugees and where the international community protested and took action (e.g. economic and other sanctions announced against Indonesia, the NATO bombing of Serbia), despite the fact that the aggressors claimed the actions were internal matters. Whatever one may think of these actions, they established precedents whereby human rights considerations, in particular war crimes, within a sovereign country can be taken as violating international law and justifying international action. Let us compare the refugee picture and the larger context of the Chechen war to these two precedents.

The chronic economic oppression and discrimination in Chechnya that has produced emigrants since 1956 was comparable to the chronic discrimination against ethnic Albanians in Kosovo up to 1999. One can compare the levels of violence and destruction against Chechen civilians in the 1994-96 war, and the interwar violence, to the violence and destruction in East Timor since 1975. The present war is more violent in terms of death and destruction than the Indonesian action in East Timor (though the latter would probably have become comparable had the UN not intervened) and has by now been more destructive than the Serbian action against the Albanian Kosovars (if only because it has gone on longer). The concentration and near-imprisonment of refugees in Ingushetia has no analog in the Kosovo conflict but is similar to the deportation and near-imprisonment of East Timorese in West Timor (where the goal of Indonesian aggression was punitive action against the East Timorese).

Systematic and complete ethnic cleansing was the goal of the Serbian action in Kosovo. The Federal Migration Service basically announced a policy of ethnic cleansing when it announced its plan to resettle Chechen refugees in various Russian cities, although the current plan, as noted above, is repatriation and

military occupation. Ethnic cleansing seems not to have been a consideration in Indonesia's aggression against East Timor.

The war against the Albanian Kosovars was genocidal, but would not have resulted in the extermination of Albanian ethnicity, language, or culture, as a large Albanian population continued to reside in Albania. The war against the Chechens is genocidal, as argued above, and threatens to exterminate the language, culture, and ethnic heritage. The violence against the East Timorese was not genocidal in intention, but would (if not stopped) have led to the extermination of not one but several entire ethnicities with their languages and cultures and heritages, and two whole language families. Many East Timorese speak Tetun, a representative of the large and widespread Austronesian family of languages with close relatives in West Timor, and Waima'a, representing a separate Austronesian branch found only in East Timor. Mass killing of Waima'a would have caused extinction of not just a language but an entire linguistic subfamily. In addition, in East Timor there are some 25,000 speakers of Fataluku and 10,000 of Makasai, languages that are family-level isolates and non-Austronesian.[19] Mass murder in these societies would have exterminated not merely two languages but two entire language families.

The prewar populations of Chechnya, East Timor, and Albanian Kosovars were comparable (on the order of a million). The absolute number of refugees from Chechnya is higher than the absolute number of refugees and deportees from East Timor to West Timor; the absolute number of Albanian Kosovars was somewhat over twice the Chechen figure. (See Table 4)

The impact of the Chechen refugees on the harboring republic of Ingushetia is much greater than that of the East Timorese on West Timor or the Albanian Kosovars on Albania and Macedonia. Only in the war on Chechnya has there been systematic impoverishment and endangerment of the harboring republic by the imposition of a large refugee population on it. The denial of refugee exit from Chechnya, the bottleneck at the entry point to Ingushetia, the coerced repatriation of refugees, and the blocking of international aid to the harboring republic are aspects of the Chechen situation that were not found in the Kosovo and East Timor crises.

VI.
CONCLUSION

The Chechen refugees from the present war are the latest and most acute phase of a long-term, state-instigated exodus. The refugees are numerous, densely concentrated in a small area, and in danger of further violence. They are a burden on Ingushetia, where they are housed, and their presence puts Ingushetia in danger of Russian reprisals. The Russian federal government's distinction between internally displaced people whose places of origin are not under Russian control (and who are entitled to federal aid), and people whose places of

19. S. A. WURM AND SHIRO HATTORI, LANGUAGE ATLAS OF THE PACIFIC AREA, PART I: NEW GUINEA AREA, OCEANIA, AUSTRALIA, map 40 (1981).

origin are under Russian control (and who, in the opinion of the authorities, are hangers-on who should return), is artificial. Both are fleeing mortal danger: Russian bombings and massacres in the war zone and "filtration" camps and executions in the Russian-controlled areas (as well as further warfare—Russian control not being a very durable status in this war). Under the Russian federal government's planned system of Russian presidential rule of Chechnya with military presence and strict passport control, all Chechens as well as any Ingush in Chechnya will be in mortal danger of torture and execution in "filtration" camps.

Existing international law and policy appear adequate to the Chechen situation in principle. Russia is grossly violating human rights and committing war crimes. It has exceeded its limitations under the Conventional Forces in Europe agreement; the situation regarding refugees, civilians in general, human rights, and survival of societies is comparable to that found in Kosovo and East Timor. The problem is the international community is not insisting on Russia's adherence to international principles regarding human rights.[20]

In the short run, the refugees in Ingushetia need food, clothing, medications and medical treatment, education for their children, accommodations, protection against coerced or forced repatriation, and unhampered access by aid agencies.

The displaced and would-be refugees in Chechnya, those trapped in the war zone, those in danger of imprisonment in "filtration" camps, and those presently in the camps are in greater danger and worse physical circumstances than those who have escaped to Ingushetia. They are in desperate need of access to aid workers and aid agencies.

The single greatest short-term need of both the refugees in Ingushetia and the civilians trapped in Chechnya is an end to "filtration" camps and summary executions of civilians.

The long-term needs of the refugees, and of Chechens in general, are the same as those of Russia. The war must end, and it must end by negotiated settlement. No conceivable military outcome will produce anything other than spiraling violence and expanding violent, radical nationalism or fundamentalism. The last war radicalized and brutalized war veterans on both sides, fostering the growth of violent organized crime, including militant fundamentalism and kidnapping gangs, in the interwar years. This in turn helped provoke the present war. The present war has seen higher levels of violence against civilians, more explicit state sanction of that violence, and more civilians in "filtration" camps than the last one. It has also seen more explicit Russian attempts to draw neighboring republics and countries into the war.

Some approximation of economic normality, some reasonable chance of financial security (however modest), reduction of corruption, and a financial future one can plan on are required if Russia is to evolve toward a civil society and

20. Several prominent human rights organizations have explicitly charged Russia with war crimes and/or massive human rights violations, and have explicitly called for international sanctions and action. *See, e.g.*, Human Rights Watch, *supra* note 8; Amnesty International, *supra* note 9; Amnesty International and Human Rights Watch, *supra* note 12.

avoid radical nationalism. Regardless of whether the Chechen Republic becomes independent, it cannot survive next to a radically nationalist Russia. The Chechens need some degree of economic normality and predictability, some confidence that what is rebuilt will not be promptly destroyed and that infrastructure is a worthwhile investment, if civil society is to return to Chechnya. The economic chaos of the last decade was another, separate contributor to the development of radical fundamentalism, paramilitary groups, organized crime, and corruption in both Russia and Chechnya.

Therefore the greatest need in both the short and long run is for forward-looking action on the part of the international community. A simple but important action would be a clear and explicit distinction by policymakers, the media, and government officials between the Chechen people and their elected government on the one hand, and the paramilitary, radical fundamentalist, and kidnapping groups whose presence in the Caucasus helped provoke the present war. These latter are part of the larger Russian organized crime world and not part of Chechen society. Other helpful immediate steps would include insistence on an international presence in Chechnya and Ingushetia, stronger pressure and sanctions, and more insistent support for a free press in Russia. Mere withdrawal of international approval from the Putin government as long as human rights violations continue would probably be appreciably effective.

Further needed steps are prompt negotiation of a settlement with international participation, international guarantees of peace—including an effective peacekeeping force, assistance at rebuilding, debrutalization of war veterans on both sides, and removal from society of the OMON troops who serve as torturers in the "filtration" camps. Some assistance at rebuilding will be necessary, though the most important need is for confidence that rebuilding is a worthwhile investment. Justice and effective reconciliation measures will have to be devised, initiated, and guided by the international community, as Russia has no experience with reconciliation and minimal experience with justice. Initiation of civil society in Russia and its restoration in Chechnya, therefore, will require action, vigilance, and diplomacy on the part of the international community. Without these things, the violence, the refugee crisis, and the genocide of the Chechens will never be brought to an end, and they will spread to other regions and other ethnic groups.

TABLE 1
CHECHENS IN 1989 CENSUS[1]

Location	Number	Comment
Chechen-Ingush ASSR	734,500	Estimate: 715,000 in present Chechnya, 20,000 in present Ingushetia
Daghestan	58,000	Non-diasporic (traditional Chechen community of Khasav-Yurt in Daghestan)
Russian north Caucasus	42,300	
Saratov, Tjumen'	10,600	
North Ossetia	2,600	Non-diasporic (traditional Ingush lands in North Ossetia)
Moscow	2,100	
Other, unknown	48,900	
Total, Russian Federation	899,000	
Kazakhstan	49,500	
Kyrgyzstan	2,600	
Other, unknown	7,200	Chiefly Georgia (non-diasporic: traditional Chechen communities in Georgian highlands)
Total, other CIS	59,300	
Total, CIS	958,300	
Jordan	5,000	Diaspora formed in 19th century
Turkey	<5,000	Diaspora formed in 19th century
Total	965,000	(CIS + Jordan = 963,300; rounded up, allowing 1700 for Turkey)
Total non-diasporic	802,300	(Chechnya, Ingushetia, Daghestan, North Ossetia, Georgia)
Total diasporic	162,700	
Total 20th-century diaspora	156,000	(excludes Jordan, Turkey)

[1]Russian north Caucasus = Russian regions adjacent to Caucasus (Stavropol, Kalmykia, Astrakhan, Volgograd regions). Saratov and Tjumen' are farther east. Source: Tishkov et al. 1995. All figures rounded to hundreds or thousands.

TABLE 2
NUMBERS OF CHECHEN REFUGEES AND EMIGRANTS,
BY LOCATION AND DATE OF CONFLICT.
"Russia" here abbreviates "non-Caucasus parts of Russia"
(i.e. excluding Ingushetia, Daghestan, etc.).
n.d. = no data. ? = uncertain. ?? = very uncertain

Location	Entered	Departed (destination)	Remain
1999-2000 war			
Ingushetia	325,000+	50,000 (Chechnya) 62,000 (Russia)	215,000
Russia	62,000+??[1]		
Daghestan	thousands	n.d.	thousands
Georgia	<10,000	n.d.	<10,000
Kazakhstan	some	n.d.	some
Chechnya	n/a	350,000?	300,000?
1996-99 interwar diaspora			
Russia	100,000??	few	100,000??
1994-96 war			
Ingushetia	200,000?	many (Chechnya)	<10,000?
Russia	??	??	??
Daghestan	thousands	n.d.	n.d.
pre-1994 diaspora			
Russia	96,700	n.d.	most
Central Asia	52,100	n.d.	most

[1]The 62,000 who departed Ingushetia for Russia presumably included some non-Chechen refugees who happened to exit through Ingushetia. Most non-Chechen refugees probably exited directly to Russia.

TABLE 3
REFUGEES IN INGUSHETIA, BY LOCATION,
DATE OF CONFLICT, AND ETHNICITY.

	Entered	Departed	Remain	Ethnicity
1999-2000 war	325,000+	112,000	215,000	most Chechen
1994-96 war	100,000?	many	??	Chechen
	>10,000?	few	~10,000?	Ingush
1992 ethnic cleansing	65,000	n.d.	most	Ingush

TABLE 4

COMPARATIVE DENSITY OF REFUGEES IN THREE RECENT CRISES.
Area and population figures from standard gazetteers. East Timor refugee total from UNHCR figures. Kosovo refugee total from Ball 2000

Refugees:		Receiving country/republic:			Refugees	
From	To	Area sq. mi.	1990's population (thousands)	Prewar population density/ sq. mi.	Numbers (thousands)	Refugees as % of population of receiving country
Kosovo	Albania	11,000	3,422	311		
	Macedonia	9,928	2,189	220		
	both	20,928	5,611	268	864	15%
East Timor	West Timor	6,120	1,170?	191	230	20%
Chechnya	Ingushetia: Entered	1,242	320	258	325	102%
	Ingushetia: Remaining	1,242	320	258	215	67%

Berkeley Journal of International Law

Volume 18 | Issue 2 Article 7

2000

A Half-Century of International Refugee Protection: Who's Responsible, What's Ahead

Bemma Donkoh

A Half-Century of International Refugee Protection: Who's Responsible, What's Ahead?

By
Bemma Donkoh*

The dawning of a new century and millennium in the year 2001 roughly coincides with the commemoration of fifty years of responsibility-sharing by States in an international system designed to protect and assist refugees. Toward the end of 2000, we will commemorate the 50th anniversary of the creation of the Office of the United Nations High Commissioner for Refugees (UNHCR).

On December 14, 1950, the United Nations General Assembly passed a resolution creating the office of a High Commissioner for Refugees. This position, under the auspices of the United Nations, would provide "international protection" to refugees and seek "permanent solutions" for the problem of refugees in conjunction with the governments of member states. In the year 2001, we will reach another landmark: 50 years since the adoption of the 1951 Convention Relating to the Status of Refugees. Under different circumstances, the endurance for half a century of an institution in which all the world's States and citizens continue to be stakeholders would have called for a celebration. Why are we not celebrating?

It is indicative of the ambivalence with which most people view the refugee issue that the UNHCR, after much internal reflection, has decided that now would not be a good time to "celebrate." Indeed, one doubts whether there could ever be a good time to celebrate such an issue. Instead, a decision was made to focus on the strengths, potential and resilience of refugees as individuals and as communities throughout the world, in order to bring into sharp relief both the plight of refugees and their proximity to the ordinary person in the street. In so doing, the UNHCR hopes also to affirm the morale and value of all those who, along with the UNHCR, assist and advocate for the rights of refugees and the forcibly displaced.

In December of 1950, the establishment of the UNHCR was a preliminary, and necessary, step toward achieving the goal of an effective, although young,

* Deputy Regional Representative, UNHCR Regional Office for North America and the Caribbean. These remarks were part of a presentation, "Global Perspectives on the Effectiveness of International Law and Institutions for Protecting the Rights of Refugees/Internally Displaced Persons (IDPs)." The views expressed are those of the author and do not necessarily represent those of UNHCR.

United Nations. The original goal of the UNHCR was to build a multilateral legal system designed to safeguard the rights of individuals displaced as a result of conflicts that had taken place in Europe and to coordinate international support for these populations. The second essential lynchpin of the new international accord was to follow within a year of the creation of the organization. In July 1951, an international conference of plenipotentiaries adopted a treaty that included a shared refugee definition and the scope of the protection attached to refugee status. The equation offered by the 1951 Convention Relating to the Status of Refugees was thus: Contracting States committed themselves to guarantee rights for refugees. The system set forth in the Convention was underscored by an understanding that States, in co-operation with one another, should be responsible for refugees, despite their status as non-nationals. The rationale underlying such an institutionalized, multilateral approach, as opposed to the *ad hoc* initiatives launched in previous eras to assist displaced groups, was explained in the Preamble to the 1951 Convention. The Preamble recognized that, "the grant of asylum may place an unduly heavy burden on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international Cooperation."

The 1951 Refugee Convention articulated the central concepts of an international refugee protection regime. These elements include:

- Establishment of a shared refugee definition. Under the Convention, a refugee is a person outside his/her country of origin who, because of a well-founded fear of persecution on account of race, nationality, membership of a particular social group or political opinion, is entitled to protection and cannot be required to return to his country of origin;
- Articulation of the principle of *non-refoulement*: refugees should not be returned to face persecution or the threat of persecution;
- Creation of a duty to extend protection to all refugees without discrimination;
- Articulation of the tenet that the refugee problem should be treated as a social and humanitarian one, and therefore, should not become a cause of tension between States;
- Recognition of the principle that persons escaping persecution cannot be expected to leave their country and enter another country in a regular manner and, accordingly, should not be penalized for having entered into or remaining illegally in the country where they seek asylum;
- Commitment to the principle that the expulsion of refugees should be undertaken only in exceptional circumstances directly bearing on national security or public order, given the very serious consequences attendant to expulsion where a refugee is involved; and
- Establishment of the principle that co-operation of States with the UNHCR is essential if the effective co-ordination of measures taken to address the problem of refugees is to be ensured.

Thus, what began as an arrangement limited in time and scope—intended to solve a post-Second World War, European problem—has lasted for 50 years. The persistent problem of human displacement and cross-border migration arising from the systematic deprivation of fundamental human rights, violent conflicts and other events affecting the security of individuals and communities forces the mandates of the 1951 Convention and its progeny to the forefront of international law. Early on in the Convention's history, events such as the Algerian War of Independence in 1956, the revolution in Rwanda, and the start of the de-colonization struggles of former Portuguese colonies in Africa and Asia forced the international community to recognize its limitations. To bridge the obvious gaps in the Convention's protective elements, a protocol was adopted in 1967. This new agreement removed the time and geographical limitations present in the original Convention, updated it in light of recent conflicts and gave it a truly "global" identity, extending its significance and reach beyond Europe to the rest of the world. At the same time, the UNHCR, an agency initially expected to be necessary for a period of only three years, has had its existence prolonged through successive renewals of its mandate.

One has only to scan a daily newspaper published in any of the world's major cities in order to appreciate the scale of humanitarian need that underlies the work of international refugee protection. On any given day, one is likely to find reporting of at least one story about sectarian and ethnic violence, an armed conflict or violent upheavals accompanied by pictures of children and their mothers, the young and the elderly, huddled together in fear or distress. But more often, these masses are not stationary. They are on the move, straining to reach relative safety. As an illustration, in the last month, the following headlines have appeared in numerous papers: *Thousands of civilians in northern Sri Lanka's Jaffna peninsula are feared trapped by fierce clashes between the army and Tamil Tiger rebels: 3,000 people seek refuge in a church; another estimated 12,000 civilians are trapped near the strategically vital Elephant Pass causeway; Refugees from the Mae Kongka camp at the Thailand-Myanmar border, numbering some 10,000, mostly from the Karen ethnic group, face on an almost daily basis, the high risk of coming under attack by Myanmar troops and their allies; On a recent visit to Chechen refugee camp in Ingushetia, the UN High Commissioner for Human Rights, Mary Robinson, expressed her dismay at "the depth of suffering, pain, resentment and frustration" demonstrated by refugees she had encountered who had described, in consistent detail, a tale of human rights abuses by Russian troops.*[1]

It is has become quite common to find civilians trapped in situations that involve struggles between groups vying for control of territory or resources. In the midst of such mayhem, civilians have been actual targets of the violent assaults, rather than their incidental casualties. Civilians have served as the pawns of "warlords," instead of receiving protection from any of the parties to the conflict. Approximately 90 percent of these people are children, women and the

1. These reports are extracts from UNHCR's *Refugee Daily* publication—a daily compendium of global news reports.

elderly, categories that in most societies are traditionally viewed as requiring protection in times of violent conflict. The plight of these children, women and men is only partly evidenced by the fact that the UNHCR is currently providing protection and assistance to at least twenty-two million people in 124 countries around the world, including seventeen million refugees, as well as some five million persons displaced within their own countries.

The scale of the tragedy of forced displacement is, however, believed to be far worse than these figures portray. Hundreds of thousands of individuals are known to be trapped internally within the confines of their countries' borders, a population of internally-displaced persons (IDPs), estimated to number some thirty million persons, a population largely "invisible" to the outside world. Unlike refugees, these IDPs fall under the responsibility of no single international agency. In short, no one is accountable or responsible for their protection, and frequently, access to these populations by humanitarian workers is sporadic or totally non-existent.

Refugees and displaced persons constitute a population whose origins are vitally connected to many of the most pressing issues confronting our world: the protection of human rights; the resolution of conflicts; the promotion of economic and institutional development; the conservation of the environment; and the management of international migration. Several refugee issues directly impact on national, regional, and global stability, and often find their way onto the international peace and security agenda. But beyond these implications on geopolitics, the urgency of refugee protection issues stems from the immense human suffering that inevitably accompanies refugee flight.

The causes of such human suffering and degradation have changed little over 50 years. They continue to stem from serious violations of human rights, in times of peace, as well as during violent conflict. The solutions previously relied upon to redress the harm from such displacement, such as asylum, are much more in demand but less available. The possibility of voluntary return to a home country where conditions of normality and safety are present, however, is often a dim prospect for refugees from countries embroiled in prolonged conflicts.

What does the UNHCR have to show for almost 50 years of progressive development of principles and institutions for the protection of refugees? We can only provide a mixed response, pointing out the concrete gains and benefits, along with the problems and challenges that beset this area of international law. The uniqueness of the international refugee protection system lies in its roots—a legally binding and standard setting treaty—which itself borrowed heavily from universal human rights principles and customary international law. International refugee protection has shown a capacity to evolve and develop not only through the experiences, practices and interpretations of its language by principal actors—State signatories and the UNHCR—but also through the contribution of a variety of international instruments, the work of intergovernmental bodies, including regional organizations, and jurists. The treaty's coherence flows from its fundamental basis: a regime of rights and obligations with a precise defini-

tion of who qualifies for protected status and the functional support of a dedicated protection agency.

In the context of the most recent and ongoing refugee situations, as demonstrated by recent events in Kosovo, Sierra Leone, Timor, Central Africa and Bosnia, the international community has tended to rely on this treaty system to respond to humanitarian needs. In these situations, the principles of non-refoulement, asylum, international solidarity and responsibility-sharing, as well as other legal and institutional arrangements, have been employed to ensure a systematic, concerted and principled response to humanitarian crises. Pressure on countries of asylum to open up their borders to fleeing refugees and guarantee their physical protection and access to the UNHCR's services and humanitarian aid can be traced to belief in this international system. These same examples also illustrate the weaknesses of international law and institutions as tools when political will wanes, or when States use a humanitarian response as a substitute for political action to solve the underlying causes of displacement.

Clearly, the international refugee protection system has produced some benefits. Just as clearly, however, it has manifested itself to be weak, vulnerable and unreliable in a number of areas. Negative trends in asylum practice—such as systematic detention and expedited removal procedures, interdiction and forced repatriation of refugees and asylum seekers, have led to a questioning of the effectiveness of the current international refugee protection regime. Admittedly, migratory flows have become increasingly complex. Those crossing borders and arriving without proper documents are seldom composed exclusively of refugees fleeing persecution in the classical sense, but often also include those responsible for creating the conflict, others escaping generalized violence, and still others affected by natural disasters and extreme poverty. This final group, driven predominantly by economic needs, does not qualify as refugees under current international law. In an era of fast-growing international criminal networking, terrorism and human smuggling, concern for national security has led governments, particularly Western industrialized countries, to unleash a series of stern measures and sanctions to deter and punish any type of irregular entry.

As the UNHCR frequently points out to governments, which like the United States in 1996 are driven to "reform" asylum laws, restrictive asylum policies are easy to export and have a tendency to spread. States everywhere, including those in Africa previously extolled for their open and generous asylum traditions, are increasingly insisting on their prerogative to offer asylum on their own terms. Those terms rarely comply with international law principles. Measures gaining popularity include rigid time limits for filing asylum applications and the use of detention, including that which is arbitrary, to deter asylum applications. There is also a trend toward inappropriate use of asylum-related notions such as "safe country," "internal flight alternative" or "manifestly unfounded claims" by officials in receiving states. A reinterpretation of the context and scope of basic principles such as *non-refoulement*, in the context of interdiction of persons attempting to enter a territory, is gaining acceptability. The fact that

such practices are being replicated in regions where laws and structures regarding the status of refugees are only now being put into place is extremely troublesome for the future of international refugee protection.

In analyzing the impact of these negative developments on the state of international protection today, however, it is important for us not to "throw the baby out with the bath-water." While decrying the shortcomings of the system we should not confuse the failure to properly apply the existing basic treaty obligations with perceived defects in the instruments themselves. To do so would be to constitute an open invitation to States to move from the agreed legal basis for refugee protection to less binding and more popular political options.

With regard to the adequacy and effectiveness of the UNHCR's current role, views span a wide range. Some advocate for a refocusing of the UNHCR's mandate to protection *per se*, while others call for an expansion of the organization's mandate to include responsibility for the care and protection of the estimated 30 million IDPs found in refugee-like situations in different parts of the world. Critics of the UNHCR's role within the contemporary refugee protection framework have highlighted its weak legal standing and financial dependency on government contributions as factors that have prevented the organization from exercising independence, standing up to governments and encouraging them to uphold principles of refugee protection.

Without embarking on a defense of the organization, it is worth noting that States are, necessarily, the implementors of refugee protection, while the UNHCR's role, in the words of Erika Feller, the Director of UNHCR's Department of International Protection, has been conceived to be that of "a facilitator." She points out that States are:

> [e]xpected to help establish the preconditions for a viable and effective refugee protection regime, namely, political support for the institution of asylum, universal respect for the rule of law, and a stable and secure global environment. [The] UNHCR's role is to prompt, facilitate, and oversee the process of State responsibility, but can never substitute for it.

Much of the frustration with the failure to find long-term solutions to refugee movements that have resulted in compassion fatigue would be better directed toward urging States to address the root causes of such movements rather than at the UNHCR. Otherwise, the UNHCR and other humanitarian agencies, whose mandates require them to engage when human needs are at stake, will continue to serve as salves to the consciences of States who, knowing full well that the only cure for forced displacement is often aggressive pursuit of political solutions and commitment to conflict resolution and reconstruction initiatives, still prefer to insist on "humanitarian" solutions.

United States Ambassador Richard Holbrooke recently made a suggestion that the UNHCR's institutional mandate for refugee protection be extended to IDPs. Some see this as the clearest indication yet that the 50-year old system set up for refugees, while not perfect, is valuable. Holbrooke's suggestion reflects the horrific scale of human displacement and misery within countries of origin in several areas of the world, some of which Mr. Holbrooke has visited.

These include places such as Angola, where almost 20 percent of the population has been uprooted, and Central Africa, where conflicts characterized by mass violations of human rights going back several decades have affected almost every country in that region. Estimates suggest that in Tanzania there are over 300,000 refugees from Burundi alone. These refugees are not the only casualties of the conflict in that country, for several thousands of their compatriots are internally displaced within Burundi. In the neighbouring Democratic Republic of Congo, hundreds of thousands have been displaced internally, while some 130,000 refugees have fled to Tanzania. Similarly, in Serbia, Colombia, Sri Lanka, and in countries of the Caucasus, refugee problems are closely linked to those of internally displaced people, both in terms of the causes and consequences of the displacement, as well as their similar humanitarian needs.

While the UNHCR is currently assisting some five million IDPs, some international body must address the needs of the several million other IDPs without consistent access to international assistance. Efforts to define an international system responsible and accountable for IDPs must be seriously pursued. This system must be invested with coherence, consistency and predictability in a manner similar to that which refugees have under the 1951 Convention and its subsequent protocols. In describing the role of her office to address the problem of IDPs, the United Nations High Commissioner for Refugees, Mrs. Sadako Ogata, stressed her commitment to increasing the extent of the organization's involvement with the internally displaced whenever possible and appropriate. She has cautioned, however, that the UNHCR's involvement will be subject to certain key considerations, such as the need to maintain respect for the right of individuals to seek asylum outside of their country of origin and to preserve the integrity of the agency's uniquely humanitarian and non-political mandate. The UNHCR's presence in a country in order to assist its internally displaced populations would, thus, be questionable where this presence is certain to be exploited by countries of asylum in an effort to justify their denial of admission to those attempting to cross their borders in pursuit of refuge. In any event, admission of refugees and access to asylum procedures must be guaranteed. Furthermore, in the face of the frequent security and political constraints that are characteristic of the complex and combative situations that accompany internal displacement of popuations, the UNHCR's effectiveness is seriously undermined. The UNHCR must be able to count on having unimpeded access to the populations of its concern and assurances of conditions of security for its staff and associated humanitarian workers. All too frequently, these conditions are not present.

Another entirely different group of persons requiring international protection are stateless persons. These people, by definition, do not possess the nationality of any country by operation of its laws. Here at least, the UNHCR has been temporarily charged under the 1961 Convention on the Reduction of Statelessness, with a mandate that enables the agency to intervene on behalf of, and to promote solutions for statelessness, including cooperation with States and

providing technical assistance on issues of nationality legislation and related matters.

In closing, I would like to provide a few thoughts on what can be done to revive the spirit of solidarity, humanitarianism and respect for the rule of law that has been responsible for the adoption, development and implementation of international refugee law. It is ironic that dissatisfaction over the *status quo* is shared by States and advocates alike, although, not for the same reasons. The question posed is whether the radical transformation of the current international legal regime for refugee protection that many desire would be realistic, feasible or necessarily curative of the ills identified. A less radical set of solutions may well be feasible. These solutions would involve recommitting the international community to the principles of international responsibility sharing, respect for human rights and upholding the dignity of asylum seekers and refugees. In this respect, the role of civic society is crucial. Too often, governments are left by default to be the sole arbiters as to when and how to comply with their contractual obligations relating to refugee protection. The active engagement of ordinary women, men, students, academics, adjudicators and advocates—members of the civil society—is needed to challenge xenophobic tendencies, particularly when these appear in subtle forms, such as the criminalization of asylum seekers and passage of unacceptable laws, policies and practices that derogate from refugee law standards in their communities. Refugee protection must be accorded its recognized "humanitarian space" in immigration control and management. It is through such involvement and vigilance that the spirit of solidarity and the common appreciation for the essential humanity of refugees can be restored into the practice of States and international organizations. A "culture of protection" must be nurtured and constantly promoted.[2]

At the same time, the issues of refugee protection go beyond the need to preserve asylum and extend to the need for concrete action to prevent the situations which lead to refugee movements and to create conditions for restoring dignity, security, peace and human rights for refugees in their home countries, where they belong.

2. Guy Goodwin-Gill, "The International Protection of Refugees: What Future?", address at the Institut Universitaire des Hautes Etudes Internationales, Geneva (Mar. 17, 2000).

Berkeley Journal of International Law

Volume 18 | Issue 2 Article 8

2000

The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work

Zachary A. Lomo

The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work

By
Zachary A. Lomo*

I.
INTRODUCTION

This paper focuses on the role that international human rights law, policy, and domestic legislation play in the protection of the rights of refugees and internally displaced persons in situations of civil war and ethnic conflict. I draw conclusions from my research experiences with refugees from the East African region,[1] which hosts hundreds of thousands of refugees and internally displaced people.

Broadly, international human rights law provides for those rights that should be enjoyed by every individual in order to lead a decent life. These human rights apply to all situations, whether during peacetime or war, and they apply regardless of gender, race, ethnicity, religion, nationality, citizenship, language, sexual orientation, and physical or mental abilities.

In this paper I argue that the existing international legal framework provides sufficient protection to all the victims of forced migration, both refugees and internally displaced persons. What is lacking in this framework is the ability of all key players to learn from past mistakes and the political will to use the available legal mechanisms in a way that can optimally protect them. Second, I argue that the staff members of many institutions, including the United Nations High Commission for Refugees (UNHCR), are not sufficiently competent to

* LL.M., Harvard Law School, 2000. The author presented this paper at the Berkeley Journal of International Law's spring 2000 symposium entitled "A Legacy of War: Displaced Masses in the Twenty-First Century," held April 14-15, 1999. I am greatly indebted to Lauren Gerber and Shawn Gould for their meticulous work editing and proof reading the several drafts of this paper. My thanks also go to Dr. Barbara Harell-Bond, Principal Investigator of the E.U. Refugee Health and Welfare Project for her initial suggestions and advice on the first draft and for allowing me to use data from the research we carried out under the umbrella project. I would also like to acknowledge the invaluable suggestions and criticisms of Joel Ngugi, S.J.D. candidate, Harvard Law School. All errors and omissions are my own.

1. From 1997 to 1999, I worked as Legal Research Officer on a study on the extent to which refugees enjoyed their rights in Uganda and the East African region under an E.U. umbrella project on Refugee Health and Welfare in and outside camps and settlements.

implement existing provisions for protecting the constituencies for whom they are responsible. Third, I note that many states have failed to enact laws necessary or to create the institutional frameworks to give effect to the international human rights protection regime. Fourth, many countries in Sub-Saharan Africa are populated by people who are uninformed about their rights and impoverished, and are thus amenable to manipulation, sectarianism and coercion. Fifth, the geo-political and economic interests of some states directly impact how the body of human rights law is implemented or interpreted. Finally, there is confusion among intellectuals and scholars about doctrinal and conceptual issues relating to the international refugee protection regime.

Part II of the paper provides an overview of the current problems affecting Africa, ranging from economic woes to civil wars and ethnic conflict. Part III highlights the conditions of refugees and IDPs in Africa: where they live, the type of assistance available to them, and the key stakeholders in the humanitarian industry. Part IV looks at the domestic legal frameworks for addressing the needs of refugees and IDPs and their compatibility with international standards. Part V discusses some of the protection problems faced by refugees and IDPs in light of the international human rights framework. Part VI summarizes the lessons learned from the struggle to protect the rights of refugees and IDPs in Africa.

II.
CONTINENT IN CRISIS

Africa is a continent beset with crises. Since colonial rulers transferred political power to African successors, many countries south of the Sahara have experienced dramatic changes. Institutions have been recast, often by the use of force, and leadership has changed frequently and violently. Despite its abundant wealth of natural resources, Sub-Saharan Africa is economically very poor. In 1999, the estimated combined gross domestic product (GDP) of all Sub-Saharan countries excluding South Africa was a mere $300 billion, less than that of the Netherlands.[2] In 1999, the region's foreign debt was estimated at $227 billion.[3]

African countries, especially those south of the Sahara, suffer not only from weak economies but also from deteriorating terms of trade with the rest of the world. Globalization has not benefited Africa; in fact, some pundits argue that Africa has been completely unaffected by globalization.[4] At the beginning of the third millennium, much of the African continent is engulfed in interstate and civil wars and ethnic conflict. Ethiopia and Eritrea were recently at war, six African countries are involved in both a civil and interstate war in the Democratic Republic of Congo,[5] and there are civil wars in Angola, Burundi, Congo-

2. *See* Donald L. Sparks, *Economic Trends in Africa South of the Sahara, 1999*, *in* AFRICA SOUTH OF THE SAHARA, 2000, at 11 (28th ed. 1999).

3. *See id.* at 13.

4. *See id.*

5. The conflict currently involves Angola, Burundi, Namibia, Rwanda, Uganda and Zimbabwe; Chad pulled out in 1999.

Brazzaville, Guinea Bissau, Namibia, Senegal, Sierra Leone, Somalia, Sudan and Uganda. Liberia recently emerged from a bloody seven-year civil war and current indicators are that fighting might flare up again.[6] These conflicts have precipitated massive waves of displacement both within and outside of affected countries. Currently, crises exist in Burundi, the Democratic Republic of Congo (DRC), Angola, Sudan, Somalia, and Sierra Leon, where hundreds of thousands of people have been forced out of their homes and live either as internally displaced people (IDPs) or as refugees in neighboring countries.

That Africa is once again verging towards another humanitarian crisis was reinforced on February 28, 2000, when the UNHCR and the WFP made a passionate appeal to the international community for 81 U.S. million dollars to feed refugees in sixteen African countries. The appeal follows a "big rise in the number of refugees" on the continent, especially in Tanzania, Kenya, Guinea and Zambia following fighting in the neighboring countries.[7]

But displacement is not only caused by wars and ethnic conflict. So-called development and conservation projects and the restructuring of economies have displaced many urban and rural people from their homes, forced to live in abject poverty. Recent semblances of democratization in some African countries notwithstanding, these conflicts are symptomatic of the dire human rights situation on the continent.

The lack of accurate statistics makes estimates of the exact number of refugees and IDPs currently in Africa difficult.[8] In 1999, the World Food Program estimated that the total number of refugees and IDPs in sixteen African countries was 1.9 million, and projected an increase to 2,065,000 in the year 2000.[9] The U.S. Committee for Refugees estimated that 2,944,000 refugees were living on the African continent at the end of 1997.[10] Although a country-by-country statistical synopsis is beyond the scope of this paper, a regional overview is illustrative. According to the High Commissioner for Refugees, "Africa's single biggest refugee crisis"[11] is in the East African and Great Lakes Region, where over 300,000 Burundian refugees were forced to flee Burundi for Tanzania following fighting in Burundi between the rebels and the Tutsi-dominated Burundi army. Kenya is host to some 192,000 refugees, the largest percentage of whom are Somalian. Uganda currently shelters 192,800 refugees, 170,000 of whom

6. *See* Human Rights Watch, *World Report 2000* <http://www.hrw.org> (hereinafter HRW Report).

7. UNHCR, Refugee Daily (visited Feb. 29, 2000) <http://www.unhcr.ch/news/media/daily.htm>.

8. *See, e.g.,* Corelli Barnett, *Who has Counted the Refugee?,* DAILY MAIL, March 26, 1999; *see also,* Jeff Crisp, *Who has Counted the Refugees?, UNHCR and the Politics of Numbers, 1999, Working Paper No.12;* UNHCR WORKING PAPERS: NEW ISSUES IN REFUGEE RESEARCH.

9. The sixteen countries are: Angola, Chad, DRC, Djibouti, Eritrea, Ethiopia, Gabon, Guinea, Kenya, Liberia, Rwanda, Sierra Leone, Sudan, Tanzania, Uganda and Zambia. *See* UNHCR, Refugee Daily (visited Feb. 9, 2000) <http://www.unhcr.ch/news/media/daily.htm>.

10. *See* U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 4 (1998) (hereinafter U.S. COMMITTEE 1998)

11. UNHCR, Refugee Daily (visited Jan. 24, 2000) <http://www.unhcr.ch/news/media/daily.htm>.

are Sudanese.[12] In West Africa, Guinea hosts over 500,000 refugees, 350,000 of whom are from Sierra Leone. Finally, in Cote d'Ivoire there are an estimated 202,000 refugees, 200,000 of whom are Liberians.[13]

Africa also has more internally displaced persons than any other continent. Sudan alone hosts 4 million IDPs—the largest IDP population—as a result of the over fifteen years of civil war between the rebel Sudan People's Liberation Army (SPLA) and the predominantly Muslim governments of the North. Sierra Leone is estimated to have up to 1 million IDPs, following the intensification of fighting between the Revolutionary United Front (RUF) of Foday Sanko.[14] In the DRC, there are 1.12 million IDPs as a result of civil war and inter-ethnic clashes. In 1998, more than 300,000 Angolans fled their homes when civil war erupted again. By the end of 1998, U.N. and Angolan government estimates placed the total number of Angolan IDPs between 1 million and 1.5 million.[15]

Beyond the statistics, and often ignored, however, are the numerous problems faced by refugees and IDPs that transcend the absence of food. These include issues of physical security, threats of forcible return to the country of origin where conditions are not ripe for return, the right to freedom of movement, refugee status determination, and absence of strong domestic institutional mechanisms for implementing the international protection regime.

In the *Mission Statement,* the organizers of this Symposium assert that although the international community has progressively come to "recognize refugees as legal persons worthy of human rights protection," in practice, "these persons have not been guaranteed enjoyment of their basic human rights despite their legalized status under international law." Indeed, every human being has a legalized status both under the municipal laws of most countries and international human rights law. Article 6 of the Universal Declaration of Human Rights (UDHR) stipulates that "[e]veryone has the right to recognition as a person before the law," and Article 16 of the International Covenant on Civil and Political Rights (ICCPR) similarly provides for recognition before the law. Thus, the basic human rights documents recognize every individual as worthy of human rights protection. The 1951 U.N. refugee convention, itself a human rights instrument, not only re-affirms the standards set by the Charter of the United Nations and the UDHR, but also recognizes the peculiar circumstances of refugees as persons who have "lost the protection" of the governments of their countries of origin. In contrast to refugees, internally displaced persons, who are also human beings worthy of human rights protection, are trapped within their countries of origin. For this reason, governments are reluctant to allow the international community to critically scrutinize the condition of IDPs under the pretext of *sovereignty,* as understood in traditional international law.

12. *See* UNHCR, The World <http://www.unhcr.ch/world/world.htm>.

13. *See* U.S. COMMITTEE 1998, *supra* note 10.

14. *See* HRW Report *supra* note 6.

15. *See* U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 49-50 (1999). For statistical updates, the U.S. Committee for Refugees annual reports together with those of the UNHCR provide reliable and up-to-date information (hereinafter U.S. COMMITTEE 1999).

The international refugee regime, and in particular the 1951 U.N. Refugee Convention, has come under considerable criticism from advocates for internally displaced persons for its failure to include these obvious victims of forced migration. Advocates for internally displaced persons have argued that given the changed circumstances, namely, the growing number of people displaced within their countries in need of protection, there is a need to expand the definition of the term "refugee" in the Refugee Convention or to expand the mandate of the UNHCR to include internally displaced people. Having experienced life as a refugee for over eleven years and then having lived as an internally displaced person in Uganda, my country of origin, I argue that the distinction between refugees and internally displaced people should be maintained because there exist subtle but very substantial distinctions between the two groups, both in fact and in law.

First, in fact, the very idea that someone is outside of his or her country of origin completely changes his or her legal status vis-à-vis the human rights he or she can enjoy and the obligations that flow from being a citizen. Second, as a matter of law, refugees are often subject to—and often victims of—immigration law and policy that has dire consequences for them. For example, while most governments will require a refugee to obtain a work permit in contravention of Article 17 of the 1951 Refugee Convention, an internally displaced person does not require one. Second, while a refugee or asylum seeker may be arrested at any time and deported to his or her country of origin by immigration officials, where he or she may face persecution, an internally displaced person does not face the threat of being deported to another country. Using the 1951 Refugee Convention as a "social engineering" tool to address the problems of internally displaced people is to destroy the fragile protection regime available for refugees. This regime is critical today, in the wake of the increasing adoption of containment policies and the rise of xenophobia against refugees and asylum seekers. Proponents of an expansive definition of the term "refugee," such as U.S. Ambassador to the U.N. Security Council Richard Holbrook, would better serve the interests of internally displaced persons by genuinely addressing the root causes of the problem which, as discussed below, are manifest in the despotic nature of African governments.

III.
THE CONDITIONS FACED BY REFUGEES AND IDPS IN AFRICA: AN OVERVIEW

No combined study on the conditions faced by refugees and IDPs in Africa exists.[16] Researchers must therefore rely on newspaper reports and reports compiled by human rights organizations such as Amnesty International[17] and

16. What does exist are general surveys and reports such as the U.S. Committee for Refugees' annual assessment of conditions affecting refuges, asylum seekers and internally displaced persons. *See* U.S. COMMITTEE 1999 *supra* note 15.

17. In 1997 Amnesty International dedicated its report entitled *Human Rights Have No Borders,* to refugee problems, in particular the refugee crisis in the Democratic Republic of Congo.

Human Rights Watch. Although these reports cover some cases of violations of the human rights of refugees and IDPs, the problems that receive the greatest coverage relate to food shortages, the abduction of children by rebel groups, and attacks on refugee camps and IDP settlements or "protected villages."

In all conflict areas in Africa, IDPs are housed in camps or "protected villages," as they are officially referred to in Uganda.[18] Isolation now appears to be the standard solution to the problem and has been defended vigorously by governments on the ground that that is the best option for securing the safety of IDPs. The same safety arguments have been advanced in relation to housing refugees in settlements and camps. In reality, the primary object of the protected villages is a military one—to isolate the civilians from the rebels and cut their food supplies. In practice, however, the so-called protected villages and camps have exacerbated the problem. Rebels have targeted women and children as well as men; children as young as ten years of age have often been abducted and forced into rebel ranks.[19] At worst, the conditions in protected villages are similar to those in a concentration camp; they are not fit for human beings.[20] The same is true of refugee camps. Refugees in camps live in squalid conditions as a result of congestion and lack of proper sanitary facilities.[21]

As internally displaced people are evacuated from their villages, they are often haphazardly resettled before the basic amenities are in place. Moreover, civilians are often forced by soldiers into the camps or protected villages before they have harvested their food crops. This problem compounds the predicament of IDPs because the protected villages or camps are often located far from their homes, resulting in the loss of the displaced persons' livelihoods. In some of the worst cases, refugees have been forcibly evicted from places where they have established themselves, such as transit centers, with wanton destruction of their meager property. For example, in February 1998, the UNHCR and the Government of Uganda ordered the eviction of Sudanese refugees from a transit camp in which they had lived for almost ten years despite the genuine security fears of the refugees, most of whom had been displaced from the previous settlements by rebels. The demolition of the houses of the refugees, which was witnessed by members of our research team, once again raised the pertinent issue of observance of human rights standards by humanitarian organizations in the field. The refugees were not compensated for their property. Food distribution through the local and international NGOs under the auspices of the World Ford Programme

18. In Burundi, these camps are called "regroupment" camps. For fairly detailed information about the internally displaced in Burundi, see U.S. COMMITTEE 1999 *supra* note 15 at 51.

19. For example, in Uganda, Guinea, and DRC, rebels have attacked refugees in camps and killed, abducted, mutilated many people including raping many women. *See, e.g.*, Ssemujju Ibrahim Nganda, *UPDF Killed 30 Children says Priest*, THE MONITOR, May 27, 1999, at 1-2; UNHCR, Refugee Daily (visited Feb. 29, 2000) <http://www.unhcr.ch/news/media/daily.htm>.

20. For example, a speaker at a seminar organized by the Human Rights and Peace Centre (HURIPEC), Faculty of Law, on the human rights situation in northern Uganda on 26 May 1999 observed that the conditions in protected villages are appalling and these villages are not fit for human beings.

21. The camps for Rwandan refugees in Goma, in the eastern Democratic Republic of Congo, where hundreds of refugees died of cholera between 1994 and 1996, are a case in point.

WFP and UNHCR is insufficient. Moreover, the supply of relief food to both refugees and IDPs has always been limited by intermittent military activity by the rebels, who sometimes loot the limited amount of food.

This situation is further exacerbated by the international community's lukewarm response to Africa's refugee problems. For example, in 1999, the international community spent $0.11 per refugee, per day in Africa. In contrast, it spent $1.28 per day per person in the Balkans. Furthermore, the international community spent $10 million a week on Kosovar refugees in Albania and Macedonia. Yet, in the same year, UNHCR's annual appeal for $8 million for refugees in West Africa only raised $1.3 million.[22]

Health standards in protected villages and camps for IDPs are far from ideal. Water in camps is scarce. The environment as a whole in these camps is appalling and the population is subjected to frequent epidemics of cholera and other enteric diseases. There are generally not enough dispensaries and those that do exist have neither sufficient resources, nor qualified staff to meet the needs of the internally displaced people. Although it is generally accepted that refugees enjoy higher standards of health services than do the locals, these services depend on unreliable international funding. Moreover, many refugees would argue that these "higher" standards do not necessarily mean services are always "adequate."[23] The major problem faced by both refugees and internally displaced persons, in settlements and camps respectively, is accessing enough land to feed themselves, a fact that further illustrates how the enjoyment of the right to health is contingent on the freedom of movement.[24]

Finally, the location of refugee settlements and camps for internally displaced people near military detachments increases the risk of people being caught in crossfire. Even intentional abuses of the rights of internally displaced people by government forces are often not documented by human rights organizations; they have focused mainly on violations and abuse of human rights by rebels. Amnesty International documented abuses of the rights of internally displaced persons in Uganda's northern districts of Gulu and Kitgum by the government forces for the first time in its 1999 report.[25]

There are several local and international non-governmental organizations operating in Africa that focus on providing various kinds of relief and so-called "development" assistance to both internally displaced people and refugees. But efforts to help both refugees and internally displaced people remain highly contentious because the policies of these organizations, often influenced by the UNHCR and the various countries' own governments, fail to meet human rights standards, in particular with respect to the ever-increasing demand for transparency, accountability and participation.

---

22. *See* HRW Report *supra* note 6.

23. *See* Zachary A. Lomo, The Role of Legislation in Promoting 'Recovery': A Critical Analysis of Refugee Law and Policy in Uganda, (1999) (unpublished manuscript on file with author 1999).

24. *See id.*

25. *See* AMNESTY INTERNATIONAL, UGANDA: BREAKING THE CIRCLES: PROTECTING HUMAN RIGHTS IN THE NORTHERN WAR ZONE, (1999).

IV.
DOMESTIC INSTITUTIONAL AND LEGAL FRAMEWORK

Although most countries in Africa are parties to the international conventions on refugees,[26] and although the 1969 OAU refugee convention imposes obligations on contracting states to "use their best endeavors consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality,"[27] many countries have not put in place the requisite institutional and legal structure for responding to the needs of refugees. This lack of domestic legislation to give effect to international treaty obligations not only "creates uncertainty about the status of refugees at the national and local level,"[28] but also explains why the policy and practice of both governments and humanitarian organizations are often inconsistent with international human rights standards.

Even where such domestic legislation exists, much of it is inconsistent not only with international human rights law, but also with the countries' own constitutions. For example, Uganda's Control of Alien Refugees Act of 1960 not only provides for the isolation of refugees but also deprives them of their property without due compensation, in complete abrogation of the 1951 U.N. Refugee Convention and the rules of natural justice.[29] By 1986, Tanzania's national refugee legislation did not incorporate the basic principles of international conventions on refugees.[30] Kenya does not have refugee-specific legislation, but campaigns for enactment of a refugee-friendly law are underway.[31]

While some African governments have taken measures to put in place domestic legislation and institutions to address the problems of refugees in fulfillment of their international obligations, such commitment is lacking with regard to IDPs. Although there is no specific international legal framework to address the needs of the IDPs,[32] international human rights law has imposed sufficient

26. Namely, the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter U.N. Refugee Convention], and the Organization of African Unity, Convention on the Specific Aspects of Refugee Problems in Africa, opened for signature Sept. 10, 1969, 1000 U.N.T.S. 46 (entered into force June 20, 1974) [hereinafter OAU Convention].

27. *See* OAU Convention, *supra* note 26, art. II (1).

28. *See* OXFORD REFUGEE STUDIES PROGRAMME, IMPLEMENTATION OF THE OAU/UN CONVENTIONS AND DOMESTIC LEGISLATION CONCERNING THE RIGHTS AND OBLIGATIONS OF REFUGEES IN AFRICA 7 (1986).

29. Following international criticism of this law, a new law is in the process of being enacted. By August 1999, a draft had been presented to Cabinet and thereafter to be tabled in Parliament. But at the time of writing, information available indicate that it had been shelved.

30. However, in 1998, Tanzania repealed this law but retained restrictions on freedom of movement and isolation of refugees in camps in complete disregard of the provisions of Article 26 of the 1951 Refugee Convention. *See* HRW Report *supra* note 6.

31. For further information about African countries that have refugee legislation, see REFUGEE STUDIES PROGRAMME, FINAL REPORT ON IMPLEMENTATION OF THE OAU/UN CONVENTIONS AND DOMESTIC LEGISLATION CONCERNING THE RIGHTS AND OBLIGATIONS OF REFUGEES IN AFRICA (1986).

32. In 1992, the secretary-general of the United Nations appointed a special Representative to overhaul existing corpus of international human rights norms and norms of international law with a

obligations on states to address their needs. Article 1 of the African Charter on Human and Peoples' Rights (ACHPR) stipulates that member states of the OAU party to the Charter "shall recognize the rights, duties and freedoms enshrined in this Charter and *shall undertake to adopt legislative or other measures to give effect to them"* (emphasis added). Similarly, Article 2 (2) of the ICCPR provides that states party to it undertake "the necessary steps, in accordance with its constitutional process and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Despite the obligations imposed by international human rights law, policy responses to problems faced by IDPs and refugees in the East African region and Africa as a whole, have generally been confused and ad hoc. There has been no harmonization of policy, leading to the creation of different institutional structures for refugees and IDPs. Although a multi-sectoral and interdisciplinary policy would pool resources and expertise, thereby benefiting both refugees and IDPs, this approach is often ignored. In Uganda, for example, there are two *sets* of administration within the Ministry of Disaster Management and Refugees, one responsible for refugees and another for "disasters," under which the internally displaced fall. The refugee section is well staffed, with several "desk" officers for women, children, and protection. It benefits from contributions from the UNHCR of resources such as vehicles and radios. In contrast, the "disaster" section does not enjoy similar access to international funds to improve the conditions of their work. Interventions on behalf of Ugandan IDPs rely heavily on external and ad hoc funding from foreign agencies and international agencies such as the UNDP and the World Bank.[33]

Rather than contributing to the creation of a viable institutional infrastructure, the involvement of international organizations often obstructs the development of sound policy and institutions for addressing the plight of IDPs. In Uganda, for example, the U.N. Disaster Management Team meets monthly, and is usually chaired by the UNHCR or the WFP Representative. However, the ministry that is responsible for disaster management is not represented.[34] Worse still, most international NGOs run parallel health and education programs instead of improving on existing local programs.

While most African governments will call for international help when faced with refugees crises, in the case of IDPs many countries refuse to release information. The governments base this secrecy on flimsy claims of sovereignty, thus effectively denying the IDPs media coverage and international support. For example, Burundi has restricted journalists' coverage of its *regroupment* policy,

---

view of preparing some form of international standards for the treatment of internally displaced people as those for refugees.

33. In 1998, the Uganda Government came up with a policy document on Disaster Preparedness and a new piece of legislation on disasters has been drafted. However, the new policy and law on disaster management does not make the "helpers" accountable to their beneficiaries. In fact, the draft law actually contains special provisions to protect those dispensing emergency assistance. Yet, in our research on refugees, we found that among the actors responsible for abrogating the rights of refugees are their "helpers," the so-called humanitarian organizations.

34. *See,* Geofrey Mugumya & Erin Mooney, *Uganda, in* INTERNALLY DISPLACED PEOPLE: A GLOBAL SURVEY 73 (Janie Hampton ed., 1998).

an attempt to isolate rebels. Under this policy, internally displaced people are evicted from their homes and confined in camps in which conditions, as noted above, are unfit for human beings. In Uganda, the government concealed, with the backing of Western governments, the plight of IDPs in the northern war-torn districts until late 1998. Journalists who defied the government to visit these war-torn areas and report on the atrocities committed against civilians by both government and rebels have been intimidated and harassed.

The lack of commitment of most African governments to create coherent legal and institutional structures for refugees and internally displaced persons is worrisome because without such a structure, the international legal framework becomes ineffectual.

V.
THE INTERNATIONAL LEGAL REGIME AND THE PROTECTION OF THE RIGHTS OF REFUGEES AND IDPS

A. The Right to Life and Physical Security

The greatest danger to both refugees and IDPs in Africa has been the threat of violence to their persons. Both rebels and government troops have murdered innocent civilians, raped women, tortured, mutilated and cruelly treated their victims. Rebels have attacked refugee camps and settlements and "protected villages" of IDPs, setting houses ablaze and destroying property. For example, in 1996, the Lord's Resistance Army in Uganda attacked a Sudanese refugee camps in northern Uganda, killing over two hundred civilians. The Burundian army is accused of killing Hutu civilians in protected villages under the pretext of rebel attacks. In Sierra Leone, the Revolutionary United Front (RUF) rebels have mutilated civilians, killed and raped women and forcibly recruited children to their ranks. In 1999 alone, the RUF raided five camps for Sierra Leonian refugees in Guinea.[35] All of this occurred despite the fact that international human rights law protects the right to life and security of the person. Article 3 of the Universal Declaration of Human Rights stipulates that every person has the right to life, liberty and security of person and article 6 of the ICCPR provides that "[e]very human being has the inherent right to life . . ." and "[n]o one shall be arbitrarily deprived of his life." In addition, the Convention against Torture prohibits the use of torture as a policy tool and stipulates that perpetrators of torture be brought to justice.

The provisions of the Geneva Convention relating to armed conflict outlaw wanton acts of violence, murder, torture, mutilation and rape against civilians. Article 3, Common Geneva Conventions,[36] establishes the minimum standards

35. *See* HRW Report *supra* note 6.

36. *See* The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force June 19, 1931); The Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Aug. 12, 1949); The Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S 135 (entered into

for the protection of human rights of civilians and other non-combatants. Article (3)(1) prohibits:

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Although only States can technically be bound by the provisions of the Geneva Convention, many of the prohibited acts—namely, torture, murder and mutilation by rebels during civil war or ethnic conflict—fall under the category of *peremptory* norms in international law. Therefore, the prohibitions of the Geneva Convention should be binding on non-parties, including non-state actors, as well.

Second, from a liberal perspective, traditional conceptions of sovereignty and how it defines obligations in international law are not just changing but are an anachronism altogether, i.e., the "state is now widely understood to be the servant of the people and not vice-versa."[37] Furthermore, the Additional Protocols of 1977 to the Geneva Conventions remedied the lacunae in the Conventions because they address the problems of internal conflicts. Read together, the Geneva Conventions remain the fundamental basis for the protection of the rights of civilians in situations of conflict. Protocol II to the Geneva Conventions specifically addresses violations of human rights in situations of civil war.[38] It "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, [and] shall apply to all armed conflicts" that are not previously covered.[39]

Protocol II, like Common Article 3, prohibits at "any time and in any place whatsoever," acts of "(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments . . . ." However, as shown above, both rebels and government forces have continued to attack refugees and IDPs, provisions of law notwithstanding. Thus, the problem is not so much a lack of legal framework but rather a failure in the implementation of the law.

B. Refugee Status Determination and the Right Against Expulsion and Refoulement

The 1951 U.N. Refugee Convention and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa define the term "refu-

force Aug. 12, 1949); The Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Aug. 12, 1949).

37. *See* Kofi Annan, U.N. Secretary General Address to the United Nations General Assembly, New York, Sept. 20, 1999.

38. *See* Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (entered into force Dec. 12, 1977).

39. *See id.* art. 1(1).

gee." The Executive Committee of the UNHCR has adopted conclusions on asylum and refugee status determination, and following its recommendations the UNHCR created the *Handbook on Procedures and Criteria for Determining Refugee Status.* Nonetheless, adequate asylum and refugee status determination procedures are lacking in Africa. This is primarily because UNHCR staff members working on refugee status determination often apply non-legal rules of convenience. Some staff lack proper legal training in refugee law.[40] Those who have proper training are often compromised by the bureaucracies of their organizations. For example, the UNHCR's branch office in Kampala rejected the application for assistance of 60 Rwandan asylum seekers on the ground that it contacted "Kigali" about their case and, from information provided, concluded that *none of these students were refugees.* The UNHCR did not give the students a chance to corroborate and challenge the authenticity of the information it had received from Kigali. The fear that staff that are sympathetic to local governments has infiltrated UNHCR offices throughout Africa.

When contrasted with Western European asylum practices, African refugee policies used to be a source of praise. However, the 1990s seem to have cast doubt on that image. Many African countries are taking measures that are inconsistent with the obligations they have assumed under international law. For example, refugees have been forcibly returned to their countries of origin against the express prohibitions contained in Articles 32 and 33 of the 1951 U.N. Refugee Convention and Article II (3) of the 1969 OAU Refugee Convention.[41]

In December 1996, Tanzania surprised many when it acted with the complicity of the UNHCR to *refoule* Rwandan Hutu refugees, in breach of international law. In a statement jointly signed by the Tanzanian government and the UNHCR, the Tanzanian authorities gave hundreds of thousands of Rwandan refugees three weeks to return to their country, despite the fact that conditions there were not ripe for such a return. An estimated 300,000 refugees tried to flee to other countries but were forced back across the border by Tanzanian soldiers. Over 400,000 Hutu refugees crossed into Rwanda in three weeks. What was Tanzania's justification? Tanzania argued that the international community had failed to respond to its call for assistance.[42] Earlier in 1996 Burundian authorities forced over 75,000 Rwandans refugees back to Rwanda and in November and December, some 700,000 refugees returned to Rwanda. Simi-

40. For example, during a meeting with Mr. Hans Thoolen, the then Representative of the High Commissioner of Refugees in Kamapala on 16 July 1998, I was stunned when he argued that refugees had no right to identity card or papers. Article 27 of the 1951 U.N. Refugee Convention clearly stipulates this right. *See supra* note 26.

41. Article 32 of the 1951 Refugee Convention forbids the expulsion of a refugee without due process of law and article 33 stipulates that "[n]o Contracting State shall expel or return ('refouler') a refugee in an manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." U.N. Refugee Convention, *supra* note 26, arts. 32-33.

42. *See* Amnesty International, Africa Regional Summary <http://www.amnesty.org/ailib/aireport/ar97/afrsum.html>.

larly, thousands of Burundi Hutu refugees in former Zaire returned to Burundi for fear of being killed by Zairian armed groups and other armed factions.[43]

Such acts are difficult to understand in light of exhortations contained in the OAU Refugee Convention, which stipulate that the "grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by a Member State."[44] The interactions of states in the region suggest that granting refugee status has been interpreted as an unfriendly act and refugees have paid heavily for conflicting state interests.

More disturbing, however, are the heinous mass killing of refugees with the tacit complacency of some states. In 1996, Kabila's AFDL, supported by Rwandan government forces, attacked and bombarded refugee camps indiscriminately and committed several massacres. About 500 Rwandans refugees and displaced Congolese from the Democratic Republic of Congo, formerly Zaire, were massacred by AFDL members in mid-November 1996 at Chimanga refugee camp, 60 kilometers south of the town of Bukavu.[45] Governments in the region, in particular Uganda and Rwanda, that brought Kabila to power, actively frustrated an international investigation of the massacre. They further engaged in propaganda vilifying the Hutu as *interahamwe* and projected themselves as the saviors, thus effectively holding the international community at bay.[46]

These events not only test the international community's willingness and ability to protect refugees and internally displaced people, but they call into question the values cherished by many democratic governments and international institutions and NGOs. Many states, and in particular the United States, with its allies Rwanda and Uganda, worked hard to assimilate Kabila into the coalition of "New African Leaders," which openly undermined international efforts at investigating the massacre. Although Rwanda and Kabila denied the massacre, refugees from the eastern Democratic Republic of Congo and human rights organizations have documentation of Rwanda's involvement in the killings of innocent refugee women and children and men. Today, western governments have endorsed leaders whose hands have been tainted in blood as the "beacon of hope" for the continent; the wrong leaders have been "anointed" for the wrong reasons as the solution to the problems in the region.[47]

---

43. *See id.*

44. OAU Convention, *supra* note 26, art. 2(2).

45. *See* Amnesty International Report, *In Search of Safety: the Forcibly Displaced and Human Rights in Africa, 1997.*

46. Furthermore, some reports implicate the Rwandan Patriotic Front (RPF) government in the shooting of the late president Habyarimaana, which sparked off the genocide. Moreover, Robert Gersony's report, commissioned by the U.N. Secretary General, implicates the RPF in gross violations of human rights before they seized power.

47. The situation is similar in Kenya. Part of the E.U. research team discovered that refugees from Somalia, Democratic Republic of Congo, Burundi, Rwanda, and Sudan have regularly been harassed, arbitrarily detained, rounded-up, relocated to rural camps or deported. Yet, Kenya is a signatory to the 1951 U.N. refugee convention.

C. *Settlement Policy and Restrictions on the Right to Freedom of Movement*

Refugee policies in the region isolate refugees in agricultural settlements or camps whether or not they have the ability to support themselves through farming. This requirement has resulted in the isolation of refugees from nationals, and has limited their right to freedom of movement. Article 26 of the 1951 U.N. Refugee Convention provides that "[c]ontracting states shall accord refugees lawfully in their territories the right to choose their place of residence." It further provides that contracting states shall guarantee the right of refugees lawfully in their territories the right to "move freely within their territories, subject to any regulations applicable to aliens generally in the same circumstances."

Government and UNHCR officials, including local and international NGOs, would claim that refugees' freedom of movement from these designated areas is actually not impeded. In practice, however, considerable obstacles to travel, even in emergencies, exist for African refugees. For example, our research in both Kenya and Uganda has demonstrated that refugees must navigate a hierarchy of power before they can finally get a "movement permit" that authorizes them to leave the settlement or camp. In Uganda, in order to "legally" leave the settlement, a refugee must first get a letter from the chairman of the Refugee Welfare Committee, allowing her to visit the Ugandan camp commandant, where she must get another letter that permits her to travel to a specific destination for a limited period of time. The offices of the camp commandants are not always nearby, nor are these officials always available when a refugee has reached their offices. Moreover, such permission is not always forthcoming because both gatekeepers have wide powers of discretion.[48]

While refugees' right to freedom of movement is constrained through legislation or through administrative practices, the methods of constraining their movement are even more dangerous for IDPs. For example, authorities in Burundi have mined the border with Tanzania, preventing people from fleeing fighting between government forces and rebels. This act is inconsistent with article 14 of the UDHR on the right to seek and enjoy asylum in other countries. It further violates the provisions of the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and On Their Destruction. Uganda settles many Sudanese refugees in settlements close to the border with Sudan, an area prone to fighting between government forces and rebel groups. This policy has led to repeated attacks on refugees, and continues today, despite the fact that the 1969 OAU refugee convention stipulates that "[f]or reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier with their country of origin." These refugees have made several desperate pleas to be relocated, to avoid the persistent attacks by rebels. In 1996, the Lord's resistance army killed over 200 refugees in the Acholi pii refugee camp in the Kitgum district. Refugees

48. *See* Zachary A. Lomo, The Role of Legislation in Promoting 'Recovery' A Critical Analysis of Refugee Law and Policy in Uganda 6 (Apr. 1999) (unpublished manuscript, on file with the author).

pleaded with the government and the UNHCR to move them to safe parts of the country in the south, but their pleas were rejected. The UNHCR claims that it does not have the funding to relocate refugees but the Kosovo refugee crisis contradicts the UNHCR's claim. When Kosovar Albanians sheltered close to the borders in Albania and Montenegro were in danger of being attacked, the UNHCR mobilized their evacuation.

Geo-political interests, more than anything else, have undermined the ability of the existing international human rights regime to protect refugees and internally displaced persons. For example, Uganda and Sudan have traded accusations of supporting each other's rebels. It is a fact that the SPLA rebels obtain their supplies through Uganda, and the SPLA presence is very well known among the local people. Uganda denies that it supports the rebels and has challenged the international community to verify this. In fact, observation missions that included officials from Sudan were sent to Uganda before the break of diplomatic relations in 1994. The problem is that it is very difficult to distinguish between the rebels and the refugees because the two have merged within the refugee communities in the settlements, largely because the rebels need manpower.

In Africa, it the rule rather than the exception that refugees are settled close to the borders. From Guinea to Liberia, Tanzania to Kenya this is the case. One explanation for this practice is the dangerous concept of temporary protection, based on the flawed idea that refugees will remain for a brief period and then return to their countries of origin. Tanzania, particularly while under the rule of the late Mwalimu Julius Nyerere, was the only country that had a deliberate policy of integrating refugees into the local communities and even granting them Tanzanian citizenship in line with Article 34 of the 1951 U.N. Refugee Convention.

Tied to the settlement policy is a provision for humanitarian assistance. Generally, the UNHCR and international and local NGOs condition their intervention on governments agreeing to settle refugees in camps and settlements. Likewise, assistance to refugees is contingent upon refugees agreeing to live in the settlements. For example, in Kenya it was not initially the policy of the Kenyan Government to restrict refugees to camps. Although some refugees, for example, those from Uganda, were settled in camps, this was not the general policy. But when the refugee crisis increased and Kenya sought the intervention of the international community, the UNHCR conditioned its involvement on the Kenyan Government's allocation of land for refugees. This signaled the opening of infamous camps like Kakuma and Dadab. Now, only refugees described as "vulnerable" are allowed to remain in Kenya's urban centers.[49] Food is being used as a policy tool, a fact acknowledged by the UNHCR Representative, Branch Office, in Kampala on February 17, 1999, during a workshop organized by the UNHCR and the Ugandan Government to convey their policy on man-

49. CR, *Comprehensive Policy on Urban Refugees, 1997.*

agement of refugee affairs. As a policy, assistance for refugees is contingent upon living in a camp or settlement, rather than legal status.

VI.
CONCLUSION

From the foregoing discussion, four lessons can be learned from the African experiences with displaced masses. First, it is clear that the existing international human rights legal framework provides sufficient the legal grounds for protecting every displaced person in Africa, whether refugee or IDP. What is lacking is the commitment from African states to strictly adhere to these instruments and to ensure their implementation both in law and practice. The African Commission of Human and People's Rights' seminar on the protection of refugees and IDPs held in Harare, Zimbabwe, in February 1994, reached a similar conclusion.[50]

Second, violations of human rights still remains the primary cause of not only forced displacement, but also of the suffering of refugees and internally displaced people in Africa. This state of affairs may continue beyond the first decades of the new millennium. Despite the rhetoric of "good governance" by the international community, most African countries lack viable political structures that allow free entry and exit of political power. The viability of a country's political structure is crucial to its stability and development in the broad sense, namely, for human rights, social justice, peace, equity and environmental concerns. That is why the "belly first" philosophy subscribed to by many African countries and leaders, including the so-called "new breed" of African leaders, is tenuous. African countries must thus first uphold fundamental human rights, thereby increasing access to politics and promoting a culture of tolerance. So far, South Africa is the only African country to approximate this model, with Nelson Mandela's courageous and visionary choice not to run for a second term in office.

Third, and related to the creation of viable political structures, most African countries do not have strong and impartial social and legal institutions to ensure respect for human rights. Judicial systems and now, increasingly, human rights commissions, in most African countries are inefficient, under-funded and compromised by those in power. The problem is compounded by the low level of literacy and high poverty rate on the African continent. As a result, the bulk of the population does not understand the justice systems. In addition, the large rural population in Africa exacerbates this problem, making it difficult to successfully educate citizens about human rights. Furthermore, human rights groups and civil society generally are limited in their effectiveness because they have a narrow domestic resource base and depend entirely on handouts from abroad. Donor countries are wary of those human right organizations that take a

50. *See* SARDC & ACHPR, PROTECTION OF THE AFRICAN REFUGEES AND INTERNALLY DISPLACED PERSONS 1 (1995).

more robust approach to advocacy for fear of endangering their "good relationship" with host countries.[51]

Fourth, internal conflicts in Africa are far from over, particularly given the involvement of international actors. To a large extent, these international actors either actively or inordinately[52] perpetrate and perpetuate conflicts. In particular, many western states have formed alliances with some of the continent's worst dictators, largely to further their own economic interests. Many western governments have made premature conclusions about the progress of African countries in making the decision to form alliances, thereby promoting political intolerance. The conflicts in the region have further demonstrated, as Stephen Stedman has fairly stated, that the fundamentals relating to "the ethics of choice among tools, approaches, and criteria of intervention and *the interests that are at stake in our choices*"[53] (emphasis added), are far from being resolved. From the point of view of some academics and politicians, the disparity between the treatment of refugees and IDPs calls for a redefinition of the term refugee. I assert that that is an emotional reaction to a complex problem that betrays a lack of understanding of the real legal problems encountered by those who have been forcibly displaced. For example, many countries still require refugees to obtain work permits before they can work. That is not required of IDPs. Second, many asylum seekers and refugees are subject to immigration laws and face dangers of deportation. IDPs do not worry about being deported or harassed by immigration officials. To attempt to do some social engineering on behalf of IDPs through the fragile framework for refugees is a less effective way of helping IDPs. My thesis is that the existing international legal framework provides an open-ended vocabulary for engaging everybody: individuals, states, rebels, churches, mosques, and civil society in addressing abuses against refugees and IDPs. If ever this is going to be realized, a concerted effort to move beyond rhetoric to action is required. Nothing short of this will make either the existing regime or "bold new measures" work.

51. *See* Zachary A. Lomo, *The Struggle for the Protection of Human Rights in Uganda: A Critical Analysis of the Work of Human Rights Organizations*, 5 E. AFR. J. PEACE & HUM. RTS. 161 (1999).

52. For a discussion on the role of international actors in influencing internal conflicts, see J.J. Stedman, *International Actors and Internal Conflicts* <http://www.rbf./pws/public.html>.

53. *Id.*

Berkeley Journal of International Law

Volume 18 | Issue 2 Article 9

2000

Stefan A. Riesenfeld Symposium Closing Address: Lessons from the Palestinian Diaspora

Khalid Abdallah

Stefan A. Riesenfeld Symposium Closing Address: Lessons from the Palestinian Diaspora

By
Dr. Khalid Abdallah,
Former Chief Representative of the League of Arab States to the United States*

Rapporteur: Ms. Hannah Garry**

Thank you very much. I start by thanking the members of the *Berkeley Journal of International Law* for inviting me. Certainly, there is a common feature bringing together all of these tragedies, but each one has its own features. The Palestinian tragedy is unique in one sense, but not in others.

Palestinians are increasingly cynical about the prospect of their return to their homeland. I hope that all predictions will be wrong and that finally, peace will prevail. The Palestinian diaspora is a very long journey, now over fifty years old. Sometimes, when people are talking about the Palestinian diaspora, they have in mind the fifty or more percent of the Palestinian people living

---

* From 1994 to the present, Dr. Khalid Abdallah has been the Chief Representative of the League of Arab States to the United States. As Chief Representative, he directs the Arab League Office in Washington, D.C. He has also been the Chief Representative of the League of Arab States to Austria. Other positions previously held by Dr. Abdallah include: Deputy Assistant Secretary for Palestinian Affairs General Department, Secretariat General, League of Arab States, Cairo, Egypt; Director, Department of Strategic Studies, Secretariat General for Economic Affairs, League of Arab States, Tunisia; Director, International Economic Affairs Section, Secretariat General for Economic Affairs, League of Arab States, Tunisia; and Chief Planner, Warsaw Planning Development Office, Warsaw, Poland. Dr. Abdallah has also taught on international political economy at the School of Islamic and Social Sciences, Leesburg, Virginia and on economic planning as a Lecturer in the Department of Planning, Faculty of Education, Garyounis University, Garyounis Al-Bayda, Libya. Dr. Abdallah has participated in a variety of conferences and workshops at the United Nations and at universities, institutions and other venues around the United States. He has written several articles on the Arab economy and has been a frequent commentator on Arab and Middle East issues on television and radio, including CNN, PBS, Voice of America, MBC, ANA, and others. Dr. Abdallah earned his Masters and Ph.D. in Economics at the Central School of Planning and Statistics, Warsaw, Poland, through scholarships received from the Municipality of Baghdad, Iraq and Ministry of Education, Poland.

** 1999-2000 Managing Editor, Berkeley Journal of International Law.

outside of historical Palestine. But most Palestinians, if not all, have experienced, in one way or another, the trauma of exile.

The diaspora began in 1948 with the expulsion of the Palestinians from their homeland. Those Palestinians actually were expelled, not as textbooks or some reports in the Western media try to represent, based on the Israeli narrative that those Palestinians were actually listening to the Arab countries to flee Palestine so that the Arab countries could go in and liberate Palestine for them. This myth has been shattered by many new historians, Israeli historians. When the Palestinians fled their home and tried to return in November of 1948, they were physically prevented from going back. Even when some returned, they found that their villages, 1,418 villages at least, were burned. Early in June 1948, the demolition of villages took on the character of a political mission to prevent refugees from returning; the destruction of these villages was the key to preventing the return of Palestinians and establishing Jewish settlements. It was a retroactive transfer.

Palestinians found their villages demolished and could not return; they entered the era of diaspora. What about the Palestinians who stayed in Palestine? Many of them have become refugees, even in historic Palestine, because Israelis began to evacuate them from their land, forcing them to live in other parts of Palestine. The exile of Palestinians also occurred for those who remained in Israel.

I want to quote Bendriski talking about how the Israeli authorities issued laws allowing the Israelis to confiscate Palestinian land—the law of the absentees. But the Israelis imposed other laws as well. The emergency regulations regarding absentee property eventually became the absentee law of 1950, in which all Palestinian property was nationalized and could serve as a convenient means for gaining control of land belonging to Arab citizens of Israel who were not absentees. Confiscating their land was accomplished by a simple method. The area would be designated as an enclosed area/closed area and Israelis would not allow the Arabs to cultivate, since under-cultivation made it impossible for them to tend their plots. Then, the Ministry of Agriculture would send them warnings that, unless they cultivated that land, it would be classified as fallow and confiscated.

I mention these things because we cannot understand the lessons of the diaspora unless we understand what happened in 1948 and even before. What are the lessons? This is a subjective matter. No one would agree with others on how to draw lessons. I might represent the view of many Palestinians:

The hypocrisy of the Western powers is evident in the transference of the burden of the guilt. Jews were persecuted in Europe for many years; not only persecuted, but also put into fire. Instead of standing up to their obligations, European countries tried to find a solution to the Jewish question in another part of the world—Palestine. And so, the Palestinians felt it was a kind of hypocrisy to give them Palestine instead of integrating them. European countries transferred the problem to the Palestinian nation.

Another aspect of this is the "supremacy" of European morals. Britons wanted Jewish cooperation in prosecuting Germany and promised Jews a homeland. In Europe, there was disregard for the principles declared at the beginning of the 20th century—when President Wilson declared the right of self-determination around the globe. But the wishes of the Palestinians were ignored. They were never asked how they felt about the partition of their country. And, to add insult to injury, when Palestine was partitioned, the Jewish community constituted 31% of the population and received 50% of the land while the 69% of the Palestinians got the rest.

The bitter denial of their existence and plight is the justification of the Jewish conquest. The Zionist project started by claiming there was a land without people for a people without land and upheld this claim until 1964; the existence of the Palestinians was denied. More importantly, there was the collusion of the Western powers, not only in denying the plight of their existence but in their racist attitude towards the Palestinians. Consider how Mr. Churchill regarded the Palestinians. Norman Finkenstein wrote in the *Rise and Fall of Palestine* that "Churchill's justification for the Jewish conquest equaled Roosevelt's argument—comparing the Palestinian Arab to a dog in a manger. Churchill maintained, 'I do not agree that a dog in a manger has the final right to the manger though he be there for a very long time. I do not admit that a wrong has been done to the blacks in Australia or the Indians in America . . . ."

Many people wonder why the Palestinian question has not been resolved for so long. Even now, there is a kind of racism shifting the blame for the decisions of Western governments to another people—the Jewish people.

The Palestinians, after so many years into the diaspora, living mostly in camps and harassed by the governments that were governing, came to the conclusion that the world would not pay attention, would not care and would not be spurred to action, unless they made them pay attention and care for their plight. So, the idea of organizing and defending one's self came into existence. The Palestinian Liberation Organization (PLO) was formed. And here again, we see the hypocrisy of the West. Instead of seeing the presence of the PLO as a signal for them to address the Palestinian question in a manner that would resolve it and satisfy the demands of the Palestinians, they instead started to concentrate on the operation and the behavior of the PLO. The core issue was forgotten and left aside. The whole media and discussion and debate in the Western countries were in operation. Here again, they labeled the Palestinians and turned them into terrorists. I have an answer to that by Michael Palumpo: "it is ironic that the news media mentions PLO terrorism but fails to mention that it was the Zionists who first used terrorism in the Middle East planting bombs in Arab markets or other crowded areas." Thus, they not only failed to see the core issue behind the PLO, but they failed to see the true origin of the violence in the region.

The Intifada, of course, brought to us the understanding that when people organize themselves, when they are smart enough to resist in ways that will make the world pay attention, then they can bring certain results. Here, I can

say it has been the major factor to force the Israelis to come to the negotiating table.

What is the peace process about? How does it tackle the Palestinian diaspora? As you know, when the peace process started in Madrid, the parties agreed to two types of negotiation—bilateral and multilateral. The bilateral accords stated that certain questions and the final status issues would be left to the end—one of these was that of the refugees. Of course, Palestinians, as the weaker party, had to accept this stipulation, and they hoped that after moving on certain issues with the Israelis that they would accept that the Palestinians desire to move toward peace and the Israelis would then agree with our demands for the refugees. The multilateral accords address matters of water, security, economic cooperation and refugees.

What is the position of the various parties on this question? The Israeli position is the following—they are not responsible for it; it is the Arab's fault. This is contrary to the writings of the new historians—Elam Papei and others who are Jewish. They also introduce into the picture the Arab Jews who migrated to Israel. Israel insisted that negotiations focus on rendering assistance to Palestinian refugees with a view to resettling them wherever they are now. They would be given bread and milk provided that the Arab countries would naturalize them. Israel maintains that it is not responsible for the problem or its resolution. I am talking about how some Israelis who are not 100 percent with Israel but are pro-Israeli in resolving this question. They say that we should be looking forward and not backward; let's not talk about what happened in the past; they are here and we need to solve their question now. But if you do not look at the causes of the question, how can you resolve it justly? Surely, the Israelis themselves always look backward and never forward in justifying their presence in Palestine. They also assume that the problem is regional in scope. They say the solution should be regional in scope. While they insist that Arab countries naturalize most of the Palestinians, they say Israel should accept only 50,000-100,000 refugees because all should share the blame. They say we should be realistic in accepting this fact. This is a license for violating international laws and norms.

The following elements are necessary for solving the problem of the Palestinian diaspora. First, it must be recognized that the refugee question is essentially a political one, not just a humanitarian one. It is, first of, all national and political. Second, the Palestinian refugees are not just those registered by UNHCR. Third, a just and fair solution to the Palestinian diaspora should be based on existing UN resolutions—#194 in particular. You must establish objective criteria. The right thing to do is go back to the UN resolutions as the organization whose resolutions are championed by the Western countries.

What I wanted to convey is that what Palestinians want is a peaceful resolution which demands a final, just and comprehensive implementation of a solution. Why not have one democratic secular state in the whole of historic Palestine in which all Jews, Palestinians and Christians will live together?

Berkeley Journal of International Law

Volume 18 | Issue 2 Article 10

2000

Stefan A. Riesenfeld Symposium and Memorial Award - Spring 2000

Stefan A. Riesenfeld Symposium and Memorial Award Spring 2000

SYMPOSIUM SPONSORSHIP

Brobeck, Phleger & Harrison, LLP

Brobeck, Phleger & Harrison LLP is proud to serve as co-sponsor of "A Legacy of War: Displaced Masses in the 21st Century." Attorneys throughout our 10 offices are committed to the plight of refugees and to the pro bono representation of refugees. Last year, Brobeck provided more than 14,000 hours of pro bono legal services to a wide range of individuals, including domestic violence victims, AIDS victims, prisoners, homeless individuals and, of course, refugees. In 1999, Brobeck gained political asylum for Kenyan citizens who were persecuted in their homeland for being members of an opposition political party. In addition, the firm gained asylum for Central American political refugees through the Texas Asylum project, which we have participated in for the last 10 years. As we enter the new millennium and see the continued violation of the human rights of displaced individuals around the world, we must continue our vigilance in safeguarding the rights of these individuals who need our help the most. Brobeck, Phleger & Harrison looks forward to our continued contribution to this important cause.

Center for International Legal Studies, Boalt Hall, UC Berkeley

Since its founding in 1911, Boalt Hall has had a long and distinguished history of providing legal instruction in the areas of international and comparative law, attracting notable scholars such as Dean Edwin Dickinson, Max Radin, Covey Oliver, Frank Newman, Albert Ehrenzweig, Stefan Riesenfeld, and Stephen Wilkins. Current faculty who make up the center include professors James Gordley, Laurent Mayali, Harry Scheiber, Richard Buxbaum, and David Caron. The Center for International Legal Studies receives funding from the Ford Foundation for use for students through increased opportunities for clinicals, research, and career development. The Center seeks to encourage interdisciplinary integration between Boalt and the social science departments at UC Berkeley and also facilitates strong connections with foreign faculty.

Morrison & Foerster LLP

With over 800 attorneys in 17 offices, Morrison & Foerster is one of the largest international law firms representing U.S., Asian, European, Latin American and

other companies, institutions, and individuals in a variety of activities worldwide. Attorneys resident in Tokyo, Hong Kong, Beijing, Singapore, London, Brussels, and Buenos Aires work closely with attorneys in our domestic offices in a full range of practice areas, allowing our clients to benefit from the most comprehensive and integrated legal services the firm has to offer.

Freshfields

Freshfields is delighted to support the *Berkeley Journal of International Law's* symposium "A Legacy of War: Displaced Masses in the 21st Century." Freshfields has one of the world's most experienced public international law groups, which has lawyers based in London, Paris, New York and Brussels. In addition to traditional state-to-state public international law, a significant element of our work arises in an international commercial context. Our leading practices in EU law and international environmental law also contribute significantly to the firm's public international law practice. The group includes lawyers who have handled matters arising from the displacement of persons through war, a recent example being Lucy Reed, one of the firm's New York partners, who served as a co-director of the Claims Resolution Tribunal for Dormant Accounts in Switzerland (the Holocaust Tribunal).

Office of the Dean of Students, Boalt Hall, UC Berkeley

We in Student Services are happy to support any effort by students to promote a thoughtful and rigorous examination of international legal and social issues. We are also committed to maintaining and strengthening a welcoming and supportive atmosphere for all students at Boalt. Good luck to the symposium participants! Best wishes from the folks in the Student Services Office: Victoria Ortiz, Dean of Students; Holly Parrish, Coordinator of Student Programs; Charlene Darden Baker, Student Programs Assistant.

Graduate Assembly, UC Berkeley

The Graduate Assembly is UC Berkeley's graduate-student government. The GA currently runs a number of projects including the Education Improvement Grant Program offering financial support to new projects initiated by graduate students.

The Center for Middle Eastern Studies, UC Berkeley

The Center for Middle Eastern Studies is one of eight major world area centers on the Berkeley campus. Our mission is to enhance awareness of the Middle East and of its diverse peoples and cultures, promoting specialized knowledge and public understanding of the Arab world, Iran, Turkey and Israel. CMES has a free Newsletter and listserve. To learn more about the Center or get on our mailing list, call (510) 642-8208, or visit our website at http://www.ias.berkeley.edu/cmes.