CANADA'S PERIODICAL ON REFUGEES

REFUGE

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CONFLICT, POPULATION DISPLACEMENT, AND CONFLICT RESOLUTION

Conflict and Conflict Resolution

Ogenga Otunnu

Human history has been punctuated by widespread and recurring violent conflicts. Attempts to explain the causes, utility and effects of the phenomenon have engaged the minds of scholars and other stakeholders for centuries. At the centre of the inquiry are questions about human nature: whether and to what extent violence is innately determined in humans or influenced by the external environment.

According to ethnology, aggression or violence is innate and essentially genetic, not learned or a response to environmental conditions. The role of the environment, K. Lorenz posits, is simply to provide stimuli that trigger or hinder intraspecific aggression. This view, which modifies and restates the Social Darwinian theory of natural selection, maintains that aggression is not dysfunctional. Rather, it serves a number of important functions: the preservation of species through natural selection; the creation of social ranks which imposes social order and stability, thus reducing intraspecific damage; defense of territory; protection of mate, siblings and community; and the distribution of members over available habitat. What makes aggression dangerous, however, is the spontaneity of instinct. Thus, Lorenz concludes that it is important to provide channels into which aggressive instinct can be beneficially diverted or redirected. Viewing aggressive sport, it is asserted, provides such an outlet.[1]

However, this hydraulic model—which envisages a bottled up flow of aggression constantly seeking expression and overflowing into violence—has been severely challenged because

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of its questionable validity to both humans and non-humans, the inadequacy of data and logic, and the failure to consider structural factors and semi-autonomous psychological causes.[2] The findings of increased aggressiveness among some people after viewing violent films or sports is also a direct refutation of the instinctive theory of aggression. The contention that aggression is innate and that humans are inevitably disposed to violence does not only present a false image of humans, it also makes violence a self-fulfilling prophecy. Equally, it makes conflict resolution practically impossible. The intellectual weaknesses of the theory, and the potential effects of endorsing the explanation, compelled a group of 20 leading scientists to repudiate it in Seville, Spain, in May 1986.[3]

Imitation and social learning have been advanced as an alternative explanation of causes of violence. According to one of the leading proponents of this view, A. Bandura, aggression or violence is largely learned by observation through modeling.[4] "By observing others," he insists, "one forms rules of behaviour, and on future occasions this coded information serves as a guide for action."[5] He then suggests that, "modeling influences can serve as instructors, inhibitors, disinhibitors, facilitators, stimulus enhancers, and emotional arousers ... When novel modeled conduct is punished, observers are likely to learn the conduct that was punished as well as the restrains."[6] One who is rewarded for violence, therefore, will influence others to do the same; conversely, one who losses out for a similar act will deter others.

In his review of the behavioural-oriented social learning theory of aggression, K. Bjorkqvist suggests that learning aggression from models require, at minimum, four factors: "1) the degree of similarity between the model situation and the actual situation, 2) the degree of identification between actor and model, 3) the success of failure of the model (vicarious conditioning) , and 4) the amount of exposure to the model situation."[7] It should be added that, while the theory correctly indicates that peace and violence can be learned, it neglects some important biological traits, and socioeconomic and political factors that influence human behaviour.[8]

Another explanation that has been advanced to examine violence is the frustration-aggression hypothesis. According to the hypothesis, frustration—which provokes anger, that in turn, triggers aggression—is the most important source of violence. Simply put, there is a direct and necessary link between violence and frustration. A number of intervening variables are then suggested: the number of frustrations in the past; the norms concerning aggressive behaviour; and the resources available to potential object of aggression to punish or retaliate against the aggressor.[9]

The utility of the hypothesis, however, is undermined by the fact that people may be aggressive not as a result of frustration, but in response to other factors. Furthermore, frustration, including that which results from unjust deprivation or inhibited goals, does not necessarily lead to aggression. For example, some people who are frustrated may become depressed, or may seek non-aggressive means to resolve their frustration. Simply, the hypothesis forgets that there are multiple causes of aggression and multiple effects of frustration.[10]

Factors and conditions that make societies prone to violence include: illegitimate and despotic regimes; illegitimate, despotic, corrupt and unaccountable states and institutions; ethnic, racial, religious, gender, cultural and economic discriminations; scarcity of resources such as arable land and water; manipulation and politicization of differences, grievances and conflict; frustrated and unmet expectations; widespread and severe unemployment and poverty; pervasive culture of violence; erosion of societal cultures and systems of conflict resolution; power politics; protracted and severe ecological crises; and easy

availability of weapons and ammunition.[11]

Some of these factors and conditions have led to wars, massive denials of human rights, genocide and large-scale internal displacement and influx of refugees. In Africa, for example, violent conflicts have ravaged many countries. In Algeria, the violence that resulted from the cancellation of multiparty general elections at the beginning of 1992, has claimed between 60,000 and 70,000 lives. In Angola, the horrors of the war that began in 1975 left approximately 1.5 million people dead, and 15 million land mines in the countryside. In Liberia, the civil war that broke out in 1989 lead to an estimated 150,000 deaths. In Somalia, the war and famines have claimed between 400,00 and 500, 000 lives since the overthrow of the Siad Barre regime in January 1991. In Rwanda, an estimated 500,000 to 1,000,000 people, most of them Tutsi, were massacred during the genocide in 1994. Approximately 200,000 Hutu refugees perished in the present day Democratic Republic of Congo. In Sudan, approximately 1.5 million people have died directly as a result of the civil war and famines since 1983. An estimated 300,000 people have been killed in the on-going war between the government and rebels in Acholi, Uganda, since 1987.[12]

In Asia, the situation is not markedly different. In Afghanistan, for example, the protracted war that followed the withdrawal of USSR troops and the overthrow of the Communist regime in April 1992, did not only led to the increased involvement of India, Iran, Pakistan, Russia and Uzbekistan in the war, but also claimed thousands of lives, and left an estimated 10 million land mines in the countryside. In Cambodia, the overthrow of the Pol Pot regime (Khmer Rouge) in late 1978—which regime had destroyed between 1,000,000–3,000,000 lives—led to more deaths and displacement. The war also left behind an estimated 10 million land mines in the countryside. The violent occupation of the former Portuguese colony of East Timor by Indonesia since December 1975, has claimed the lives of approximately 200,000 Timorese. In Sri Lanka, the war between the government and the Liberation Tigers of Tamil Eelam (LTTE) has claimed over 32,000 lives since 1983. In Tajikistan, the war that broke after the declaration of independence in August 1991, is estimated to have killed between 50,000 and 200,000 people.[13]

In Europe, violent conflicts have also ravaged some countries. In Bosnia and Herzegovina, for example, more than 100,000 people were killed in the war that followed the resolution of federal Yugoslavia. The war or ethnic cleansing ended immediately after the Dayton (Paris) accord was signed in November 1995, and a NATO-led multinational force (IFOR) launched Operation Joint Endeavor to replace the United Nations humanitarian operation. The war left an estimated 3 million land mines in the countryside. In Croatia, the civil war that broke out in 1991 caused the deaths of more than 10,000 people. In Russia (Chechnya), the violent conflict that followed Chechnya's abortive declaration of independence, caused the deaths of an estimated 40,000 people.[14]

These examples indicate that the cost of violent conflicts, measured in terms of deaths, is a major calamity of the closing decades of this century. Injuries caused by wars and land mines escalate the costs. To these burdens must be added the trauma that the survivors suffer; large-scale internal displacement and refugee migrations that result from such conflicts; profound economic consequences, including insecurity which discourages investments, loss of human resources, increased corruption, disruptions of agriculture, transportation and industry; severe damage to cultures and institutions which could settle conflicts and provide stability; and the promotion of the culture of violence, repression and discrimination.

Given the patterns, magnitude and effects of violent conflicts, a very pressing need exists for prevention, management and resolution of conflicts. How conflicts are defined, what strategies and methods are adopted at a particular point, the objectives of intervention and the cultural, socioeconomic and political history of the society, will have significant effects on both the outcome and future relations. Often, each specific conflict is interlocked with other conflicts. Hence, changes in other conflicts may affect both the direction and tempo of the specific conflict that is the focus of attention.

Preventing conflicts before they develop into violence is the most desirable and least costly method of conflict resolution. It requires effective and comprehensive early warning systems. Such systems must be based on factual analyses of the socioeconomic, cultural and political history of the society, and rigorous and balanced examination of the underlying causes, nature and phase of the conflict. Early warnings, in turn, require assertive leadership and commitment to early actions that will alleviate pressures, or risk factors; and comprehensive efforts to resolve underlying and/or structural root causes of violence.[15]

Once violent conflicts have erupted, preventative action should focus on "creating political, economic, and, if necessary, military barriers to limit the spread of conflict within and between states. Firebreaks may be created through well-designed assertive efforts to deny belligerents the ability to resupply arms, ammunition, and hard currency, combined with humanitarian operations that provide relief for innocent people."[16]

Negotiation is also a necessary method of conflict resolution. Here, conditions that make the protagonists recognize the humanity of each other, and that a mutually acceptable settlement is possible and necessary, should be created. Such confidence-building strategy requires mediators who are perceived as fair and just by the parties to the conflict. This perception is important if a high-quality and durable settlement is to be reached. The mediators should also possess good understanding of the conflict and its

underlying causes, the parties and the society. Depending on the nature, phase and goals of conflict and conflict resolution, the roles of the intermediaries may include: encouraging communication; providing appropriate settings for negotiations; developing options; offering compensations and rewards that facilitate reaching negotiated settlements; increasing costs of not reaching negotiated settlements; offering appropriate conflict resolution methods; controlling information; and setting time limits.

Generally, mediators fall into two broad categories: non-official and official. The former, called variously, Track Two, people-to-people, citizen, or supplementary diplomacy, increasingly offers important channels of communication and creates options for negotiated settlements. These are often done by organizing conferences and providing other forums for unofficial dialogue involving members and/or supporters of the parties in conflict. Such activities may also influence formal decision-making process, that is Track One Diplomacy. National and international non-governmental organizations are among the major players in Track Two diplomacy. For example, The World Council of Churches (WCC) and the All Africa Conference of Churches (AACC) were principal mediators in the 1972 Addis Ababa agreement that temporarily ended the war in Sudan. Saint Egidio and churches in Mozambique were important actors in Mozambique peace negotiations. In Uganda, the churches continue to exert pressure on both the government and armed opposition groups for a comprehensive negotiated settlement to the war in the north and west of the country. The International Peace Academy, the Carter Center's International Negotiation Network, the Institute for Multi-Track Diplomacy, and the International Alert, among other NGOs, have also been instrumental in mediation efforts.[17]

Official mediators are representatives of states, regional and international organizations, and pursue Track One diplomacy. Often, they bring more incentives, resources and muscle and higher prestige to mediation than unofficial mediators. For example, powerful and industrialized states are capable of engaging in "power mediation" by using coercion or leverage in the form of incentives, compensation or threatened punishments to drive the parties towards a negotiated settlement. Weak states with low prestige and very limited access to resources, on the other hand, are more likely to engage in "pure mediation" in which they have no power over the outcome.

Although bringing more incentives, rewards, resources and muscle, and higher prestige do not guarantee success in negotiations, it improves the chances of settlements. This is particularly true when the parties to the conflict depend on the support of external powers for financial and military assistance, moral support, propaganda and recognition. The significance of assets, resources, prestige and leverage in mediation also suggests that weak, poor and less prestigious regional and international governmental organizations have diminished influence in driving the parties towards negotiated settlements. The Organization of African Unity (OAU) is a good example of a weak, poor and less prestigious regional governmental organization that has very little power over the outcome of negotiations. Admittedly, the ineffectiveness of the OAU in mediation is also result of other factors: its reluctance to get directly involved in internal conflicts because the charter of the organization prohibits such an action; the willingness of some member states to continue aiding the protagonists with propaganda and war supplies; and the presence of many major violators of human rights, and dictators as heads of state.

In some instances, mediation is supported by sanction regimes and forceful actions to ensure compliance. Sanction is often intended to serve three major policy purposes: send a clear message of grave concern to the offending sate; punish the state for unacceptable behaviour; and indicate that stronger measures, including, if necessary, the use of force may follow.[18] The imposition of sanction on Iraq is a good example. Effective sanction regimes, however, must be carefully targeted to avoid punishing the whole population. The sanction regime in Iraq is an example of one that is poorly targeted and has lost moral appeal because it continues to decimate the population.

The foregoing suggests that violent conflicts are caused by many related factors. Resolving violent conflicts, therefore, requires a number of coordinated interventions by many actors. Powerful governmental organizations such as the World Bank and the International Monetary Fund (IMF), for example, should use their powerful economic leverage to attach non-violent political practice, democratic pluralism and respect for human rights, as conditions for loans and development assistance. Such a policy should be supported by the industrialized states that control these financial institutions. However, it will also mean that some aspects of the Structural Adjustment Policies (SAPs) that cause tensions and violence, and undermine economic development and social justice, should be eliminated.[19]

Collective actions for conflict resolution will require educational institutions to offer courses in conflict resolution and problem-solving. This will also mean reforming the institutions, designing curriculum and adopting teaching techniques that are less adversarial, less dictatorial, and less discriminatory. Teaching and learning peace will involve developing a clearer theoretical and practical understanding of conflict and conflict resolution techniques.

Non-governmental and governmental organizations that provide humanitarian assistance and work with refugees and immigrants should become more actively involved in conflict resolution. This will require the organizations to train their employees in cross-cultural conflict resolution. Those who work for the organizations

should also posses good and balanced understanding of the people and/or societies that they assist. Such knowledge and training are important because those who are being assisted are not only victims of conflicts, but also carry the very conflicts that uprooted them from their homes.

Reducing the likelihood of violence, containing and resolving those that emerge, demand identifying, creating and strengthening local and international institutions and regimes for conflict resolutions, protection of human rights, and economic development. Also, such goals call for active commitment, investment and participation of governments, the United nations, regional organizations, religious institutions, business community, and the media in resolving conflicts and eliminating the root causes of violent conflicts. It is only by engaging actively, promptly and collaboratively in preventing conflict that the international community will avoid watching many more countries being violently torn apart, millions of people killed and many more violently displaced, violence spreading to, and/or destabilizing peaceful regions.[20]

This issue of *Refuge* focuses largely on conflict and conflict resolution. The significance of strengthening international human rights institutions and regimes; the assumptions and roles of non-governmental organizations in conflict resolution and rebuilding war-torn societies; scarcity of resources, such as land, and its implications for conflict and conflict resolution, are discussed. ■

Notes

1. K. Lorenz, *On Aggression* (London: Methuen & Co. Ltd., 1967), vii–x, 34–40, 55–71, 237–89.
2. See, for a start, S. D. Nelson, "Nature/Nuture Revisited I: A Review of Biological Basis of Conflict," *Journal of Conflict Resolution* 18, no. 2 (1974): 285–335; P. Wilkinson, "Social Scientific Theory of Violence, in *Terrorism: Theory and Practice,* edited by Y. Alexander et al. (Boulder, Colorado: Westview Press, 1979), 48–51; D. Zillmann, *Hostility and Aggression* (Hillsdale, New Jersey: Lawrence, 1979), 1–170.
3. See "Seville Statement on Violence (1989)," deposited at the Lamarsh Centre for Violence and Conflict Resolution, York University.
4. A. Bandura, *Principles of Behavior Modification* (New York: Rinehart and Winston, 1969), 62.
5. Bandura, *Social Foundations of Thought and Action: A Social Cognitive Theory* (Englewood Cliffs, NJ.: Prentice-Hall, 1986), 47. See also, A. Bandura, D. Ross and S. A. Ross, "Transmission of Aggression Through Imitation of Aggressive Models," *Journal of Abnormal and Social Psychology* 66 (1963): 3–11.
6. Bandura, *Social Foundations of Thought and Action,* 47.
7. K. Bjorkqvist, "The Inevitability of Conflict But not of Violence: Theoretical Considerations on Conflict and Aggression," in *Cultural Variation in Conflict Resolution: Alternative to Violence,* edited by D. P. Fry and K. Bjorkqvist (Mahwah, NJ: Lawrence Erlabaum, 1997), 32.
8. See, for example, Wilkinson, "Social Scientific Theory of Violence," 52. Indeed, Bandura, a liberalized behaviorist, is critical of some behavioral formulations. See Bandura, *Principles of Behaviour Modification,* 45–46.
9. See J. Dollard et. al., *Frustration and Aggression* (New Haven: Yale University Press, 1939), 7; L. Berkowitz, "Frustration-Aggression Hypothesis Revisited," in *Roots of Aggression: A Re-examination of Frustration-Aggression Hypothesis,* edited by Berkowitz (New York: Atherdon, 1969), especially 1–34.
10. See, for example, Bjorkqvist, "The Inevitability of Conflict," 30–31.
11. See, for example, Carnegie Commission, *Preventing Deadly Conflict* (Washington, DC: Carnegie, December 1997).
12. See, for example, The Carter Center, *State of World Conflict, 1995–1996* (Atlanta: The International Negotiation Network, 1996), 16–29; The Democratic Party, *The War in Northern Uganda* (Kampala, 1997).
13. The Carter Center, *State of World Conflict, 1995–1996,* 33–51.
14. Ibid., 64–71.
15. See, for a start, Carnegie Commission, *Preventing Deadly Conflict,* xviii.
16. Ibid.
17. See, for example, D. R. Smock ed., *Making War and Waging Peace: Foreign Intervention in Africa* (Washington, DC: United State Institute of Peace Press, 1993), 11.
18. See, for example, Carnegie Commission, *Preventing Deadly Conflict,* xxiv.
19. For a good discussion of SAPs, see, among others, P. G Gibbon, Y. Bangura and A. Ofstad, *Authoritarianism, Democracy and Adjustment* (Uppsala: The Scandinavian Institute of African Studies, 1992).
20. See Carnegie Commission, *Preventing Deadly Conflicts,* xvii–xlvi. □

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International Humanitarian Law as a Source of Protection for Refugees from Areas of Armed Conflict

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Abstract

The primary focus of attention in discussions on legal norms protecting refugees are usually the 1951 Geneva Convention relating to the Status of Refugees and more recently international human rights instruments, such as the European Convention on Human Rights. In the context of armed conflicts, however, it seems natural to think of international humanitarian law as applicable in armed conflicts. This article examines the potential of international humanitarian law, i.e. the four Geneva Conventions of 1949 and their additional protocols of 1977, as sources of legal protection for refugees who seek shelter outside their home country.

Précis

Les textes légaux de référence sur lesquels l'attention se porte dans les discussions à propos des normes juridiques en matière de protection des réfugiés sont la Convention de Genève relative au Statut des Réfugiés de 1951 et, plus récemment, la Convention Européenne sur les Droits de l'Homme et autres mécanismes internationaux pour les droits humains. Dans le contexte des confrontations armés cependant, il semble naturel de concevoir les lois internationales en matières humanitaires comme continuant de s'appliquer dans le conflit. Cet article examine le potentiel des lois internationales en matières humanitaires, nommément les quatre Conventions de Genève de 1949 et leurs protocoles additionnels de 1977, comme sources de protection légale pour les réfugiés qui recherchent un abri hors de leurs foyer.

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In discussions concerning the legal protection of people fleeing areas of armed conflict, the primary focus of attention is usually the 1951 *Geneva Convention relating to the Status of Refugees*.[1] Recently, some consideration has also been given to human rights instruments, such as the *European Convention on Human Rights*. It is the aim of this article to examine how far international humanitarian law, i.e. the four Geneva Conventions of 1949,[2] the two Additional Protocols of 1977,[3] and the law of The Hague[4] can serve as a source of protection for the victims of armed conflicts who search for protection abroad. The following explanations distinguish non-international from international armed conflicts.

Non-International Armed Conflicts

Article 3 Common to the Four Geneva Conventions of 1949

In case of a non-international armed conflict on the territory of a contracting state of the four Geneva Conventions of 12 August 1949, each party to the conflict, pursuant to Article 3 common to all four Geneva Conventions of 1949, has to observe certain rules concerning the treatment of the civil population, the injured, and the sick. The provision does not contain any obligations for third states, such as reception or non-refoulement of refugees. Such obligations are neither expressly set down in the wording of Article 3 nor can they be derived by way of interpretation.[5] The rules contained in Article 3 common to the four 1949 Geneva Conventions form part of "general principles of humanitarian law to which the Conventions merely give specific expression."[6] They represent peremptory norms to be followed in non-international as well as in international armed conflicts. Also, by virtue of Article 1 of the Geneva Conventions, the contracting parties have to "respect" the Conventions and even "to ensure respect" for them "in all circumstances." Third states are therefore under an obligation not to encourage persons or groups engaged in the conflict to act in violation of the provisions of Article 3 common to the four Conventions.[7] However, these general principles of law, and in particular the duty following from Article 1 common to all Geneva Conventions to ensure respect for the Conventions, do not create a duty of *non-refoulement* for states not involved in the conflict.[8]

Protocol II Additional to the Geneva Conventions

Protocol II,[9] according to its Article 1 (1), applies to all non-international armed conflicts that take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups with a certain organization and power. Pursuant to Article 2, it protects all persons affected by an armed conflict of such kind. In the following provisions, those persons are guaranteed a certain treatment, while the civilian population and individual civilians pursuant to Article 13 are granted special protection through part IV of the Protocol. None of the provisions laid down in Protocol II contains obligations for third states not parties to the conflict. Even if one assumes that the rules set out in the additional protocols to the Geneva Conventions at least partly represent rules of customary international law,[10] and therefore do not bind only the contracting parties, these customary norms do not bind third states and do not contain a principle of *non-refoulement*.[11]

International Armed Conflicts

For the case of international armed conflicts, neutral states[12] are expressly

provided with limited duties through the four Geneva Conventions and Additional Protocol I.[13]

Article 4 of the 1st Geneva Convention, Article 5 of the 2nd Geneva Convention and Article 19 Protocol I

Pursuant to Article 4 of the 1st Geneva Convention,[14] Article 5 of the 2nd Geneva Convention,[15] and Article 19, Protocol I neutral powers shall apply, through analogy, the provisions of the respective Convention or Protocol I to the wounded, sick and shipwrecked, to members of the medical personnel, and to chaplains of the armed forces of the Parties to the conflict received or interned in their territory. This, however, does not imply a duty to receive any such person. A certain treatment is merely obligatory, in case a reception has already taken place.[16]

Article 12 of the 1st and 2nd Geneva Conventions

Pursuant to the respective Article 12 of the 1st and the 2nd Geneva Conventions, the persons listed above shall be respected and protected in all circumstances. Possibly, a duty not to *refoule* the protected persons from the territory of a receiving state could be deduced from this rule of respect and protection.

Article 4 B (2) of the 3rd Geneva Convention

Article 4 B (2) of the 3rd Geneva Convention[17] obliges neutral and non-belligerent powers to treat prisoners of war whom they have already received on their territory according to the Convention. However, the provision does not contain a duty of reception towards the said persons. Also, the provisions on the repatriation and accommodation of certain prisoners of war, Articles 109 et seq., do not establish an obligation of reception for the neutral countries but only set down duties for the parties to the conflict.

The 4th Geneva Convention

Finally, the 4th Geneva Convention[18] contains in its part II provisions on the protection of the whole of the populations of the countries in international conflicts, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, which are intended to alleviate the sufferings caused by war.[19] These rules are, however, only addressed to the parties to the conflict.[20] They do not create duties for neutral states. In part III, the Convention confers certain rights pursuant to Article 27 et seq. to "persons protected by the Convention," i.e. those, who, pursuant to Article 4 (1), at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.[21] The 4th Geneva Convention does not set out an express obligation on third neutral states to refrain from indirectly exposing persons in search for protection within their territory to the danger of becoming the victim of a treatment prohibited by Article 27 et seq. through extradition, rejection at the frontier, or expulsion. In particular, no duty of third states to admit persons corresponds to the right to leave the territory of conflict under Article 35 of the 4th Geneva Convention. Article 44 of the 4th Geneva Convention concerns the treatment of refugees, but only refers to refugees already admitted to the territory of a party to the conflict. Equally, Article 45 only applies to "protected persons" according to Article 4[22] and Article 70 (2) protects nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, i.e. not persons, who became refugees in the course of the present conflict.[23] An interpretation of these provisions by the means provided for the interpretation of international treaties under public international law[24] does not lead to an obligation of third neutral states not to indirectly expose protected persons to the danger of becoming victims of treatment contrary to Article 27 et seq. by way of an extradition, rejection at the frontier, or an expulsion.[25]

The V. Hague Convention of 1907

Finally, the V. Hague Convention of 1907 needs to be shortly reviewed: Chapter II of this international treaty deals with the treatment of belligerents interned and wounded in neutral territory. This rules does not establish any kind of reception duty. According to Article 12, the neutral power shall, in the absence of a special convention to the contrary, supply the interned with the food, clothing, and relief required by humanity. At the conclusion of peace, the expenses caused by the internment shall be made good.

Conclusion

Under international humanitarian law persons fleeing their home are only protected insofar as they are in the power of a party to the conflict.[26] Therefore, one can say that international humanitarian law is not a fertile source of norms for the protection of persons fleeing armed conflict[27] who seek protection outside their country of origin.[28] Especially, no international obligations going beyond those stemming from the *Geneva Convention relating to the Status of Refugees*, the *European Convention on Human Rights* and other international Human Rights treaties, arise from the four Geneva Conventions of 1949 and the additional protocols of 1977. ■

Notes

1. *UNTS* Vol. 189, 150.
2. *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* of 12 August 1949 (*UNTS* Vol. 75, 31, 1st Geneva Convention). *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* of 12 August 1949 (*UNTS* Vol. 75, 85, 2nd Geneva Convention). *Convention Relative to the Treatment of Prisoners of War* of 12 August 1949 (*UNTS* Vol. 75, 135, 3rd Geneva Convention). *Convention Relative to the Protection of Civilian Persons in Time of War* of 12 August 1949 (*UNTS* Vol. 75, 287, 4th Geneva Convention).
3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977

(*Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, Vol. I, Bern 1978, p. 115, Protocol I). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (ibid., 185, Protocol II).

4. In the context of this article regard will be had exclusively to the *Convention of the Hague of 18 October 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land* (reprinted in D. Schindler, and J. Toman, *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents*, Geneva 1988, p. 941, (V. Convention of The Hague of 1907).
5. But see R. Marx, in *Aktuelle asylrechtliche Probleme der gerichtlichen Entscheidungspraxis in Deutschland, Österreich und der Schweiz*, edited by K. Barwig and W. Brill, p. 103, 129 referring to the ICJ in the case of Military and Paramilitary Activities in and against Nicaragua, *ICJ Reports* 1986, p. 14, 113 et seq.; M. Sternberg v., *IJRL* 5 (1993), 153, 172.
6. See the judgment of the ICJ in Military and Paramilitary Activities in and against Nicaragua, *ICJ Reports* 1986, p. 14, 114, para. 220. Cf. also *Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field*, edited by J. Pictet, p. 38, 41; *id., Principles of Humanitarian Law*, p. 26; T. Meron, *AJIL* 81 (1987), 348, 362.
7. See the judgment of the ICJ in Military and Paramilitary Activities in and against Nicaragua, *ICJ Reports* 1986, p. 14, 114, para. 220.
8. In the Nicaragua case the ICJ held that the actions of the United States in and against Nicaragua fell under the legal rules relating to international conflicts (cf. *ICJ Reports*, p. 14, 114, paras. 218 and 219). The U.S. were held to be under an obligation pursuant to Art. 1 of the Geneva Conventions not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Art. 3. See also U.S. Court of Appeals of the 9th Circuit, in Echeveria-Hernandez v. *INS*, 923 F.2d 688 (9th Cir., 1991); U.S. Board of Immigration Appeals, in Matter of Medina, 19 I & N Dec. 734 (*BIA* 1988), pp. 738–40.
9. For full name, see *supra* note 3.
10. See T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, p. 65, 73; concerning Protocol I, see A. V. Lombardi, *Bürgerkrieg und Völkerrecht*, p. 310; similar S. R. Chowdhury, *IJRL* 7 (1995), 100, 109. As a consequence, these authors are in favor of applicability of Art. 4, 14, 17 and 18 (2) of Protocol II to internally displaced persons in situations below the threshold of an armed conflict.
11. Not convincing the opinion of R. Marx, in *Aktuelle asylrechtliche Probleme der gerichtlichen Entscheidungspraxis in Deutschland, Österreich und der Schweiz*, edited by K. Barwig and W. Brill, pp. 103, 130, 131.
12. Art. 16 of the V. Convention of The Hague of 1907 (for full name see supra note 4) defines neutrals as nationals of a State which is not taking part in the war.
13. For full name, see *supra* note 3.
14. For full name, see *supra* note 2.
15. Ibid.
16. There is not such an obligation in international customary law either. For a disscussion view see R. Marx in *Aktuelle asylrechtliche Probleme der gerichtlichen Entscheidungspraxis in Deutschland, Österreich und der Schweiz*, edited by K. Barwig, and W. Brill, pp. 103, 130, 131; See also *supra* note 11 and the text belonging to it.
17. For full name see, *supra* note 2.
18. Ibid.
19. See Art. 13 of the 4th Geneva Convention.
20. Article 23 (free passage of all consignments of medical and hospital stores and objects necessary for religious worship, foodstuffs, clothing and tonics) forms an exception. It envisages all contracting parties to the Convention.
21. Pursuant to Art. 73 Protocol I also persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence are protected persons within the meaning of Parts I and III of the 4th Geneva Convention.
22. See also O. Kimminich, *AWR-Bull.* 32 (1994), 160, 168; W. Kälin, *Grundriss des Asylverfahrens*, p. 207.
23. For explanations on this see also K. Obradovic, in *Thesaurus Acroasium*, pp. 131, 150, particularly note 40 and pp. 159, 160; J. Patrnogic, UNHCR reprint from *Ann. de Droit Int'l Méd.* 7/1981, 95, 98 ff.; O. Kimminich, *AWR-Bull.* 32 (1994), 160, 166 et seq.
24. See Art. 31 et seq. of the *Vienna Convention on the Law of Treaties*.
25. See also the United States BIA in Matter of Medina, 19 I & N Dec. 734 (BIA 1988), quoted in M. Sternberg v., *IJRL* 5 (1993), 153, 171. For a dissussion view see Parker, *Immigration Newsletter* 13 (May–June 1984), 6, 7. D. Perluss and J. F. Hartmann, *Va. J. Int'l L* 26 (1986), 551, 606, however, regard such an interpretation as "an ambitious one." W. Kälin, *Grundriss des Asylverfahrens*, p. 207, is of the opinion that, in view of the large number of states that have ratified the Geneva Conventions, these provisions do express a basic confession that foreigners originating in countries of conflict are worthy of protection.
26. See also J.-P. Lavojer, *Rev. ICR* 812 (March–April 1995), 183 at 189.
27. For an examination with regard to internally displaced persons see D. Plattner, *Int'l Rev. Red Cross* 291 (1992), 567–80.
28. See also *Index of International Humanitarian Law*, edited by W. A. Solf and J. A. Roach. ◻

The Refugee-Security Dilemma in Europe

Joanne van Selm-Thorburn

Abstract

Focusing on two of the institutions involved in the range of European activities on conflict prevention and displacement in the wake of the Yugoslav crisis, this article seeks to address the complex interplay of refugee protection and security enhancing strategies. The conclusion to an analysis of the mandates and expectations placed upon the OSCE's High Commissioner on National Minorities and the United Nations High Commissioner for Refugees is that the latter is at risk of abrogating its responsibilities towards refugees and potentially misinterpreting the motives of other (actual conflict prevention) organs in the international security arena and their impact (or not) on displacement. The article places this institutional and conceptual dilemma of refugee protection and security in the context of International Relations theories, and stands squarely against the view that refugees are themselves a threat to west European security.

Précis

En concentrant son attention sur deux des institutions impliquées dans le réseau des activités européennes en matière de prévention des conflits et des déplacements de populations dans la mouvance de la crise yougoslave, le présent article s'efforce d'analyser l'interconnexion complexe qui s'établit entre la protection des réfugiés et les stratégies de renforcement de la sécurité. La conclusion d'une analyse des mandats et projets chapeautés par le Haut Commissaire aux Minorités Nationales de l'OSCE et le Haut Commissariat des Nations Unies aux réfugiés est que ce dernier risque purement et simplement d'abdiquer ses responsabilités envers les réfugiés et de virtuellement mécomprendre les motifs d'autres organismes (assurant de fait la prévention de conflits) dans l'arène de la sécurité internationale, ainsi que leur impact (ou absence d'impact) sur les déplacements de populations. Le présent article place ce dilemme institutionnel et conceptuel de la protection des réfugiés et de la sécurité dans le contexte des théories sur les relations internationales et s'inscrit fermement en faux contre la croyance selon laquelle les réfugiés seraient eux même une menace à la sécurité en Europe occidentale.

... if we are to break the pattern of coerced displacement, the security of States must presuppose the security of people within those States.[1]

Two key developments for conflict prevention and refugee protection took place when Europe was faced with the mass exodus from, and movement of displaced persons within, Bosnia-Herzegovina. The United Nations High Commissioner for Refugees (UNHCR), whose West European donors were reluctant to accept large numbers of refugees, developed policy initiatives which included a prevention role, in spite of its protection oriented mandate. The Organization for Security and Co-operation in Europe (OSCE), on the initiative of West European states, installed a new international figure as a High Commissioner on National Minorities (HCNM), with a mandate to operate in the areas of conflict prevention and early warning.

This article seeks to identify the links between minority and refugee issues in the security context, describe two of the institutions involved in the new security apparatus being established on the humanitarian level, and thus demonstrate the refugee-security dilemma in Europe at the end of the 1990s.

The issues of minorities and refugees, the rights of both groups, political decisions made on a domestic and international level concerning their acceptance and integration in societies labelled as majorities or hosts, and the whole range of interrelated issues surrounding these population groups are among the priorities on the post-Cold War security agenda. Traditional inter- and intra-state conflicts, including those with origins in minority related issues, remain the fundamental threat to European and international stability, while so-called new transnational threats such as terrorism, crime, drugs, and uncontrolled migration are perceived to have increasing importance.

The position of minorities in their state societies and the degeneration of tense situations into migration enforcing circumstances (other than generalised economic hardship as inferred in the concept of a threat of uncontrolled migration) are security concerns with a human face. These humanitarian manifestations of the security problematic have taken a key position in the building and remodelling of institutions since 1990. They are moving up the political agendas of state governments in Europe and becoming priorities of international organisations.

Within the new security architecture, encompassing Europe, the USA, Russia, and ultimately the global security construct, there should be an ur-

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gent effort made to avoid duplicitous overlap and to avoid the leaving of gaps in the security armour.

Organisations established to deal with the security scenario of the Cold War are changing to develop new strategies, included an altered notion of the need for and right to intervene in the affairs of sovereign states. There is an increasingly strongly supported notion in political and societal thought that other states and international or regional organisations have a right to intervene in states where they can: save lives; protect lives; protect themselves and other neighbouring states from the massive movements of displaced persons which could result from a war, as well as the spill-over of the violence itself.

The norm of non-intervention, based on the right of sovereignty of a state over its internal affairs, has always been challenged by the notion of *humanitarian* intervention.[2] Exactly what humanitarian intervention is seems to be in a process of redefinition, to suit the needs of the potential interveners, and the atrocities of the state or non-state perpetrators of ill treatment to citizens in their state of origin. The three seeming justifications of the need to intervene set out above can be questioned, just as the right to intervene with justification can be questioned.[3] This questioning, in conjunction with the three notions set out above would appear to result in five norms guiding the activities of international actors:

1) Discrimination of the individual or group (minority) is unjustifiable;
2) The loss of life or threat of loss of life in a conflictual situation between state and citizens is unjustifiable;
3) Forced flight is unjustifiable (but perhaps not as "bad" as loss of life);
4) The denial of protection for those displaced is unjustifiable, especially if their lives would be at risk if returned to the country of origin (but it would be better to deal with the "problem" at source); and
5) Intervention in the affairs of sovereign states is questionable (but perhaps not in all cases unjustifiable).

Complete discussion of the theoretical and philosophical problematic being presented here would require an entire book. This article is concerned with two of the institutions involved in the practical manifestations of these emerging (or in some cases entrenched) norms. The UNHCR is chiefly concerned with points 3) and 4) above. The OSCE HCNM is chiefly concerned with points 1) and 2). The HCNM's activities on these points are of concern and interest to UNHCR, but UNHCR's work and the points they are chiefly concerned with are not central (and in the case of point 4 almost not peripheral) to the mandate and activities of the OSCE's High Commissioner. Where both become involved, as do the states supporting (and funding) them, is on point 5.

The issues of minorities and refugees, and the security implications of their existence, position, integration, and movement are interlinked on a number of levels. Many minority populations in current European states are descendants of the migrants and refugees of the centuries gone by.[4] Ethnically rooted or motivated conflict between minority and majority populations can result in displacements and refugee movements. Many minorities in Eastern and Central Europe claim kinship with neighbouring states. If they feel compelled to flee their homes they would likely move to those states, potentially disturbing a fine balance between their kin majority population and its own minorities. While recognition of groups as refugees is not accorded by the 1951 Convention, the objectively provable fact of persecution due to one's membership of a social group can be a basis for the accordance of individual refugee status. Lesser statuses may also be accorded by governments recognising the basis for flight in the ethnic origins of groups of asylum seekers. Refugee influxes develop new minority populations in some states, even if sometimes only temporarily. Post-Cold War interpretation of potential conflict in Europe sees minorities at the causal end, and refugees[5] as a result of the conflict process. In the 1995 *General Conclusion on International Protection* the Executive Committee of the High Commissioner's Program (EXCOM) states that it

> condemns all forms of ethnic violence and intolerance which are among the major causes of forced displacements as well as an impediment to durable solutions to refugee problems; and appeals to States to combat intolerance, racism and xenophobia and to foster empathy and understanding through public statements, appropriate legislation and social policies, especially with regard to the special situation of refugees and asylum seekers.[6]

One core line of argument of this article is that the major actors in the field either depend too heavily on each other to fulfil expectations that go beyond the reality of pragmatic scope for action and of operational mandates, or by concentrating on the core necessities of fulfilling their own assigned functions ignore related issues, thereby jeopardising their own ultimate success as comprehensive action is not achieved.

A significant example of such expectations can be seen in UNHCR's 1995 *State of the World's Refugees: In Search of Solutions*.[7] One of a limited number of special sections is devoted to the subject "Protecting Europe's minorities: preventing refugee movements." The section describes the establishment and functioning of the post of OSCE High Commissioner on National Minorities. Elements of the HCNM mandate are described, some of the first High Commissioner, Mr. Max van der Stoel's, recommendations are referred to, and his task of acting as an early warning mechanism for minority related conflicts is highlighted. With reference to this latter function, UNHCR's report states that it is

> of particular importance, because few of Europe's ethnic, religious and linguistic minorities are confined to a single state. Any form of violence, therefore, is likely to spill across national borders and to draw in other governments, with the risk of creat-

ing uncontrollable regional conflicts and *refugee movements*.[8]

However, there is no reference to refugees or refugee movements in the OSCE Mandate of the High Commissioner on National Minorities (HCNM). This does not mean the work of the HCNM cannot be interpreted as having this potential impact, however, it cannot and should not be assumed that the fact of the existence of the HCNM means there will be no or fewer displacements caused by minority related conflict. In fact, by the time a conflict has gone beyond an early warning point, which it must have done if displacements occur, it is too late for the HCNM's early action. The HCNM mandate can, however, be seen to include measures aimed at increasing the potential for peace maintenance and refugee return once a conflict is clearly over.[9] The HCNM can only become involved in a limited number of situations, and only with the consent and approval of an number of actors, including those directly involved. Due to the limitations placed on the scope of his work, practical, political, and constitutional, the incumbent HCNM was not involved in Russia and thus not in Chechnya in 1994 when conflict broke out there. The violent situation in Albania in 1997 is not minority related and Mr. van der Stoel, while active in Albania, thus had no role to play in signalling a potential conflict focused on political unrest and economic mismanagement.

While it is logical to assume that conflict prevention, including the prevention of conflicts between minorities and their majority compatriots, will have the spin off of preventing people's forced movement or flight, this is in no way a declared or direct element of the High Commissioner on National Minorities' work. UNHCR like many actors in world politics and international relations is in search of solutions. In its particular case, UNHCR is in search of solutions to refugee crises. Since 1992 it has turned its attention increasingly towards strategies of prevention and away from its statutory task of protection. Prevention is protection, the line goes. Prevention of refugee flows is addressed by tackling the causes of forced migration and prevention of refugeehood by stopping people from crossing borders (an essential feature of the refugee condition).

UNHCR is very much at the centre of the discussion of this paper, as a long-standing organisation with a broad but specific mandate, which is facing both internal and external pressures to develop. The implication of the argument developed here with regard to this UN agency is that, drawn in by the wider security debates following the end of the Cold War and the particular crisis in Europe of former Yugoslavia, UNHCR is in danger of abdicating from its position of agency responsible for refugee protection, by seeking an alternative role as protector through prevention, and furthermore turning to others to fulfil the prevention task on its behalf.

The Refugee-Security Dilemma

The core dilemma in this discussion is that of the linkage between security and refugee flows. On the one hand a lack of security, a term used here to mean the degeneration of a tense situation into violent conflict, inevitably produces population movements, whether inside a recognised state territory or across borders—in nontechnical terms a refugee flow. A refugee flow meanwhile can cause destabilization through the fact of populations on the move, populations seeking safety first, and later work, housing, education etc., but also a destabilization on social balance in states with minorities of the same acknowledged group as the refugees, where their numerical quantity is suddenly increased, or a destabilization in terms of increased racial and xenophobic attitudes in states where sections of the population feel threatened by newcomers and outsiders, seen not as helpless people in need, but as scroungers and the thieves of limited resources.[10]

This security-refugee dilemma is a theoretical problematic, a result of linguistic overlap in terminology between two closely related fields of practical action and academic thought and an area of practical overlap and linkage between institutions developing a complementary but distinct role in the post-Cold War global security scene.

From a security, a minority, and a refugee perspective, conflict is undesirable. Conflict is a potential cause of instability in the region. It most often provokes refugee flight (or includes forced migration as a weapon of societal destruction), it can be the result of and can become an addition to ethnic tensions in many cases, and for all these reasons it can result in calls for intervention. Furthermore, those states which could offer protection to refugees are, in the late twentieth century (as in World War II), reluctant to do so. On all levels the obvious solution seems to be to prevent conflict from breaking out in the first place. However, can or should security be rephrased as rich states with the power and strength to prevent conflicts protecting themselves from refugee influxes or *in situ* protection requirements? And if such a rephrasing would be ethically justifiable in itself, would or should states have any greater political will to step in to potential conflicts than has been the case with each call for humanitarian intervention to date?

The activities of the HCNM and those of other third party diplomats and mediators not examined in depth here are all measures of conflict prevention. However, conflict and human rights abuses, while they are not unavoidable, are not eradicable as yet either. People are still forced to flee. Indeed, because the security apparatus of the post-Cold War era is still in a state of transition, and because the spread of global power and interests remains unsettled, more massive refugee producing situations are taking place in the mid 1990s than took place in the previous four decades combined. Protectors of the refugees are absolutely essential.

Refugees are considered by some to be a threat to sovereignty and security.

In the era of the "global citizen," with ethical approaches to political activities and decision-making increasing in popularity with the people, the state of flux in realist inter-state relations means that the normative standpoint taken is often that of the right of the citizen and not of the human being. Why should foreigners have the rights to take "our" jobs and welfare benefits just because their own people fight? Actions such as Proposition 187 in California or the withdrawal of housing and benefits from those who do not declare their desire to seek asylum immediately on entry to the United Kingdom do not emerge out of a political vacuum in which no one will vote for those propagating the stance. The politicians involved in formulating these policies must sense that a proportion of the population whose votes they seek desire these xenophobic stances.

However, the security issue in refugeehood comes not from a conspiracy by the world's poor to invade the rich countries and take all the jobs and benefits. The security problem is earlier—it is the breakdown in security which forces refugees to flee. Security used to mean protecting territory from armed invasion and occupation or nuclear attack. Refugees have moved on to the security agenda as a threat. This perception is a misjudged interpretation of the refugee position in regional and global security. Realising that persecution of minorities was one root of the conflict in Bosnia Herzegovina, and that this story could repeat itself in other central and Eastern European states, the OSCE participating states agreed to create a High Commissioner on National Minorities as a conflict prevention tool and early warning mechanism. Refugee protectors have seemingly jumped on this development as a step forward in their cause. In some ways there is a movement forward, but without intention or drive.

HCNM Mandate

The OSCE High Commissioner on National Minorities is, according to the mandate, an instrument of conflict prevention at the earliest possible stage. The HCNM is to provide "early warning" and, as appropriate, "early action," in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage, but, in the judgement of the High Commissioner, have the potential to develop into a conflict within the OSCE area, affecting peace, stability or relations between participating states. This means that HCNM action is restricted to pre-conflict situations, under circumstances in which tensions between majorities (often governments) and minorities can be expected or anticipated. The High Commissioner can issue an early warning if he or she concludes that there is a *prima facie* risk of potential conflict as described in the previous sentence.

This decision is to be based on information the HCNM may collect and receive regarding national minority issues from a variety of sources including the media, NGOs, governments, religious groups and others, provided they do not practice or publicly condone terrorism. Parties directly involved may communicate their concerns and information on the situation in writing to the HCNM directly, giving their full name and address, providing their information can be readily substantiated, and is about the situation of the previous twelve months maximum. The HCNM's early warning would be issued to the Chairman-in-Office and then communicated to the Senior Council (previously Council of Senior Officials). The Senior Council may then trigger the "Emergency Mechanism" as set out in Annex 2 of the *Summary Conclusions of the Berlin Meeting of the Council.* The HCNM must give an explanation of the reasons for the warning to the Council. In the first four years of activity no early warning was issued by the HCNM.

Early action meanwhile involves further contacts and closer consultations with the parties involved, most usually via visits to the state(s) concerned.

The HCNM is part of the OSCE's "touchy-feely" participation as a third-party observer, facilitating, monitoring, fact-finding, and gently mediating rather than enforcing or muscling in to a peace-making role.[11] The incumbent HCNM has used quiet diplomacy to make advances in peaceful relations between governments and minorities in the thirteen states in which he has been active.[12] He and his team of advisors use the media and personal contacts with relevant organisations and officials to keep themselves informed of developments in the political situations in the countries involved. The High Commissioner and his appropriate advisor make visits to states on a regular basis. Usually, the calmer the situation the less frequent the visits, although contact is maintained. He meets with government officials and representatives of minority groups, and issues a letter of recommendation to the government following his visit. A written response is usually made to this letter, and at that point it is usually approved for public release by the Parliamentary Assembly of the OSCE. The High Commissioner has favoured the establishment of Roundtables as dialogue mechanisms, and this method of discussion has been used with most particular effect in relations between the Ukrainian authorities and representatives of Crimea in attempting to resolve constitutional issues. Other examples of this Roundtable dialogue are to be found in the Baltic states. The High Commissioner is also active in diplomatic efforts to resolve sticking points in the conclusion of bilateral treaties, such as those between Hungary and Slovakia and Hungary and Romania.

UNHCR Statute

The United Nations General Assembly adopted the *Statute of the Office of the United Nations High Commissioner for Refugees* in Resolution 428 (V) of 14 December 1950. The UN High Commissioner for Refugees is to

> assume the function of providing international protection, under the auspices of the United Nations, to

refugees falling within the scope of the present Statute, and of seeking permanent solutions for the problems of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.[13]

The part of this mandate where prevention activities could be seen to fall is in the search for permanent solutions for the problems of refugees. What could be more permanent as a solution than not becoming a refugee in the first place? However, the mandate presupposes that while the agency exists its activity will be to protect those who have already become refugees, finding solutions to the situation in which they find themselves.

The UNHCR's work is to be of a non-political character, i.e. to be impartial in conflict situations, protecting all refugees regardless of their affiliations (except for war criminals) and to help all sides. It is also to be humanitarian and social and to relate to groups or categories of refugees.[14] This distinguishes international protection from the individualised character of state recognition of refugeehood and accordance of refugee status following the guide of the 1951 *Convention Relating to the Status of Refugees* and 1967 *New York Protocol*. The definitional scope of those to be protected by the agency however is individualised ("Any person who ...") and is very similar to the definitional clause of the 1951 Convention, although the addition of fearing persecution due to membership of a social group was added to the later document.[15]

The High Commissioner for Refugees is, according to the Statute, to provide protection for refugees by promoting international conventions for the protection of refugees, supervising their application and suggesting amendments; *promoting measures to improve the situation of refugees and to reduce the numbers requiring protection*; assisting voluntary repatriation or assimilation; *promoting admission* and the transfer of assets needed for resettlement; obtaining complete information on numbers of refugees and domestic laws and regulations concerning them; maintaining contact with governments, NGOs and private organisations, and facilitating work of these latter concerned with the welfare of refugees.[16]

The work of the High Commissioner is to be carried out with reference and responsibility to the General Assembly. The General Assembly has on a number of occasions broadened the mandate of the UNHCR, for example by requesting "good offices" in a number of refugee producing situations in Asia and Africa in the 1970s and more recently by assigning it the role of lead agency in the relief efforts in former Yugoslavia. The effect of this has been to make UNHCR the agency with *de facto* responsibility for the protection and relief of internally displaced persons as well as refugees, although no such function officially exists.

From the beginning of the refugee crisis in former Yugoslavia, the UNHCR issued calls for adaptations in protection regulations and policies, as European states showed reluctance to grant status to the large groups of former Yugoslavs and Bosnians requesting asylum in their territories.[17] While not actually a suggestion for a convention or amendment of existing refugee conventions, these adaptations would clearly be protective tasks or duties of the UNHCR. However, it has also turned its attention to the prevention of refugee flows, both by participating in the creation of "safe areas" within countries of origin (thereby allowing potential host governments to claim a safe flight alternative or to expect less exits) and by encouraging the development of root cause approaches—preventing displacements if possible.[18] This participation potentially falls within the scope of "reduc[ing] the number requiring protection," if successful, but it should not be allowed to compromise the essence of protection.

Links between the Two Institutions

On a practical level the closest working link between the OSCE and UNHCR has been cooperation on the CIS Conference held in May 1996 to discuss the massive displacements and management of flows of refugees and internally displaced persons in the countries of the former Soviet Union. The organisation of this conference was a cooperative effort between UNHCR, the International Organisation for Migration, and the OSCE. The OSCE's input was channelled via the Office for Democratic Institutions and Human Rights (ODIHR). The High Commissioner on National Minorities' role was very minimal, although NGOs, scholars and perhaps cooperating organisations and states may have expected more. It was, however, an example of the type of situation in which a close reading of the HCNM mandate and following of his activities would indicate that, as a political figure, his involvement could influence his own effectiveness and the outcome of proceedings. After all, while the HCNM is not active in Russia, Russians form minorities in many of the states of the Baltic and Central Asian regions where he is involved. Russia's outspoken stance on the subject of its nationals and Russian speaking groups in the "near abroad" is well known. Pressure concerning the granting of citizenship or some sort of status to migrants from these groups would be politically very difficult for a person in the political position of the OSCE HCNM. With conflict prevention as a major task, a HCNM could not put him or herself in the position of advocating a stance which could put negotiating partners against him or her. The HCNM is not even a High Commissioner *for* National Minorities, but *on* National Minorities—not advocating the position of minorities or acting as an ombudsman on their behalf but dealing in matters which affect the relations between minority groups and governments, and trying to facilitate compromise and a satisfactory relationship for all.

The UNHCR highlights prevention as protection, but it cannot act on its preventive desires as such activity does not lie within its mandate or capabilities. The HCNM acts to prevent conflicts or give early warning of their potential eruption, and his activities may have the side-effect or preventing some people from becoming refugees, however this is not a primary purpose of his work or mandate.

Conclusion: Institutional and Political Needs

Do we need a security organisation which strives to prevent refugee crises? At the root of much talk of prevention of refugeehood is the lack of willingness to effectively protect those forced to flee by conflict, either as a host state or by intervening to protect the displaced *in situ*. The humane goal in interventionist strategies often seems to be protecting the lives of the interveners' armed forces, and protecting one's own citizens from the impact of a lack of security caused by the failure of other states to protect their citizens. States see it as being in their interest not to receive large numbers of asylum seekers. For reasons of self interest they also decide whether or not it is appropriate for them to intervene in a "foreign war." Those same states are the providers of mandates and funds for the organisations which administratively and operationally deal with all the issues involved in this security debate. States need to guide the organisations which serve them and in which they cooperate to coordinate and cover all aspects of the issues and to clearly stick to the most appropriate mandate. The UNHCR would do a disservice to those who must become refugees if they let a protection emphasis slip and focus on prevention. Prevention cannot always succeed, someone has to protect those it fails.

The overlap between the mandates of the two offices discussed here is minimal. The links between them come in the late twentieth century understanding of the security-minority-refugee-security continuum. The UNHCR cannot and should not rely on the HCNM to prevent refugee crises in Europe. The UNHCR also needs to search deeply into the question of to what extent prevention is protection. Its mandate has always been to give international protection to those in a refugee-like situation. Its role in the twenty-first century must be to protect those whose forced displacement was not preventable, and support others in prevention activities. Above all, it must lend a moral voice to the debate on behalf of people who through no fault of their own become refugees. UNHCR should expect other (security) organisations to listen to its calls for more action to protect people from displacement, particularly if states continue in their reluctance to provide traditional asylum.

From an idealist perspective there should be a layering of cooperating organisations linking military, diplomatic and political efforts to ensure security by preventing or resolving conflictual situations, establishing a global human rights regime and protecting those who become the victims of violence and human rights abuses. Within this pluralist view the major issues are shifting. Protecting territory and citizens of richer states from an ideological foe is no longer the priority. However, protecting territory and citizens of the rich world from refugee invasion is a mistaken effort at reprioritising. Protecting the rights of all humans, allowing all to live in peace and security should be the goal of a global society based on the normative values espoused during the last fifty years. The major protectors of rights and security are still states. The end of the Cold War has shifted the balance from a realist perspective—that much is undebatable. Where the balance of power now lies, what sort of power is most relevant and which states hold it, and indeed whether states are the sole actors in international relations, are all open question. States need to cooperate on the human issues paramount at the end of the twentieth century, using the organisations they have established to expand in terms of membership and competence to cover all aspects of security, migration, and ethnic relations. They also need to realise that minorities and refugees are not necessarily a threat to state power, but could be the key to showing the extent of the power of humanity. ■

Notes

1. UN doc. A/AC.96/860, *The Report of the Forty-sixth Session of the Executive Committee of the High Commissioner's Programme*, 23 October 1995, Annex: Opening Statement by the High Commissioner, Monday 16/10/95.
2. See M. Akehurst, "Humanitarian Intervention," and Hoffman, S., "The problem of Intervention," both in *Intervention in World Politics*, edited by H. Bull (Oxford: Clarendon Press, 1984).
3. See M. Walzer, *Just and Unjust Wars* (New York: BasicBooks, 1992, 2nd ed.).
4. For theoretical approaches to the explanation of minority formation through migration see S. Castles and M. J. Millar, *The Age of Migration: International Population movements in the Modern World* (London: Macmillan, 1993), particularly Chapter 2, "The Migratory Process and the Formation of Ethnic Minorities."
5. The term *refugees* is used here in its broader and more common sense and not restricted to the definition contained in Article 1 A paragraph 2 of the 1951 Convention Relating to the Status of Refugees. This Convention defines a refugee as any person who

   > as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

6. UN doc. A/AC.96/860, *The Report of the Forty-sixth Session of the Executive Committee of the High Commissioner's Programme*, 23 October 1995, paragraph (h). In paragraph (i) EXCOM calls on UNHCR to support States and cooperate with the UN High Commissioner for Human Rights on the development of an effective human rights regime.
7. UNHCR, *State of the World's Refugees: In Search of Solutions* (Oxford: Oxford University Press, 1995).

8. Ibid., 80.
9. The HCNM's involvement in Croatia since 1996 is proof of this.
10. On the so-called new xenophobia, or re-emergence of this phenomenon, see *New Xenophobia in Europe*, edited by B. Baumgartl and A. Favell (The Hague: Kluwer Law International, 1995).
11. See Janie Leatherman, "The CSCE's (Im)Possibilities for Preventive Diplomacy in the Context of Ethnic Conflict," *International Journal on Group Rights* 2, no.1 (1994): 35–54.
12. For a broad description of how the HCNM becomes involved in countries, and his activities in the thirteen states in which he has been active see *The Role of the High Commissioner on National Minorities in OSCE Conflict Prevention*, (The Hague: Foundation on Inter-Ethnic Relations, 1997).
13. *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428 (V), 14 December 1950, Annex 1, Chapter I, 1.
14. Ibid., Chapter I, 2.
15. Ibid., Chapter II, Aii, *Convention Relating to the Status of Refugees*, 1951, Article 1a.
16. Ibid., Chapter II, 8.
17. See Joanne Thorburn, "Transcending Boundaries: temporary protection and burden-sharing in Europe," *International Journal of Refugee Law* 7, no. 3, 1995.
18. See Joanne Thorburn, "Root Cause Approaches to Forced Migration," *Journal of Refugee Studies* 9, no. 2, 1996.

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Cycle of Violence Theories and Conflict Resolution in the Post-Yugoslav States

Vanessa Pupavac

Abstract

This paper examines the implementation of non-governmental programs in the post-Yugoslav states. Current conflict resolution initiatives are informed by theories of deviancy and the idea of cycles of violence. The presumption of such programs is that conflict has resulted from a culture of violence. Whilst some non-governmental organisations have expressed doubts about the effectiveness of their peace education work, the reasons for the problems they experience are often misunderstood. One reason that is never addressed is that people from the region are already familiar with the concept of peace education, but have seen it fail. Ironically postwar Yugoslavia was very important in the development of the field of peace education and was held up as a model of ethnic conflict management for other countries to follow.

Précis

Cet article examine la mise en place de programmes non-gouvernementaux dans les états de l'ex-Yougoslavie. Les initiatives actuelles en matière de résolution de conflit s'inspirent des théories de la déviance et de la notion de cycle de la violence. Les programmes en question supposent donc que le conflit est la résultante d'une culture de la violence. Un certain nombre d'organisations non-gouvernementales ont pourtant exprimé leurs doutes sur l'efficacité du présent travail d'éducation à la paix, mais les problèmes auxquelles elles font face sont souvent mal compris. Une des causes non nommée de ce fait est que les habitants des régions sont déjà familiers avec le concept d'éducation à la paix, mais pour en avoir observé l'échec. Il est ironique de constater que la Yougoslavie d'après-guerre joua un rôle très important dans le développement du champs de l'éducation à la paix et fut érigée en modèle à suivre par les autres pays en matière de gestion des conflits ethniques.

Only a reconstruction effort which gives due priority to the well-being of the populations and address[es] as crucial issues: the psychosocial recovery of the younger generations; the building-up of an education system capable of promoting the development of the child's personality and preparing him or her for a responsible life; the reform of social services structures which will increase their efficiency and limit their cost can foster long term stability in the region. (UNICEF 1995, 2)

The United Nations High Commissioner for Refugees (UNHCR) has announced that it hopes to repatriate twenty thousand refugees to Bosnia and Herzegovina by December 1997. In the meantime, Eastern Slavonia is to be re-integrated into Croatia. This means that it is seen as imperative to re-establish peaceful relations between the different ethnic groups to avoid a renewal of fighting.

Nonviolent conflict resolution programs are very popular with international donors and more have been introduced to facilitate the reintegration of refugees and to prevent a renewal of fighting in the post-Yugoslav states. UNICEF and other internationally-funded initiatives are endorsing a predominantly psychological approach to conflict resolution. This approach is informed by the Western welfare model which has traditionally emphasised the role of the professional and, therefore, individual causations and interventions, and de-emphasised the influence of the wider social, economic, political and cultural circumstances (Boyden 1990, 192).

Since the end of the Cold War the focus of policymakers has shifted away from fears of confrontation between two superpowers to preoccupations about "failed states" and domestic peace, particularly following the Oklahoma bombing. The domestic concerns of donor countries about the breakdown of the family and a growth of violence are being projected onto how international problems are conceptualized.

The culture or cycle of violence thesis has been described as "undoubtedly the most frequently mentioned theoretical framework in the literature on family violence" (Pagelow 1984, 223). It is often assumed that children who have experienced or witnessed violence "grow up to become juvenile delinquents/criminals and/or abusers/victims of violence" (ibid.). We can see parallels in the concept of abusing families as suffering from an underlying pathology passed on from generation to generation in many of the current theories of ethnic conflict that is commonly seen as deriving from age-old conflicts. Anthony Smith looks to the culture of particular groups to explain conflict and claims that "it is in the properties of such (ethnic) communities that one can find the key to the explosive power of nationalism" (Smith 1993, 49). Seyom Brown (1994) draws parallels with violent families and nations and sees the problem of violence as learned behaviour:

> Explicitly or implicitly, groups (from families to gangs to nations) convey to their members what kind of

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> conflictual or cooperative behaviour is admired or disparaged, and such group norms can work or reinforce, channel, or deflect aggressive desires to dominate others or to strike out at those believed to be responsible for one's deprivations and frustrations. (Brown 1994, 19).

Marc Howard Ross (1993, xiv) states, "Violence, I am convinced is most likely to produce more violence." He calls for the recognition of "the central role of psychocultural sources of conflict."

The Report of the Commission on Global Governance (1995, 49) argues, "At a broader level, the security of people is imperilled by the culture of violence that has infected many societies." It is feared that children who are victims of war have grown up in a culture of violence and that they are more likely to become future perpetrators of violence:

> A disturbing feature of the contemporary world is the spread of a culture of violence. Civil wars brutalize thousands of young people who are drawn into them ... Conflict and violence also leave deep marks on the lives of children, innocent victims who are rarely able to rid themselves of the legacy of war. The culture of violence is perpetuated in everyday life ... The world over, people are caught in vicious circles of disrespect for the life and integrity of others. (ibid., 16–17)

UNICEF's *News in Brief* states that "the world has only just begun to realise that left untreated, the psychological wounds of war can be most damaging, as children grow up unable to function normally, often driven to perpetuate the violence they have experienced."

The victims of war are seen as the future perpetrators of war. The idea of the need for moral rehabilitation has led UNICEF to define new policy areas, "Best practise in the context of psychosocial counselling; how to demobilize and detraumatize child soldiers; how to deal with conditions of social breakdown in the 'failed state'" (Black 1996, 272). Intervention is called for to try to break the cycle of violence.

Many organisations have adopted an unquestioning and pragmatic attitude towards to the cycle of violence thesis. As Daley Pagelow (1984, 224) has reasoned:

> It *sounds* intuitively reasonable, if it transmits an emotional appeal to masses of people, even if not factually accurate, what harm can be the harm? If the phrase "cycle of violence" raises money for child-abuse organizations or other humanitarian causes—why not use it—whether or not it has been substantiated?

It should be noted that despite the popularity of intervention based on the idea of cycles of violence theories, there is a lack of research to prove the theories. Daley Pagelow has highlighted the "shaky evidence" to support the cycle of violence theories, "Most writers have done no original research but have gathered reports in the field and repeated findings and assumptions from these secondary sources," (Pagelow 1984, 225) and "at this point, there is no scientifically sound empirical evidence that there is a causal relationship between being an abused child and becoming an adult child abuser" (ibid., 254).

There is also a lack of studies to support the cycle of violence thesis in the context of conflict. Guy Goodwin Gill and Ilene Cohn (1994, 174) admit in their study on child soldiers that "no systematic study appears to have been conducted into the relationship between the way children cope with exposure to violence and future choices ..." and that "research is inconclusive ... as to the likelihood of moral breakdown among children who actively participate in political violence and armed conflict."

This concern about moral breakdown and the need to rehabilitate the child underlies Article 39 of the Convention that requires states to "take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim." Counselling to promote recovery and reintegration has become very popular in the United States and Britain and this is reflected in UN and northern NGO programs, although the benefits of counselling have been questioned. King and Trowell (1992, 26) contend, "Unfortunately no amount of counselling and psychotherapy is likely to make much impact on families suffering from multiple problems associated with poverty." The limitations of counselling refugees are even clearer among whose lives are, by definition, "insecure and unstable" and have obvious practical problems, such as a lack of housing.

The prevalence of counselling or other initiatives to empower individuals from parenting to anti-bullying classes have been condemned domestically as an avoidance of tackling socioeconomic problems. They have been described as often "directed at radically altering the attitudes of young working class people" and have been linked to the underclass thesis which "is increasingly shaping US and UK social policy" (Jeffs and Smith 1994, 21–22).

The medicalization of social problems internationally has also been criticised. Jo Boyden questions the trend towards a universal diagnosis of Post Traumatic Stress Disorder in those who have survived wars and the pathologizing of children's experiences in war (Boyden 1994). She cites research which indicated the "astonishing plasticity" of children in extremely stressful situations and other research where it was found that trauma was lessened when adults or children felt that they had some control over events. Aggressive responses, which Boyden points out are often linked to survival mechanisms, are condemned by UNICEF psychologists as being dangerous (ibid., 261). A local psychiatrist in Knin working with refugee children told me that she believed it to be wrong to try to "cure" children of such symptoms as hyperalertness when they were in a war situation. She felt that alertness helped children avoid danger. Attempting to rid children near the front line of the symptoms, she said, was damaging to their future recovery as it confused them as they had every reason to be

afraid. Her reasoning was confirmed by the fact that just six weeks later, in August 1995, she and the refugee children she had been treating fled Krajina because of the Croatian Operation Storm offensive.

Derek Summerfield of the Medical Foundation for the Victims of Torture is also critical of the emphasis on trauma programs with donors and international agencies which he describes as the "reproduction of the colonial status of the Third World mind" (*BBC World Service*, 11 April 1996). The popularity of psychosocial programs reached their height in Croatia and Bosnia in 1994. Since then there has been a retreat from funding psychosocial programs there but there has been a growth of such programs in Serbia. However, the general shift of funding away from psychosocial programs does not represent a shift away from a focus on the Third World mind or culture as being the problem. Even traditional relief and development NGOs have shifted the focus of their work. Oxfam is now involved in conflict prevention/mitigation work in Sarajevo and intends to expand its work in this field.

UNESCO in March 1994 set up its Culture for Peace Program that was based on the idea that following war, the whole of society needed to be re-programed out of a culture of violence, the director-general of UNESCO indicatively referring to the "rehabilitation" of a country after war, not its reconstruction (UNESCO, Paris, 7–8 July 1993). Whereas past Western missionaries spoke of the need to civilise the natives, today's aid workers speak of the need to promote tolerance and peaceful conflict resolution skills. UNESCO's Culture of Peace Program which sees the wars in El Salvador, Mozambique and former Yugoslavia as being the result of a culture of violence epitomises how such attitudes towards the Third World are expressed in today's politically correct language. Whilst UNESCO is keen to emphasise that a culture of peace cannot be imposed from outside, and its programs stress they are derived from local cultures and traditions, the presumption of the programs is that the culture of the particular country is the problem. International agencies like UNESCO are seen as necessary "to play a new invigorated role in the United Nations system in the active promotion as well as conceptualization of a culture of peace to replace the culture of violence and war."

There are many internationally-funded projects to instill civilised values into both children and adults. Hi Neighbour, a program of social integration and psychological support for traumatised children aims "to cultivate their tolerance of differences" and "to develop strategies for peaceful resolution of conflicts and for prevention of social conflicts" (undated report).

UNICEF and other organisations seem to have forgotten or be unaware that the promotion of good relations between the different peoples of Yugoslavia and the celebration of their cultures was integral to the school curriculum in former Yugoslavia. Therefore, peace education programs are not new and something that Yugoslavia was not only familiar with but led the field. However peace education and policies to instill tolerance are seen as having failed to stop the war. The problem of such initiatives is that they do not address the issues at the heart of the conflict. In Serbia, worsening relations between the local population and refugees since 1993 has had nothing to do with ethnic differences (as the majority of the refugees there are ethnic Serbs), but has been linked to the impoverishment of the population as a whole. The fighting in north-western Bosnia between the Muslim-led Bosnian government forces and the Muslim forces under Fikret Abdic illustrates that the conflict did not relate to simply a failure to respect cultural differences.

Through this approach, the causes of wars are trivialized and the international context is ignored. Instead, explanations are sought in the pathology of the people. However detailed research such as Tone Bringa's study of a mixed Muslim-Croatian village in Bosnia from 1987 to 1993 demonstrates that the reasons for the outbreak of war in Yugoslavia cannot be found within communities. Bringa (1995, 5) argued that her study of the village could not explain the war in Bosnia, "for the simple reason that the war was not created by those villagers" and that "the war has been orchestrated from places where the people I lived and worked among were not represented and where their voices were not heard."

Moreover for all the peace education initiatives in former Yugoslavia, the use of force is seen as having been the actual way of dealing with conflict. Whilst people may have been involved in internationally funded nonviolent conflict resolution programs, they have witnessed military force as being the way disputes are ultimately resolved. It was the power of the US military, demonstrated by the NATO bombing of Bosnian Serb positions, not nonviolent conflict resolution initiatives, that resulted in the Dayton Agreement. Ironically, nationalist leaders in the successor states have been keen to be seen to be enthusiastic about nonviolent conflict resolution initiatives. Nationalist leaders have been attempting to recast themselves as upholding multicultural values and implicitly blame ordinary people for nationalism to enhance, or in Serbia's case, turn around their international standing.

Whole schools of children are being put on trauma or rehabilitation programs as a matter of course even if they have not been traumatised by the war. There is a presumption that in the absence of such programs children are growing up to be aggressive and intolerant. However, surveys carried out contradict this view. For example, a survey of three Belgrade primary schools by the Institute of Pedagogy found that young people did not identify with war figures (*Politika*, 6 March 1995, 55). They chose American basket ball players or film stars as their heroes. They were against the war and saw it as ruining their childhood and said it was not important whether people were Serb or Croat etc.

It should be emphasised that programs to rehabilitate children have not been confined to Serbia, which has been considered the aggressor in the war. Such programs have been more numerous in the Federation parts of Bosnia and in Croatia. The emphasis given to such programs has led to unease. The psychologist Zorica Trikic, involved in UNICEF's trauma counselling for children, has expressed concern that it seemed as if it were forgotten that the problem was not the children (*Vreme*, 26 September 1994, 25). The underlying assumption seems to be that the children of the region are (potential) delinquents lacking moral guidance who need to be reclaimed.

It is worth recalling the condemnation of such paternalistic attitudes towards the Third World by Paulo Freire (1972, 39) who was so influential in UNESCO in the 1960s and 1970s:

> They see the Third World as the incarnation of evil, the primitive, the devil, sin and sloth—in sum, as historically unviable without the director societies. Such a Manichean attitude is at the source of the impulse to "save" the "demon-possessed" Third World, "educating" it and "correcting its thinking' according to the director societies" own criteria.

Freire did not think that the dominant powers could play the positive role that they are now sought to have, describing it as "a contradiction in terms if the oppressors not only defended but actually implemented a liberating education" (Freire 1978, 30).

UN agencies are aware that there is hostility to the idea that the problems of such states are cultural, are considered by Third World countries to have racist undertones, and contain echoes of nineteenth century imperial missions to civilise the natives. As one refugee from Bosnia resentfully told me, "Just because I come from a country at war, doesn't mean that I'm uncivilised."

UNICEF (1993) has privately acknowledged that

> the topic is also a sensitive and controversial issue in many countries and therefore, public information and media relations are critical both in raising awareness and advocacy, and also in avoiding misunderstandings that can damage organizational relationships and affect the public image of UNICEF.

Whilst UNICEF sees its Education for Development as promoting global solidarity, describing it as providing "an unthreatening means of bridging North and South and (East and West), and donor and recipient" (UNICEF 1992, 10), such programs actually end up legitimising the distinction made between donor and recipient countries. For example, UNICEF's Development for Education in Western countries envisages that children may grow up to be "decision makers and potential donors" (ibid., 15). This and other programs encourage volunteers from Western countries to go to Eastern European or African countries, but there is no parallel encouragement or funding of Eastern European or African youth to work as volunteers instilling tolerance and democratic values in Western children.

As these programs illustrate, intervention focuses increasingly on changing culture or individual behaviour and individual relations. However, the problems of the region did not arise at the level of the individual, nor can they be put down to culture, or have solutions aimed at without taking into account the wider political, economic and international context. Moreover, the idea that the problems of the post-Yugoslav states or other states in the Third World are cultural is reinforcing a North-South or East-West divide that cannot promote conflict resolution or assist the plight of refugees in the long-term. ■

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Creating a Space for Peace-making: Burundi and Beyond

Tim Wichert

Abstract

Mennonites and Quakers have historically renounced the use of violence for resolving conflicts. From 1994 to 1997 the Mennonite Central Committee (MCC) ran a program of civilian peacemaking in Burundi at the request of local Quakers. Their goals were modest, hoping that international volunteers could assist in reducing the level of violence and creating space for positive things to happen. Lessons learned were discussed at a seminar hosted by the Quaker United Nations Office in Geneva in May 1997.

Précis

Historiquement, les Mennonites et les Quakers ont abandonné le recours à la violence dans la résolution des conflits. Entre 1994 et 1997 le Comité Central Mennonite a piloté un programme de pacification civile au Burundi à la demande des Quakers locaux. Leurs objectifs étaient modestes et se fondaient sur l'espoir que des volontaires internationaux pourrait contribuer à une réduction du niveau de violence et à la constitution d'un espace permettant la réalisation d'actions positives. Les leçons tirées de cette expérience furent discutées lors d'un Séminaire tenu par le Bureau Quaker des Nations Unies à Genève en mai 1997.

In late 1994 Burundi Quakers invited the Mennonite Central Committee (MCC) to send international volunteers to Burundi. What is the role of international agencies in such a setting of conflict?

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Amongst other things, the MCC facilitated unarmed outside interventions, encouraged dialogue amongst church leaders, planned regional training in conflict resolution, developed nonviolence materials in Kirundi, and organized trauma healing workshops.

The program coordinators were responsible for supervising volunteers who came for six month periods to be a peace presence amongst threatened communities. The volunteers were not chosen for their particular skills or training; their mere presence was considered more important than their activities. They received no special training. Most were in their twenties. Most lived in rural locations with Burundian people (usually Hutu) and with access to a vehicle. There were few administrative and backup structures.

In May 1997, the Quaker Office in Geneva organized a workshop to discuss the MCC program in Burundi with UN agencies and Non-Governmental Organizations. The following issues were highlighted:

Objectives

- To reduce the level of violence (i.e., perhaps by "shaming") through the presence of individuals.
- To encourage dialogue and understanding at the grassroots level, by bringing people together for specific activities.
- To "create space" for something positive to happen.
- To accompany individuals who felt vulnerable so they could carry on with their own activities

There was no attempt to create a buffer zone between communities and to monitor or document human rights violations.

Ambiguities/Dilemmas

- Should those in conflict be brought together, or should they be kept apart?
- It is difficult, if not impossible, to both "stand with" people and document human rights violations;
- What should be done with evidence of human rights violations?
- Should those intervening maintain a low or a high profile?

Positive Impacts of Presence

The presence of individuals:

- facilitated meetings with authorities, e.g. visits to jails, getting through checkpoints;
- established communication with military personnel at local level, building trust;
- promoted inter-ethnic dialogue, e.g. through conflict resolution seminars;
- established an inter-ethnic peace committee in one local community;
- initiated volleyball games between Tutsi soldiers and Hutu civilians; and
- helped to share Burundi experiences with the outside world.

Negative Impacts of Presence

- Some people were seen as benefiting more and resentment arose.
- Some regarded the volunteers with suspicion, especially those without a specific activity/job (there was one nurse); rumours arose that they were mercenaries.
- Their presence attracted criminal elements, assuming they had material goods.
- Their presence and association with Burundians could lead to greater threats or targeting after they left the country.
- They were helping the most vulnerable but were never confronting the belligerents.
- Their presence gave vulnerable people the confidence to take risks they perhaps should not have.
- Their presence perpetuated stereotypes, namely that the lives of out-

siders were more valuable than those of local people.
- Some people resented their presence, thinking that Burundi problems should be solved by Burundians ("Leave Burundi for Burundians").

Limitations

- Insecurity increased, especially against expatriates.
- Expatriates increasingly attracted negative attention.
- The Burundian Quaker Church was unable to provide continued support, and some Burundian Quakers had to flee the country.
- The MCC was perceived as pro-Hutu, because most volunteers worked or lived with Hutus.
- Grassroots work could not be really effective when the problem was at a national, political level.
- Timing—what might be appropriate at one point may not be at another.
- UN missions are limited by their inability to obtain clearance from UN and local authorities to move about the country because of security concerns—this affects the extensiveness of their work.

What Could be Done Differently

- More planning is required regarding goals, strategies, and training.
- Necessary administrative structures must be in place, with requisite financial resources.
- Those participating need emotional support; there is no such thing as a "low maintenance" person.
- Maintain a creative balance between short and long term involvement—6 months might be insufficient but the tension of the situation and burnout are very real problems.
- More balanced presence with both Hutus and Tutsis is required.
- Try to have Burundian Tutsi and Hutu advisors for such a program.

Other Lessons (Open Discussion)

Outsiders need to be aware of the work at different "levels":

- There is a need to work with local people and build on local capacity; a willingness to "suffer with" and to be more closely linked to local structures.
- Many small, local initiatives lack support, e.g. peace-making manuals, training, finances.
- There could be more in-country, inter-agency dialogue on peace-making (not simply on humanitarian issues and relief).
- There could be more support for the International Tribunals, aimed at creating a climate of justice.
- There must be political pressures and dialogue at national, regional and international level.

Outsiders must:

- have experience, maturity and sincerity (local language skills also important, e.g. Kirundi);
- have modest objectives, and be modest about what can be done;
- build trust, while being aware of extensive mistrust.

Further,

- impartiality is important for building trust, but is difficult to achieve in practice; and
- there will always be ambiguities and dilemmas; it is important to remain aware of these.

Who Should Do Peace-making Work

- Leave Burundi for Burundians? No, there is a role for outsiders within certain parameters.
- Civilian peace-making interventions cost much less than military peace-making (e.g., Blue Helmets).
- Should UN agencies have a peace-making mandate; should it be "mainstreamed" within their programming? (e.g., staff training in conflict transformation, programs for conflict transformation and peace education)
- Can UN agencies do peace-making work through "humanitarian observers" or "White Helmets"?
- Should peace-making be done primarily by organizations which specialize in this (e.g., NGOs)? ■

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This directory is designed for service providers who work with refugee families and children in Metro Toronto. Its aim is to improve service provision through networking and the sharing of training opportunities.

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Property Issues in Displacement and Conflict Resolution

Tim Wichert

Abstract

Property plays an important role in the decisions made by refugees and displaced persons regarding durable solutions for them and their families. In particular, it will affect their decision whether to return to their homes. Understanding property rights in this context is imperative, especially for agencies involved in post-conflict rehabilitation. This paper sets out the context by outlining various legal and practical considerations. It then looks at specific initiatives in Mozambique, Bosnia and Nicaragua. For a variety of reasons, there is a move towards "non formal" resolution of property disputes, in particular the use of alternative dispute resolution mechanisms. These are considered, and seven points of comment and conclusion then follow.

Précis

La propriété joue un rôle important dans les décisions prises par les réfugiés et les personnes déplacées lorsqu'il s'agit d'établir des solutions durables pour eux-mêmes et leurs familles. Cette question va particulièrement influer sur leur décision quant à une réintégration de leurs foyers. Une compréhension des droits de propriété est, dans un tel contexte, cruciale, surtout pour des agences impliquées dans la reconstruction après un conflit. Le présent article se propose de décrire ce contexte particulier, en résumant un ensemble de considérations légales et pratiques. Il analyse ensuite différentes initiatives particulières au Mozambique, en Bosnie et au Nicaragua. Pour un ensemble de raisons, on remarque une nette orientation en direction d'une résolution "informelle" des contentieux fonciers, et notamment la mise à profit de mécanismes alternatifs de résolution de conflit. Ces derniers sont décrits, et l'exposé se scelle sur sept points de commentaire conclusif.

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Introduction

Property issues at the best of times can be difficult and controversial. They are fraught with cultural, religious and political connotations and variations, that are difficult to universalize. Because of domestic variations and the principle of national sovereignty, there are few guidelines at the international level for resolving property issues. While the right to own property is enshrined in the *Universal Declaration of Human Rights*, the Cold War era underscored how different political philosophies define this right. Since then, we have begun to better understand the complexity of the property issue in other regions of the world, primarily the impact of traditional and religious rights and imperatives. There are also more voices speaking to issues of non-discrimination and equality, particularly on the basis of gender.

Beyond the complexity of legal theory, there are the more practical matters of resolving property issues in the context of conflict and displacement. Understanding property rights and finding practical ways to help disaster and war victims deal with them is increasingly becoming an important part of the work of agencies involved in post-conflict rehabilitation. The issue of property plays an important role in the decisions made by refugees and displaced persons regarding durable solutions for them and their families. In particular, it will affect their decision whether to return to their homes. In the long term, the establishment of a clear and secure legal framework for property rights is essential for sustainable development, including investment and economic recovery.

Some Legal Considerations

International

The *Universal Declaration of Human Rights* (1948) states that "Everyone has the right to own property alone as well as in association with others ... [and] ... No one shall be arbitrarily deprived of his property" (Art. 17). However, it proved impossible to reach agreement on including this right in either the *International Covenant on Civil and Political Rights*, or the *Covenant on Economic, Social and Cultural Rights* (1966).

A number of other international standards also speak to the property issue. The Women's Convention (i.e., the *Convention on the Elimination of all forms of Discrimination against Women*, or CEDAW) requires States to ensure the same rights for wife and husband in acquiring, owning, enjoying and disposing of property (Art. 16(1)(h)). The *International Labour Organization Convention* speaks to the cultures and spiritual values of indigenous and tribal people with respect to land, in particular the collective or communal aspects. Specifically, it requires recognition of ownership and possession rights over land traditionally occupied (No. 169, art. 13–19).

At a regional level, the right to property (i.e., the peaceful enjoyment of possessions) was included in the *European Convention on Human Rights*, specifically through the First Protocol (1952). However, it specifically preserves the power of the State ("in the public interest") to take certain measures with respect to property. Both the *American Convention on Human Rights*, and the *African Charter on Human and Peoples' Rights* also contain the right to property. These are also subject to re-

striction in the interest of society or the community. Amongst other things, such a restriction allows for nationalization policies.

National

National sovereignty, embodied in provisions that the right to property is subject to legitimate societal interests, ultimately leads to a range of domestic variations. These variations are governed by domestic legislation that can be based on a variety of underlying political philosophies. Domestic property rights can be vested in the individual, in the state, in the community, and in some cases are also governed by religious imperatives (i.e., Sheria law).

In Kenya, for example, land is subject to a variety of laws, many of which originated during the colonial period.[1] While there is an explicit policy direction and trend towards the private registration of land, there are also constitutional safeguards for communal land tenure.[2] This can often lead to legislative confusion, including some specific inconsistencies. Negotiating the legal maze can be further complicated by a lack of resources and a particular political climate (i.e., in which elites aim to protect their own interests).

Universal Principles

How can international principles inform domestic policies within this context? It is important to underscore and promote universal principles, while realizing that there is also a need to promote certain principles at a national level. The following should be considered:

- clear legal protection for access or ownership, as individuals or as communities;
- restoration to rightful owners, or adequate compensation, particularly after dispossession (by the State or by others);
- within both of these contexts, ensure equality of opportunities and access for vulnerable groups, including women, peasant farmers, pastoralists, etc.

The Context of Displacement

Practical Considerations

Displaced people and refugees tend to lose much of their property when forced to flee. Apart from land itself, this can include crops and livestock, homes and shelters, and other personal belongings. Property is often destroyed, confiscated or stolen, particularly so in the context of armed conflict.

Within countries of asylum, these items are provided by the host government or the international community. Access to land is controlled by the host country. The government determines which land is to be used for refugees. The amount of land made available will determine whether there are sufficient opportunities for farming and grazing, and will ultimately affect the degree of self-sufficiency.

Difficulties arise when displaced persons (including refugees) return to their homes and find their property used and occupied by others. Not only is this an obstacle to return in the first instance, but it raises broader issues of reconciliation, and specific issues of restitution. How is the right to property claimed in this context, particularly through restitution or compensation?

The United Nations High Commissioner for Refugees (UNHCR) (1996a) lists access to land as one of the primary constraints to voluntary repatriation. Land is particularly pertinent for returnees from rural and agrarian communities, but has often been taken over by other displaced persons. It is important to know the policies of local and national authorities in this context. For example, the Government might make land available for returnees, either near their original communities or further afield. On the other hand, it might oppose settlement in certain areas for political reasons. In Cambodia, returnees were given a choice between land in a particular location or a cash grant; apparently 95 percent chose cash and then settled with relatives in other areas.

As part of its repatriation programme, the UNHCR develops Quick Impact Projects (QIPS) for providing reintegration assistance within countries of origin. In formulating these, a specific consideration is whether problems of accessibility to peasant farming land will be encountered. Matters to look for include present conditions of land occupancy and ownership policy (UNHCR 1994).

Reintegration is frequently impeded by limited access to land, according to a joint UNHCR and the United Nations Development Program (UNDP) review of the rebuilding process in Central America (UNHCR 1995). The review suggests that UNDP should have a clear understanding about what it can do in this regard, although both agencies obviously have an interest in addressing the problem. Suggested activities include the establishment of a land register system, a system for issuing land titles, and land reform institutes.

These formal systems tend to be underdeveloped in many regions of the world.[3] During armed conflict, and subsequent reconstruction, domestic legal systems tend to be even more dysfunctional. Whether they should be revitalized or reformed is an important consideration for international agencies. Not only is it a long term process, but it touches on issues of national sovereignty and policy. Courts, and other systems for dispute resolution, are necessary to create an environment that encourages return and deals with potential conflict after return. Apart from official assistance at the national level to rebuild the judicial system, efforts can be made at a local level to create informal or traditional mechanisms that build on local knowledge and experience. These could be particularly useful for assisting with disputes related to land, as well as questions of restitution or compensation.

Another consideration for agencies and NGOs is whether to become involved in acquiring or leasing land on behalf of displaced persons. This could provide a short-term solution when restitution or compensation is not im-

mediately forthcoming (i.e., subject to dispute), or when the Government is not facilitating access to land.

Legal Considerations

International legal instruments provide some protection in situations of armed conflict. When they are internal, Protocol II of the *Geneva Conventions* (1949) protects personal property of displaced persons from theft and vandalism, and prohibits the destruction and removal of "indispensable" matters such as food, crops, livestock, and drinking water. When the conflicts are between States, certain provisions in the *Geneva Conventions* and the *Hague Regulations* (1907) apply. For example, they provide protection for dwellings or buildings which are undefended, they prohibit destruction of property (real and personal), and prohibit the confiscation of private property. On the other hand, property can be "requisitioned" for the needs of the occupying force, and exceptions are allowed for "military necessity" (Deng 1995, 276–78).

There is increasing recognition of the right to restitution at the international level. The rules of the War Crimes Tribunal for the former Yugoslavia allow for the award of restitution of property, or its proceeds, to victims (Art. 105). The Inter-American Commission on Human Rights has recommended that compensation be given to returning IDPs for loss of property, including homes, crops, and livestock. The World Bank suggests there should be full compensation for people involuntarily displaced as a result of development projects that give rise to "severe" economic, social and environmental problems (Operational Directive on Involuntary Resettlement).

Most importantly, the domestic laws of States affected by displacement need to be examined on an individual basis to determine the extent of property protection. Specifically, they might address the right to property, and the issue of restitution or compensation.

Case Studies

Mozambique

Land has long been a source of conflict in Mozambique, and its relation to returning refugees was highlighted in a recent report by the Lawyers Committee for Human Rights (1995). Both the liberation struggle with Portugal and the more recent civil war have been struggles over differing concepts of land ownership and control (the former in a colonial context and the latter in a socialist context). In the recent and current context of repatriation, access to land is a crucial issue since the vast majority of refugees and displaced were peasant farmers.

The General Peace Agreement included provisions that guaranteed restitution of property which was owned and still in existence, as well as the right to take legal action to secure the return of property. However, since land in Mozambique is vested in the state, this does not practically apply to land (the state assigns "use" to individuals).

More importantly, the *Memorandum of Understanding between the Government and UNHCR* stated that, "The Government shall ensure that returnees have access to land for settlement and use, in accordance with Mozambique law." How are such provisions ultimately implemented? Disputes are inevitable, particularly where land is most fertile, where infrastructure is most developed and has been repaired, and near borders where there has been a regular flow of people. (On the other hand, the people of Mozambique are all too familiar with displacement, through the liberation and civil wars, as well as drought and famine. Lessons could probably be learned from past experience with settling disputes in the context of displacement.)

The problem in Mozambique, as in most countries which had a colonial history, is that the notion of traditional authorities is complex. The colonial powers imposed one type of system, the independence government another, with opposition groups during a conflict perhaps installing yet another within areas of their control. In other situations, communities might have maintained more traditional systems based on bloodline chiefs. A policy of simply reinstating traditional authorities can prove difficult. It may be necessary to rely on new forms of authority, including those that may have been developed by communities while in the country of asylum, or while displaced within their own country.

Specific problems that have been encountered in Mozambique include the assignment of land titles to foreign interests, including multinational companies and ex-colonists. Land allocated in this manner is sometimes that which had been abandoned by displaced people. In other cases, returning refugees and others have not always known about legal procedures and how to pursue their claims. Some have faced bureaucratic obstruction. In effect, obstacles which may already exist in many countries are merely exacerbated in the context of displacement.

Bosnia

Bosnia and the former Yugoslavia offer a good example of post-conflict challenges related to property. The international community, through the Office of the High Representative pursuant to the Dayton Peace Agreement, has created the Commission for Real Property Claims of Displaced Persons and Refugees. At the national level, there is legislation which exists and is being interpreted by the courts. Also at the national (or community) level, there are other informal processes at work.

The Property Commission

The Property Commission started on 20 March, 1996. It has nine members: three appointed by the European Court of Human Rights, four by the Federation of Bosnia and Herzegovina and two appointed by the Republika Srpska. It is meant to adjudicate claims for return of property or compensation for dispossession. Annex 7 of the Dayton Agreement gives the Commis-

sion power to "promulgate such rules and regulations ... as may be necessary to carry out its functions." In doing so, it is required to consider domestic laws on property rights. Initially, much faith seems to have been placed in the Commission, and its basic aim was meant to be confidence building. Over 20,000 claims have been filed with the Commission since it was created.

However, reports indicate that their decisions have been delayed by a number of factors. They have been chronically underfunded, and suggest that their funds will run out in June this year (they have reported that they need $6 million to function through 1997). One practical effect of this has been the inability to obtain specially treated and prepared paper for issuing written certificates in order to avoid counterfeiting. Further, the Commission has been accused of avoiding politically sensitive issues concerning tenancy rights, evictions, and war time legislation, and has proven unwilling to stand up to existing authorities (Forced Migrations Projects 1997a, 1997b). In short, it has been a disappointment.

The Judicial Process

The judicial process appears to be functioning in many parts of Bosnia, albeit in a limited way. Problems, which have arisen, relate to the nature of existing legislation, the independence of the judiciary, and the lack of enforcement of court orders.

Existing legislation is problematic in a number of ways. Firstly, there is some inconsistency between different legal enactments. Secondly, there were some that were enacted during the conflict, and now create discriminatory obstacles to return (i.e. original rights have been lost, sometimes being superseded by temporary rights). Finally, there is some relevant legislation and documentation that is unknown and difficult to ascertain (Forced Migration Projects 1996a).

Regarding independence of the judiciary, there have been some concerns expressed about the lack of transparency in the selection process for judges by the Sarajevo Cantonal Assembly. In a recent decision, fourteen of 37 Cantonal Court judges were not re-elected, and fifteen of 41 municipal judges were not reappointed. Apparently no explanation or advance notice was given and all apparently had substantial professional experience (Office of the High Representative [OHR] 1997).

Even when favourable court rulings are obtained, they are not being obeyed. Following the expulsions of Muslims and Croats from Banja Luka in 1995 (ostensibly to accommodate the influx of Serb refugees expelled from Krajina) most of the evicted filed claims in local courts. Approximately forty have won their cases. However, local police have ignored court decisions, even when ordered repeatedly to execute them. The OHR (Human Rights Coordination Office) reported that none of the 25 reinstatements scheduled for April went ahead. They blamed the lack of action on the failure of local police to show up at the properties and enforce court orders (Forced Migration Projects 1997c). Evictions continue to take place all over Bosnia, by all three ethnic groups.

The *positive* aspect of this is the fact that some people have been able to access the courts to obtain favourable rulings relating to their property.

Other Processes

There are a number of initiatives which can potentially have a "political" impact. These include the Office of the High Representative (who has created a Sub-Committee on Property), the Ombudsman of the Federation of Bosnia and Herzegovina, the FMP's Legal Policy Task Force, which is made up of lawyers from the region and international experts, etc. These have the potential for taking up matters at a political level, such as applying direct pressure on Bosnian politicians. However, this kind of advocacy is obviously *ad hoc* and time-consuming.

Other efforts might consist of legal education and legal assistance for court actions. Both of these are limited by the fact noted above that people have actually been able to access the courts to obtain rulings. The problem rather has been one of enforcement. Because of this, more efforts could be put into mobilizing civil action for enforcing court orders, or acquiring/buying property for redistribution.

Nicaragua

The case of Nicaragua is obviously different from that of Bosnia, the former being a conflict largely of ideology and the latter largely one of ethnicity. Nonetheless, there are parallels.

The Follow-up Commission

In 1995, five years after the Chamorro government was elected to replace the Sandinistas, property was still a much disputed topic. In July 1995, a two-day conference sponsored by the UNDP and the Carter Center brought together participants from all sides of the issue in what proved to be an atmosphere of respect and constructive problem-solving. The conference brought together over seventy people representing the cabinet, the National Assembly, leaders of the major political parties, members of the Supreme Court, leaders of organizations representing former property owners, present occupants, workers, ex-combatants, and some outside observers (i.e., diplomats, international financial institutions). The key issues related to effective compensation and follow-up. Regarding the former, options agreed to included the proposed sale of at least 40 percent of the Nicaraguan telephone company to raise part of the necessary funds, along with other initiatives such as lotteries and international assistance. Regarding the latter, a Follow-up Commission was created involving government, legislative and civil society representatives (which were to complete their work within 3 months).

The Judicial Process

Part of the discussion process was to agree to the need for 5 new courts, 2 within the capital Managua and 3 outside, to deal with the thousands of cases expected to go to litigation (UNDP has provided funding for these

courts). Other suggestions included the appointment and training of quasi-judicial officers (law clerks, lawyers) to facilitate case processing, thus freeing the judges to actually make decisions.

There has been some disagreement over the need for new legislation. As with Bosnia, much helpful legislation existed, although there was a need to deal with contradictory and discriminatory legislation. It was easier to obtain agreement on legislation relating to small holdings, especially as part of an overall policy of agrarian and urban reform. It has not been as easy to obtain agreement over larger properties and houses, and the amount and form of compensation.

Other Processes

A 1995 Report prepared for the UNDP by the Carter Center recommended a 2-track approach for resolving property disputes and stimulating the long-term growth of peaceful dispute resolution in Nicaraguan society (Carter Center 1995a). First, they recommended an Ombudsman's Office for handling complaints. In particular, they would provide information to claimants (of property rights), assist them through the maze of administrative offices, and refer some cases to mediation services. This purpose would be to reduce the burden on the courts and produce faster resolution of cases.

Secondly, the Report recommended the development of an "independent, non-profit non-governmental organization" dedicated to conflict resolution. Such an NGO would develop a panel of mediators as well as staff to monitor court dockets and encourage people to use mediation. Judges would also be able to refer cases to mediation. The purpose would be 3-fold: reduce the work of the courts and speed up resolution in the short-term; provide training to mediation groups in the medium-term; and provide a basis for alternative dispute resolution mechanisms in the long-term.

In order to ensure both impartiality and training (and avoid politicization) there would need to be collaboration between established and respected institutions. In the short-term, mediation efforts by existing groups could be encouraged and supported with training.

Although there has been some difficulty in following through with these recommendations, the current government is apparently trying to revive and restructure the concept of a mediation centre, with the assistance of the UNDP.

Alternative Dispute Resolution (ADR)

For a variety of reasons, both legal and practical, many people would likely settle for a "non-formal" resolution to disputes relating to property. For example, there seems to be a growing informal market in property and land in many post conflict settings, especially when the formal system does not meet expectation. There is clearly a trend in many Western countries to develop alternative systems for dispute resolution in industrial, labour, family and other legal fields. In determining the appropriateness of ADR models for situations of conflict or post conflict, there are a number of considerations.

- Are there components of society which support ADR? This is important for ensuring that there is a motivation to use it, because it is perceived to be an effective alternative. Amongst other things, the society must be willing to use consensual approaches to dispute resolution and perceive them to be impartial.
- Are there laws which require or allow ADR? These laws will ensure that decisions reached can be supported and enforced if necessary. For example, laws regarding arbitration usually allow courts to enforce decisions that are made. On the other hand, is it appropriate to provide a legislative framework for such a system, or allow informal systems to develop on a voluntary basis.
- Are there existing efforts, and is there existing capacity, to develop ADR? In particular, there must be a knowledge of the process, and a capacity for training. Training models may be brought in from outside, or they may be based on traditional models, or they may need to be a combination of models. There must be broad based conflict management training.

Comments

a) The property issue must be placed within the broader context of sustainable development. Resolving disputes will be necessary to ensure the requisite stability for economic recovery and investment. For many people, land is the "means of production," and the rebuilding and continued development of a society is dependant on people accessing and using it.
b) There is an urgency to resolving property disputes, in that they remain an ongoing source of potential conflict. At the same time, creating the necessary consensus and institutions takes time.
c) Although there are clear gaps within the legal systems of many countries, and laws are often vague, unclear, contradictory or discriminatory, the main property problem is one of enforcement. This is especially important, for example, when international peace agreements turn over dispute settlement to the "application of domestic legislation." Such legislation is only as effective as the ability to enforce it.
d) Legal education must take place concurrently with the rebuilding of judicial institutions. Making people aware of their legal rights implies that there must be effective legal institutions to which they can turn to for assistance.
e) Alternative dispute resolution mechanisms must be created—either new ones, or based on traditional mediation. People will often create informal property markets when the formal structures do not appear to work.

f) Compensation must be a primary consideration, given that many people will not be able to get their land back (it is impossible to restore things to their previous state). The nature and amount of compensation must be dealt with.

g) Agencies must give more consideration to what processes they can be involved in. ■

Notes

1. Apart from the Constitution itself there are the following statutes: Registered Land Act, Land Titles Act, Government Lands Act, Registration of Titles Act, Registration of Documents Act, Land Control Act, Land Consolidation Act, Land Adjudication Act, Land (Group Representatives) Act.
2. See generally, Lenaola, Jenner and Wichert, "Land tenure in pastoral lands," in *In Land We Trust: Environment, Private Property and Constitutional Change*, edited by Juma and Ojwang (Initiatives Publishers, Nairobi and Zed Books, London, 1996).
3. Including a lack of effective administrative machinery for implementing existing legal statutes.

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The Role of Land Conflict and Land Conflict Resolution in a Peace Process: Mozambique's Return to Agriculture

Jon D. Unruh

Abstract

The massive return and reintegration of refugees and displaced persons in Mozambique (the largest in the history of Africa) has pushed land tenure issues to the fore in the country's peace process. While land re-access for the six million dislocatees is critical for food, security and political stability, conflict over land resources has become a primary concern of the government and both the regional and international community participating in Mozambique's recovery. Based on data recently collected over a year-and-a-half in Mozambique, this paper will look at the problematic issues of land access, land conflict, and land conflict resolution emerging from the recent 16 year war, and highlight the role of organizations from the national to the international, in land conflict resolution.

Précis

Le retour massif et la réintégration des réfugiés et des personnes déplacées au Mozambique (la plus vaste entreprise de réintégration de toute l'histoire de l'Afrique) a mis la question de la propriété terrienne au centre du processus de paix dans ce pays. Alors que l'accès renouvelé à la terre apparaît crucial pour les six millions de personnes relocalisées pour des raisons alimentaires, de sécurité, et de stabilité politique, les conflits en matière de ressources terriennes sont devenus la principale inquiétude du gouvernement et des communautés régionales et internationales impliquées dans la reconstruction du Mozambique. S'appuyant sur des données colligées sur le terrain lors d'un séjour d'un an et demi au Mozambique, le présent article étudie la question problématique de l'accès à la terre, des contentieux fonciers, et de leur résolution, suite à la récente guerre de 16 ans. Sera mis en relief le rôle des organisations nationales et internationales dans la résolution des contentieux fonciers.

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Peace Making and Conflict Management

New Directions Sought

The 1992 U.S. and then UN intervention in Somalia and the failure of the overall effort to effectively initiate a peace process has become a turning point that has led policy makers and analysts to rethink approaches to peace making and conflict management in general (Oakley 1995; Crocker 1995).

As the forces that contribute to armed conflict within countries merge with geopolitical and geoeconomic realities, and become interpreted in a larger context than the nation or the region, conventional top-down approaches for peace making—tools developed for conflict resolution between countries—are proving ineffective. These tools are inept at addressing the underlying forces that provide a foundation for conflict or a return to conflict (Homer-Dixon 1990; Chopra 1996). At a recent meeting of the UN's Special Political and Decolonization Committee, it was determined that UN Peace Keeping missions needed to address underlying social and economic causes of tension and war as part of peace keeping (Willett 1995). Without such an approach, "peace keeping operations cannot hope to establish the conditions necessary for establishing peace and stability and thus are prone to failure" (Willett 1995).

There is increasing recognition that in developing country agrarian situations, customary and local ways of interaction in areas such as access to and use of resources need to be identified within the sociocultural and agroecological contexts of countries prone to and recovering from war, and be incorporated into conventional approaches to peace making (Cohen 1995; Sisk 1995; Unruh 1995). There are indications that if such customary features are identified, recognized, and supported as assets in the larger setting of conflict resolution and peace making on a national and sub-national level, they can become powerful tools in a peace process (Chopra 1996; *Horn of Africa Bulletin* 1996; Lund 1996).

Following armed conflict, the large-scale return of dislocatees and their attempt at reintegration into agricultural pursuits is a problematic aspect of recovery, with great potential for renewed instability via intense competition for what in many cases are limited agronomic resources which can quickly be brought into food production (Unruh 1995). This article considers the role of land tenure dispute resolution within the wider context of a peace process, and then looks at Mozambique's own return to agriculture after 16 years of civil war.

Return and the Role of Critical Resources

As time begins to convince refugees, internally dislocated populations, and those interested in larger commercial ventures that a peace effort will hold—as repeated attempts at cease-fires, peace treaties, and elections frequently do not—these communities then attempt to return to "home areas," proceed elsewhere, or those who are already settled or able to mobilize capital begin to invest in long-term economic strategies. Initial efforts to engage in recovery (from household to national) for largely agrarian societies will drive land and resource tenure

problems to the fore over large areas in a short time-frame for significant numbers of people.

The post-conflict rehabilitation of many households, land uses and production systems, as well as regional and national food security and economy, will rely on access to the areas where physical security, cultivable land, perennial water, relief assistance, and infrastructure are present together. These critical resource areas will be especially important where they exist within or in proximity to less usable, accessible, secure, or arable zones (Unruh 1995; Scoones 1991; Ibrahim 1993). Intense resource competition in these areas in the early years of recovery will occur in an environment rife with complicated resource tenure disputes, and lacking in functioning tenure dispute resolution mechanisms viewed as legitimate and workable by the parties concerned. This will occur in a context of recent and/or ongoing armed conflict—itself highlighting the issue of legitimacy in government—such that these areas, while crucial to beginning a sustained recovery and a nascent peace process, can also become locations that spark renewed instability (Unruh 1995).

As well, critical resource areas can be key components in the negotiation of a peace settlement, these being among the first, if not the first areas where initial cease-fires are negotiated to occur, and thus are crucial to a peace settlement (Vines 1996).

Land Resource Competition

Post-conflict perception of rights to land can originate in different situations at different points in time. Exercising such rights will not happen all at once, but over time, as claimants return or migrate to destination areas from different wartime conditions and locations, as well as attempt to take advantage of the confusion, weakened government capacity, and land emptied by dislocation to establish new access rights.

Some of these claims also represent the opportunity for larger-scale commercial agriculture and other land resource interests to begin to be explored and realized, and these can contribute much to economic recovery. However land resources for this group can be accessed in a very different manner than that utilized by returning dislocatees and already returned smallholders attempting to make short to long-term agricultural decisions. While smallholders gain or regain access to land via local customary tenure structures, commercial and large land interests gain access to land through some remaining portion of the national land tenure system that if at all operable after war, most likely continues in a much crippled form. In one way or another this latter approach to land access usually involves a document of some sort, while land allocated according to customary rules usually does not carry with it such evidence. What emerges then is a situation whereby what is left of the state land tenure system that is used to acquire, control, dispose of, and defend rights to land resources in a post-war period, is profoundly out of step with the realities of reemerging customary social, tenurial, and agroecological constructs. While variants of such a disconnect operate widely in the developing world, and especially in Africa, it is most pronounced, and carries the greatest risk, in critical resource areas of countries recovering from armed conflict, due to the possibility of undoing a tentative peace process. This is made still more problematic by the temporary (lasting years) division of national territory into areas under control of an opponent group(s) involved in the conflict, as part of an ongoing peace process.

Land Conflicts in an "Out of Step" Tenure Context

Disputes over land resources between participants in a national versus customary tenure system, and the inability of the two to connect in terms of how such disputes are resolved in ways that are viewed as secure and legitimate (and therefore respected) by participants in both systems, can be a very problematic aspect of a peace process. The issue of legitimacy is crucial. Civil conflict is based on the perception of non-legitimacy in various forms. For land dispute resolution to work in a context of recent conflict, the question of legitimacy becomes paramount, and must be attended to directly. The importance of such legitimacy in resolving land conflicts (including armed conflict explicitly over land) is noted in studies on Chiapas (Howard and Homer-Dixon 1995), the Gaza Strip (Kelly and Homer-Dixon 1995) and South Africa (Percival and Homer-Dixon 1995) and generally in civil conflicts (Homer-Dixon 1991).

Disputes over resource access are especially problematic during recovery from a war which dislocates large populations because refugees while in exile often develop political awareness, such that upon their return to home areas, perceived land tenure injustices can be placed in the context of the larger political dynamic (Ek and Karadawi 1991; Basok 1994). Resolution of land conflicts will be particularly important when different production systems (such as small and commercial agriculture) and groups from opposing sides in the war focus agricultural activities onto the same areas. Certain individuals and groups have the means to prevent peace from returning, and will exercise this option if tenure disputes are not resolved in ways that are, at the very least, commonly viewed as having a legitimate, inclusive, transparent, and fair procedure (*Africa Watch* 1993; Unruh 1995).

Land Dispute Resolution

The role that land dispute resolution mechanisms play in post-war reconciliation and economic rehabilitation should not be underestimated. That such resolution happens quickly is important to the secure reengagement of populations in familiar land uses, agricultural production and food security, and agricultural contributions to economic recovery and associated trade opportunities. That it happens in ways that are seen as transparent and equitable by most claimants is important because disenfranchisement of

local populations from land rights is a major factor contributing to instability and resource degradation (Hutchinson 1991).

An important first step in forming legitimate, workable land dispute resolution mechanisms in a post-war context, is state recognition and legitimization of customary tenure regimes. Such state recognition is important for two reasons. First, following war, aspects of customary arrangements—albeit in many cases transformed—will be reestablished and operational before, and perhaps long before, a state recovering from conflict is in a position to formulate, implement, and enforce a national land tenure system backed by a workable land law. Such that when the latter does occur, both derivation and implementation of significant parts of a national tenure system will be more straightforward, and more successful if it incorporates aspects of what is already in place. This holds the possibility at least of creating fewer tenure disputes in the future by building on known tenure arrangements, as opposed to attempting to introduce new tenure rules that can be poorly understood at the local level. The second reason is that many small-scale resource users will have very little confidence in a new and unfamiliar land tenure system established by a state that will almost certainly be viewed as fragile, if not suspect, until such a government proves itself as a legitimate avenue to land tenure security. Failure to recognize and act on such important aspects of a post-war land tenure dynamic will manifest itself in an aggravation of the disconnect between customary and national tenure systems, with disputes between the two systems operating within the context of the still contentious issue of legitimacy and armed conflict. Such a situation then resides much more proximate to physical confrontation than it would otherwise.

An important part of state recognition of customary land tenure systems, is legal (state) recognition of customary evidence pertaining to land claims and land disputes with large land interests, even though such customary evidence will rarely include documentation. Legal legitimacy given to customary forms of evidence then encourages large land interests operating within the formal tenure system to "cut a deal" with smallholder communities (e.g., leasing land, roads, schools, wells, etc.), in order to avoid problematic disputes over land that could jeopardize investments and create tenure insecurity for commercial leaseholders.

Characteristics of a Dispute Resolution Procedure

For a tenure construct involving the customary and formal systems to function in land dispute resolution and peace keeping in situations of recovery from armed conflict, five characteristics take on primary importance:

1) the construct needs to be able to be established quickly;
2) it should embrace and engage the evolving tenure situation and mitigate emerging problems, as opposed to aggravating these or imposing unfamiliar constructs;
3) it should be able to mesh easily with subsequent realities involving development efforts, and priorities and aspirations involving resource access, investment at different levels, export production, and the passage of national legislation;
4) it should be low cost, with this based on a realistic assessment of existing formal and customary institutions; and
5) it should be seen as legitimate.

Mozambique

Background

Mozambique has produced more refugees than any other country in Africa (USCR 1994). The most recent conflict (lasting 16 years) together with a six year drought, separated approximately six million people from food producing activities that covered very large areas of productive land. The massive return and reintegration of refugees and displaced persons in Mozambique (the largest in the history of Africa) is a phenomenon that could not be orchestrated (USCR 1993). The UN's International Organization for Migration expects to continue its resettlement activities until the year 2000 (Lauriciano 1995).

As the number of dislocated equalled approximately 50 percent of the national population, the settlement of rural refugees back into agricultural production systems similar to what they once participated in will be critical to future food security, political stability, and to the reformation of the social and land-use foundations upon which relevant development agendas can be built. However Renamo (the insurgency) maintains control over large areas under the peace accord, and these are only beginning to open to outsiders after years of total isolation.

Land Re-Access and the Peace Process in Mozambique

In a recent study by the UN's Wartorn Societies Project for Mozambique, the land question was highlighted as one of the most significant points of potential instability, and a possible flashpoint for a return to armed conflict (UNRISD 1996). Alden and Simpson (1993) highlight that the land access issue in Mozambique in particular is likely to become a major source of contention with potentially explosive consequences. Galli (1992) states that the land question will be the most important political question in post-war Mozambique, and that if agriculture and peace is to survive, secure land use rights for cultivators must be given priority and a clear land policy and land law that is the guarantor of cultivator rights is needed above all else. It is therefore extremely important that the country possess recognized, legitimate judicial mechanisms regarding land conflict.

Problematic land tenure arrangements have meant that small-scale agriculture in many areas has not had the capacity itself to guarantee the subsistence of the rural family. The problem is further exacerbated by land shortages and land mines. Many demobilized and dislocated have returned to find

their lands occupied by others, resulting in large numbers of land disputes. This issue is most frequent and problematic in the most fertile (critical resource) areas, where elites from Maputo, wealthy South Africans and Zimbabweans, and a host other larger land interests have claimed land.

Tanner and Monnerat (1995), and Willett (1995), reviewing a number of recent studies on Mozambique, found that there is a direct correlation between the number of land conflicts, and locations where fertile soil, perennial water, infrastructure, and market access, are present together; these being areas of high population density as a result of the war (also World Bank 1994; Hanlon 1995). Especially problematic in these critical resource locations are disputes between smallholders operating within reestablishing customary tenure systems, and larger land interests utilizing the national tenure system to gain access to land. Several researchers state that conflicts between participants in customary and the national tenure system in Mozambique are very serious and will likely intensify (McGregor 1995; MOA/MSU 1994b; Bawa 1996; UNHCR 1996).

Reintegration and Land Access

For Local Communities

While many agriculturalists have been able to relocate or return to areas of origin to resume farming and livestock raising, significant numbers continue to move from place to place, depending on land availability. Large areas of agricultural land remain uninhabitable or problematic due to land mines and control by Renamo. Further complicating land access, are large-scale recovery efforts by the international development community to rehabilitate whole agricultural sectors, such as cashew and livestock production. These efforts involve, in these cases, free or greatly subsidized saplings and animals which then need to be connected to the landscape in some way—and are frequently used to claim land.

As recovery progresses and returnees attempt to restart agricultural production, in any one area there may be several persons or entities claiming land access, especially in the better, or critical resource areas. These include:

1) descendants of the original population which was expelled during the colonial era;
2) people who received parcels from the local administration after independence and during the war;
3) dislocated persons who abandoned their lands and are now returning;
4) people occupying land they found to be abandoned during the war;
5) former land owners from the colonial period;
6) concessions given by state agencies;
7) state collectives dating from the early independence Frelimo (government) era;
8) speculators and others who use the present fluid land tenure situation to acquire resources; and
9) ex-combatants and current officials of both Frelimo and Renamo as part of the peace agreement (officially or unofficially).

For Large Land Interests

Reintegration of dislocated populations is especially problematic in critical resource areas where aggressive land acquisition of various kinds are underway by large land interests using the state system. In the most agronomically endowed areas, overlapping and conflicting claims and concessions to land are being granted (legally and extra-legally) at different ministries, agencies, and levels of government with no coordination, and usually on land already occupied by smallholder communities (Carrilho 1994). The national tenure system presently operates in an extremely debilitated form, with a very poorly functioning, and poorly coordinated land titling procedure, a lack of a central institution for adjudicating overlapping claims (even within the national tenure system), and virtually no capacity for enforcement; with, again, the added jurisdictional problem of areas still under Renamo control. And international development activities are concentrated in the most agronomically productive and accessible areas, as these are the locations where results can be quickly and most easily realized (Levy 1996; USAID 1995).

Likewise donor supported recovery of trading, transportation, and marketing of agricultural production, further encourages acquisition of the agronomically valuable and most easily accessible land. And an assumption that pending constitutional reform will have Mozambique switch from a policy of state, to private ownership of land, has led many large land interests to acquire land in the best areas for speculative purposes. At least nine million hectares of land, by conservative estimate, have been awarded by the government in concessions involving farming, hunting, tourism, and mining activities (Moll 1996). Practically all these concessions include settlements of smallholders, who presently are not part of government land allocation decisions and who do not enjoy rights of consultation or veto over allocations (Myers 1994; Moll 1996). These nine million hectares occupy the highest quality land of the 35 million hectares of arable land in the country, including all the major river basins and land near infrastructure and towns (Moll 1996). This has generated large-scale conflict between smallholders and concession holders, with violent confrontation becoming more common (Moll 1996; UNHCR 1996).

Confusion in Land Rights

Legally all land continues to belong to the state in Mozambique. But with limited capacity to enforce this, there is considerable ambiguity over who actually is the "owner" of landholdings. As a result, there is a great deal of confusion over exactly what rights individuals, communities and the state have. At the same time state ownership has given license to land grabs and land speculation by civil servants and their informal clients—a situation that encourages land disputes, and discredits government legitimacy (Myers 1994). The inability of the Mozambican

state to insert itself in even a small proportion of land rights transactions involving smallholders has created a situation where most land transactions and activity involving land occur outside the domain of the state in a black market arrangement, where rules of national tenure do not apply. This invites corruption and conflict, further decreasing legitimacy.

The Need for Tenure Dispute Resolution Mechanisms

Even if the present national tenure framework operated perfectly and the necessary enforcement capacity existed, this would not be able to resolve the complicated land conflicts that are emerging in post-war Mozambique. The central issue is less the lack of a surveying service and an official agency of coordination and arbitrage, than the legitimacy itself of the existing services with the competence to solve land conflict problems given the realities of post-war Mozambique (Tanner and Monnerat 1995). While recent national political change in Mozambique recognizes the legitimacy of local, customary authority structures (MOA 1995a), the existing land law does not recognize customary tenure systems and therefore denies community access rights to land not currently under cultivation. More importantly, the land law does not recognize as legitimate, customary decisions that resolve conflicts between smallholders. Thus, land incorporated in fallow systems, minor forest product extraction, grazing, land otherwise held in "common," or areas belonging to the community but as yet not allocated for cultivation according to customary tenure, emerge as being empty, and are vulnerable to occupation by larger land interests able to get title.

Present land dispute resolution mechanisms employed by the Mozambican state favour those in possession of some form of documentation—which nearly all returning and reintegrating smallholders do not have. A tribunal or judge must make a decision based only on the evidence presented. While documents pertaining to land are admissible forms of evidence in such a proceeding, oral testimony and corroboration are not. Thus, based on admissible forms of evidence, a judge or tribunal presently must make a decision in favour of documentation. Such an inequitable, and from the perspective of small holders, illegitimate arrangement of land tenure dispute resolution, operating in aggregate, carries serious risks toward impoverization, land degradation, rural exodus, and instability. Meanwhile, the General Peace Accord between Renamo and Frelimo states that, "Mozambican refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it" (African-European Institute 1993). The recently revised land policy for Mozambique, which lays the groundwork for subsequent revision of the land law, makes this explicit for small-scale agriculturalists (MOA 1995). However, in addition to there being layers of superimposed claims made at different dates, the dislocation problem together with the recent war and the lack of state authority, creates a situation where the backing to such claims will be extremely variable. Strategies to deal with this complexity must be derived carefully.

Land Policy Reform in Mozambique

There is general agreement within the government and donor community in Mozambique that a new land law is an exceedingly important goal, and that there presently exists a window of opportunity to make substantial progress toward significant policy reform. The Minister of Agriculture has made land issues and a new land law a priority.

With support from the donor community, the government of Mozambique is presently seeking to revise the current land law to more effectively address problems, and reflect the tenure situation emerging in the post-war period. Land conflict resolution is one of the primary objectives of this land policy reform. The Inter-Ministerial Land Commission plans to have a revised land law ready to submit to Mozambican Parliament in 1997 as part of a National Land Program. Preliminary versions of the land law contain some very positive elements regarding customary tenure systems, especially when compared to legislation in other SADC countries (Negrao 1996). Within this context, land tenure conflict resolution that is viewed as legitimate by all interests becomes important to the real success of a new land law and land policy reform. A number of donors are waiting to see what kind of land law is passed by Mozambican parliament before deciding what kind (if any) agricultural and recovery projects and programs to fund. ■

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Conflicts for Land and Territory: An Analysis of Internal Migration in the Rural Areas of Colombia

Flor Edilma Osorio Pérez

Abstract

This article compiles some elements of analysis on the problems of displacement of the rural population in Colombia. To that end, we gathered quantitative and testimonial data and articulated perspectives at national[1] and local[2] levels. Four aspects are discussed: conflicts for land and territory, some characteristics of the displaced population, the uncertainty of the alternatives and the government presence and role.

Précis

Cet article procède à la compilation d'un certain nombre d'éléments d'analyse concernant le problème du déplacement des populations rurales en Colombie. Dans ce but spécifique, nous avons réuni des données quantitatives et des témoignages en articulant les perspective aux niveaux national et local. Quatre aspects sont discutés: les conflits terriens et territoriaux, un certain nombre de caractéristiques des populations déplacées, le caractère incertain des alternatives, le rôle et la présence du gouvernement.

Dynamics of the Conflict for Land and Territory

Forced displacement in Colombia is a historical phenomenon, together with armed conflicts, which are half resolved and renewed years later with the increased force of retaliation. Many of these conflicts, situated within the dynamics of the "dirty war," appear to be linked to the fight for political power.

In the first half of this century the fight was between the two political parties, Liberal and Conservative; later on, from the beginning of the 1960s, with the intervention of the guerrillas of various affiliations; and from the beginning of the 1980s, with the rise of drug trafficking, new armed players, such as hired assassins, paramilitary and self-defense groups, enter the scene. Alliances are built according to interest, and even when they have national links, they develop regional strategies. All of these have carried on with impunity from the authorities who are unable to provide equitable solutions to the conflicts.

In addition to political power, the armed conflicts have implicated economic interests of regional and local players. One of the immediate consequences of war is the evacuation of space by a frightened rural population who sell their land at ridiculous prices or abandon it in the face of imminent threat of death. In this way, the internal war has articulated two conflicts not yet resolved: territory and land. The territorial conflict has to do with the control and ownership of strategic spaces. Political and economic interests converge in this conflict, which requires the subordination of the resident population by terror. The conflict for land is more limited because it focuses only on productive physical space. The land still constitutes a prestige factor, power and an investment, which maintains and strengthens the structure of wealth in the country.

Although these two conflicts could happen independently, they have easily superimposed themselves on one another. In May, 1996, about 700 families left the rural zone of Batata in the direction of Tierralta.[3] A displaced women from the rural zone of Tierralta municipality gave the following explanation:

> The guerrillas gave the order. The paramilitary were sacrificing many people. People were letting themselves be killed. People were disappearing. The guerrillas were also killing. This was a change. They were burning buses. It turned into a confrontation. And then, from one moment to the next came the order that everyone must vacate the land, within a given period of time. The *guerilleros* did not want to leave the land, nor did the paramilitary. In situations like this, the one in the middle is the peasant. The land thus vacated became a battleground for the paramilitary and the guerillas.

However, in addition to the land, there are major infrastructures, such as highways, the port and a potential interoceanic channel tht are part of the hidden interests that explain the violence in the Uraba Region.

The interest of the displaced in land is manifested in several ways. In the case of Tierralta, as one peasant explained, "They said to us that they are going to buy INCORA, the peasants need to give a power of attorney." When intermediaries made these offers, they paid 600,000 to 700,000 (Colombian) pesos per hectare, not the best price, but still possible.

After checking on these procedures, and informing the farmers that this might be a trick, the strategy changed. Armed men came to let them know that they were buying at 40,000 to 50,000 pesos per hectare. "But, if you do not sell, we will buy easily from the widow," was a common threat, according to a testimony of a local peasant.

The registry of 395 families consulted originates from 13 blocks in the municipality, and accounts for about 12,000 hectares of fertile land, owned in many instances without formal

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ownership titles. Only 20 percent of families have returned and there are several blocks that are still empty.

The Urban Displaced: Some Characteristics

Every month in 1995, in Colombia about one thousand homes with rural ties were forced to leave their homes and their work. This means that every three out of four families with rural[4] ties were displaced. The same study registered that eight of every ten HVR displaced had access to land, but only six of the ten were owners of land. Their parcels of land belong to micro and small parcels[5] that were for the most part abandoned. In a country in which 75 percent of the population is rural, two out of three displaced people had a rural tie, which exemplifies the impact of this phenomenon on the rural population.

For the Tierralta sample, all of the displaced depended for their livelihood on agriculture and cattle-raising, which means that many were motivated to return to renew their agricultural activities with some seed and belongings. Gradually, close to 500 families returned to Batata, some only partially, because they stayed in the village rather than their farms because of fear. In Batata, where there is a National Military base, the returnees formed a Cooperative, CONVIVIR,[6] around which some paramilitary groups have been formed. These groups have been intimidating the population, assassinating peasants with list in hand, stealing, threatening and raping women. A displaced peasant of Tierralta described the situation succinctly:

> These youngsters came with the displaced population. Here they did everything they could, but they couldn't work. Then, they went up to see if they could get work in the harvest. There what did they have to harvest? There, what they were able to achieve was entrance to the cooperative CONVIVIR to pick on people at night, and to kill them.

This situation makes the possibility of returning remote. Thus, approximately 200 families stayed in Tierralta and this number continues to increase because those who had returned are displaced again and again as well by people from other municipalities in Uraba. According to a displaced peasant,

> this is an emergency, because people are suffering. They are adapting to this way of life, but they are not settled and truly when you do not have a place to stay, you are destroyed. The people who work in the country, those who plant the seeds so we all can eat should be welcome, looked on with respect, appreciated in the village or the town. Today, on the contrary they are the most deprived.

Displacement produces serious problems in the home life of each family member, independently of age and gender. According to a national study, six of every ten children of HVR displaced are below 15 years of age and eight of every ten children are of school age, but they can not attend primary school. As well, one quarter of the HVR displaced have a woman as head of the family. For these women the only economic alternative is the informal economy in the cities.

One of the characteristics of rural violence is the selectivity of the armed players against the leadership of the local society. They are the leaders of the peasant organizations. This intimidates and displaces the families. One of every ten HVR heads interviewed at the national level acknowledge belonging to a social organization before their departure. The selective strategy dissuades the organizing process in rural civil society which, after displacement, has very little resources to organize itself to denounce the situation as a flagrant violation of human rights, as they face certain poverty. The traumatic experiences further diminish their political participation.

The search for resources to survive in the city confronts the HVR displaced immediately since they are not trained to work in jobs beyond agriculture and cattle raising. For every ten heads of HVR households, two have not had any formal education and six have finished only primary school or attended partial primary school. One of the ten has finished high school or attended high school without graduating and only one has technical or higher education.

"In the country a person does not need to know how to read and write, but in the city you do," said a displaced peasant in Tierralta.

In the National Survey, of ten HVR displaced, four heads of families had not received any earnings in the past month, three had received the equivalent of half the minimum[7] salary, two had received up to half or full minimum salary, and only one received more than a minimum salary.

The above conditions mark the daily life of approximately one million persons, who have left their land in the past eleven years. However, this does not really represent the magnitude of the problem. The geographical extent of the problem involves departures from more than 600 municipalities and relocation to 100 municipalities, in addition to the large cities. What has happened in the first quarter of 1997 shows a significant increase in this phenomenon, particularly the mass exodus of entire populations from one part of the country to others or outside the country.[8]

The National Study registers as the cause of displacement, first, paramilitary groups (26%), second, guerrillas (21%). However usually people indicated several armed players, without indicating clearly who they were. Usually the strategy of the armed groups is to identify themselves as belong to a different group so as to confuse the people. A consensus among the displaced is that fear is a major factor in abandoning their land.

The Uncertainty of the Alternatives

While 36 percent of displaced peasants in the country, wanted to return to their land between 1985 and 1994, in 1995, only 18 percent of HVR heads of household wanted to do so. In fact, 60 percent preferred to stay in the new place of residence. Relocation to another place was the preferred option

for 18 percent of those registered in the National Survey.

Displacement seriously weakens the rural tie, because only one of every three homes which had access to land before will consider returning to it now, or considered that the land could provide any source of income for the family. The National Survey calculated that between 70 and 80 percent of the displaced population from the countryside has totally and definitively lost its rural ties. Other economic alternatives such as micro-industry and wage labour were a possibility among 30 to 33 percent of the displaced population. Any decision, however, will depend on real opportunities that can be offered to them to solve some of the most urgent needs, such as jobs that will allow them to recover its own self-esteem.

The alternatives are few and slow to come. In Tierralta, for example, the Municipal administration were concerned that if they provided solutions in the city many more displaced people would come. As one displaced women acknowledged:

> The situation is very difficult, it is critical. There are a large number of people here, with so many problems, unemployment, housing, children without school, or if the children are admitted, they are expelled shortly after because they do not have uniforms, they are not well dressed or they do not have the school supplies.

The roots of the problem are the abuse perpetrated by the armed groups, legal and illegal, the impunity with which they do so, and the lack of protection of the civil population. "The solution is not easy, because the strength of money is one thing, Money here is power. I think for those who have money, money is God. I think the best way to succeed and to have peace is to dialogue," said a displaced peasant woman in Tierralta.

The Government Presence

The institutional presence of the government has been slow, ineffectual, insufficient and ambiguous. In spite of a historical presence and a recent increase in the dimensions of the problem in Colombian society, the government did not even recognize the displacement situation until 1995. This was possible for several reasons: on one hand, a permanent pressure by NGOs, who were the first to register and attend to the problem; second, the Organization of Displaced Persons,[9] which emerged to claim their rights and to denounce the continued and outrageous violations.

Recognition was also possible because of a number of studies which published information on the situation. Particularly important was the study done by the Colombian Episcopate,[10] which reported on many national and international incidents, because it came out of an institution with enough credibility. Finally, the weight of reality and the resonance given in the media made this country's drama visible.

In 1995, the government of Ernesto Samper promulgated the document CONPES No. 2804,[11] in which the government proposed some criteria and defined institutional responsibilities to deal with the situation. The Office of Displaced Persons was opened as part of the Human Rights Unit, which is a division of the Ministry of the Interior. The Ministry of the Interior was called before the Ministry of Government.

In 1997, in the face of international pressure, particularly from Europe, the First Lady was given the mandate to work on this problem. In April, the Presidential Council for Displaced was formed. All this institutional movement in a short period of time has been mediated by a propagandistic approach. In practice, this Office is still not fully competent when it comes to evaluating effectiveness, resources are insufficient, and interventions are often opportunistic and inappropriate. Furthermore, its power to sanction is very limited. The work of the Office takes place in an institutional culture that it is inefficient and corrupt. Often, there isn't any knowledge or commitment to resolving such a delicate problem, where the displaced are easily confused with voluntary migrants.

This year there was another CONPES, No. 2994, and in July, Law No. 387 was approved which

> adopts measures for the prevention of forced displacement, socioeconomic strategies, protection, consolidation and stabilization of people internally displaced by violence in the Republic of Colombia.

This is a measure which offers opportunities to the displaced population to demand its rights, but there are no regulations to facilitate its implementation. The law requires the presence of the military and police in all local, regional and national situations to take decisions and pay attention to problems. However, due to the irregularities perpetrated by troops and police and their alliance with the paratroops, this decision is a serious obstacle to the Displaced Services Committees being able to offer enough security guarantees to the population. In the meanwhile, the displacement increases by leaps and bounds.

Conclusion

Other conflicts and crises in Colombia often hide the impact of displacement, even though manifested in the national order. The impact is greatest at local and regional areas, which is not always well reflected in the national percentages. We make some final remarks from both perspectives.

Displacement is emerging as a major economic crisis in the agricultural and cattle-raising sector since it diminishes food security in the country. This is more noticeable in the household and at the local level, with an increase in prices and the scarcity of basic foods. As well, it is generating great food and economic dependency for the displaced, which has a high cost at the economic, cultural and political levels. These costs have not been calculated.

Displacement also leads to a geographical reordering that has reached critical proportions at the local level. The displacement leads to a new rural order, with different players that control the territory by violent means, in a process which concentrates land in a

few hands. The personal history of many Colombians is marked by fear, pain, uprootedness and injustice, which repeats cyclically in the family history.

Simultaneously with the rural displacement, urban slums are established, where at the same time that new solidarity networks are built, other relationships are marked by rejection and competition for scarce resources. It seems that there is no place for families, because the violence continues to grow. Furthermore, intolerance and selfishness among the less poor against new arrivals, contaminates with the violence and poverty and result in intolerable situations. People said: if they are persecuted it is "because they have done something wrong."

In the big cities, even though it is easy to hide the arrival of the newcomers running away from violence, the effects of displacement are cumulative and, exacerbated by unemployment delinquency and misery, become more and more difficult to manage. In a process of decentralized adjustments with serious ambiguities and neocentral tendencies, and in an environment of violence and private justice, there isn't a forum to a debate on civil participation because "to survive, you have to be silenced." The local development of small and medium size municipalities is already fragile in their socioeconomic and political dynamics, and they are further threatened and without protection. How, then to develop local and rural development in a constant stage of war?

The government response is schizophrenic. On one hand, it wants to be seen as a defender of human rights, given international pressure, and, on the other hand, it makes and reinforces statements that increase violation of those rights. The potential and the will to generate a process of capacity-building and a dialogue with armed players, is treated as a joke, in a government with its own governability, legitimacy and credibility crisis.

On the other hand, services for displaced show the waste and the high cost of war. No budget of governmental or non-governmental organization has the capacity to respond effectively to the immediate demand for services, let alone to take specific actions for a comprehensive social recovery of this population. The country cannot consolidate socioeconomic structures for the displaced, and the demand for services continues to increase. As the situation continues and increases, the situation of the displaced continues and is aggravated, so that there seems to be no end to the problems.

As the situation evolves, there is a need to develop intervention strategies that analyze how the local realities of the displaced form the regional and national dynamics of territorial conquest. To back the right of the population and to create dialogue spaces for negotiation there is a need to regenerate a framework for strong support and political willingness from national and international sectors and civil society as a whole. The displaced population continues to reinvent survival strategies and trust that the life will offer a better future, displaying an amazing resistance capacity. ■

Notes

1. Data are taken from a study done with Fabio Lozano, of the Presidential Council in Human Rights, as well as from the System of Information for Displaced People, SISDES, CODHES, through the National Surveys for Displaced Population, July, 1994 and October, 1995. The 1996 data from SISDES have not yet been processed, given the many difficulties in public order.
2. This information has been collected as part of the work done by a team of professionals from the Javeriana University with the displaced population of Tierralta. The author is part of this team. The above mentioned consultation was a contract with the Colombian Institute for Agrarian Reform (INCORA). The quotations in brackets are the testimonies of displaced individuals.
3. This Municipality has approximately 70,000 inhabitants, 60 percent from rural areas. It is located in the South-Occident part of the department of Cordoba, in the North of the Country. It is part of the Uraba region with which it has maintained a strong sociocultural and economic alliance.
4. Homes with rural ties, HVR, were considered those who, before displacement, had at least one of these three characteristics: residence in the block, access to land and employment, at least one of the household members works in agriculture and/or cattle raising as either producer or labourer.
5. The definition of micro and minifundios was established according to the Agricultural Family Unit, UAF, according to the agro-ecological conditions of each municipality.
6. The security groups legally established to support the army with control, information and intelligence. These groups have given rise to an intense debate because of the evidence of serious violations of human rights, with sadistic and cruel strategies to impose control. No limits exist to these cooperatives, to the self-defense units or the paratroops.
7. For this year the minimum salary was 120,000 (Colombian) pesos, or approximately $120 U.S.
8. At the beginning of this year, many families crossed the frontier and settled in Panama. They were deported back to Colombia, which is a violation of International Human Rights principles.
9. This movement first emerged from leftist political groups, like the Patriotic Union, which has been one of the most affected, with more than 2,000 dead in six years. The elimination of the "enemy" was extended to all people and groups which were perceived as a threat to the traditional powers, and included civil organizations, unions, teachers, journalists, judges, health promoters, Catholic religion teachers, etc.
10. The study looked at displacement from 1985 and 1994.
11. Document issued by the National Political Social Council.

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Refugee Protection as Human Rights Protection: International Principles and Practice in India

Brian Gorlick and Sumbul Rizvi Khan

Abstract

This article focuses on the relationship between international human rights standards and refugee protection. The foundational status of the Universal Declaration of Human Rights and other human rights treaties are surveyed in light of India's international legal obligations. The authors argue that international human rights law and practice have had a significant impact on the protection activities of the Office of the United Nations High Commissioner for Refugees (UNHCR) both in countries of asylum, countries of origin and in relation to the United Nations and other human rights actors. In this context, courts and national human rights institutions are important players in safeguarding the rights of refugees. As none of the countries of South Asia is party to the international refugee instruments nor have any of them adopted a national refugee law or procedure, the activities of the Indian National Human Rights Commission stand out as a positive example of national institution expanding the legal protection of refugees in the region.

Précis

Cet article porte sur la relation entre critères internationaux en matière de droits humains et protection des réfugiés. Les statuts fondateurs de la Déclaration Universelle des droits de l'Homme et d'autres traités sur les droits humains sont analysés à la lumière des obligations juridiques internationales de l'Inde. Les auteurs développent une argumentation selon laquelle les lois et pratiques internationales en matière de droits humains ont un impact significatif sur les activités de protection assurées par l'Office du Haut Commissariat des Nations Unies aux réfugiés, autant dans les pays asiles, que dans les pays d'origine, et ce dans toute interaction entre les Nations Unies et les autres intervenants en matière de droits humains. Dans un tel contexte, les tribunaux et les institutions nationales traitant des droits humains sont des acteurs cruciaux en ce qui concerne la protection des droits des réfugiés. Comme aucun des pays d'Asie du Sud n'est engagé dans les grands mécanismes internationaux en matière de droit des réfugiés, et comme aucun d'entre eux n'a adopté de loi ou procédure nationale en matière de droit des réfugiés, les activités de la Commission Nationale Indienne des droits de l'Homme s'avèrent représenter un exemple positif d'institution nationale assurant le progrès de la protection légale des réfugiés dans cette région du monde.

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International Human Rights as a System of International Law

Human rights are freedoms which are granted equally to all persons without distinction. In a sense, human rights can be considered universally recognized standards of behaviour. The violation of these standards by states, or other agents, may give rise to situations which lead to the creation of refugees. Refugees, by definition, are victims of human rights violations.[1]

Viewing the refugee problem in the context of human rights is clearly relevant. In fact the origin of the international system of refugee protection, as codified in international refugee law, grew out of concern for the plight of refugees fleeing the troubles of post-war Europe. Regrettably, protecting and assisting victims of human rights violations which result in forced displacement is as relevant today as it was some fifty years ago. However, refugees are not simply victims of human rights violations as they represent a distinct group of individuals who are without the protection of a national state. The international system of refugee law was adopted in order to replace the protection which is normally provided by and is the responsibility of national governments for their citizens.

The idea of developing a system of law which protects the human rights of individuals is also nothing new. Many states have been established on the basis that individuals have certain inherent rights which must be respected by the state. The idea of establishing a system of international human rights law is a more recent development which has been catalyzed through the United Nations. The 1945 *UN Charter* proclaims in its Preamble that "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" is a primary purpose of the United Nations. Member states of the UN pledge themselves to take action in cooperation with the United Nations to achieve this purpose.

Apart from the *UN Charter*, the *Universal Declaration of Human Rights* of 1948, and the *Convention relating to the Status of Refugees* of 1951,[2] a number of other international human rights standards and instruments have been developed and adopted by member states of the United Nations. These include the *International Covenant on Civil and Political Rights* (1966), the *International Covenant on Economic, Social and Cultural Rights* (1966)—collectively known as the International Bill of

Rights—the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), the *Convention relating to the Status of Stateless Persons* (1954), and the *Convention on the Elimination of Racial Discrimination* (1965), and the *Convention on the Elimination of Discrimination against Women* (1979). More recently, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), and the *Convention on the Rights of the Child* (1989) have been adopted at the international level.

In addition to the central foundational status of the *Universal Declaration of Human Rights*, more than 189 states have ratified or adhered to at least one (or in the majority of cases more) of these international human rights treaties, thus establishing binding legal obligations of a continuing nature. Several South Asian states are party to the major human rights conventions in addition to the 1949 Geneva Conventions and their 1977 Additional Protocols governing the laws of war.

Among the international human rights treaties, India is party to the two international Covenants as well as the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Rights of the Child*, and the *Convention on the Elimination of All Forms of Discrimination Against Women*. India has also ratified the *Convention on the Political Rights of Women*, the *Convention on the Suppression and Punishment of the Crime of Apartheid*, the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, and the *Convention on the Prevention and Punishment of the Crime of Genocide*. Most recently, India acceded to the 1984 *Convention Against Torture*.[3]

Using "Human Rights" to Enhance the Protection of Refugees

In the international system of human rights protection, the grant of asylum by a state to persons entitled to invoke Article 14 of the *Universal Declaration of Human Rights* cannot be regarded as an unfriendly act by another state. Similarly, and particularly in the post-Cold War context, it is widely acknowledged that international attention to human rights violations is not an interference in a country's domestic affairs but is rather part of routine international diplomacy. Although some states will go to great lengths to avoid scrutiny or criticism before international human rights bodies, the international community has identified a need to strengthen and improve application and enforceability of the international system of human rights protection. This has been realized through, for example, the UN-sponsored human rights missions in Cambodia, El Salvador, Guatemala, Haiti, the former Yugoslavia and Rwanda; the establishment of international criminal tribunals for the former Yugoslavia and Rwanda; and technical cooperation in the field of human rights with governments and other actors. Of course the degree varies, ranging from assistance and advice, to monitoring and reporting and direct protection.

In its own policies and programs, UNHCR has incorporated a number of human rights principles. Its protection activities in countries of asylum and countries of origin include working with states in the areas of legal rehabilitation, institution building, law reform and enforcement of the rule of law and providing humanitarian assistance to internally displaced persons. Increased cooperation with international and regional human rights mechanisms are also new areas of involvement for UNHCR. These activities add to an already overburdened agenda. Some states have expressed concern that UNHCR should not undertake tasks which go beyond its formal mandate. This concern is well taken as these more recent activities are placing considerable strain on UNHCR's limited resources. In this context the question of whether UNHCR has the capacity and capability to do these tasks must be addressed. Despite these apprehensions, in this era of downsizing and reform of the UN system it seems unlikely that UNHCR will be permitted to continue its activities along traditional lines. Furthermore, "in country" protection activities are becoming increasingly formalized as part of UNHCR's evolving protection mandate.[4]

In efforts to prevent refugee flows the UN and others, notably NGOs, are providing technical assistance to states within a general human rights framework. This includes the promotion of human rights standards through the training of judges, lawyers, and human rights activists; giving substance to educational rights by funding the construction of new schools in war-torn countries; and promoting economic rights through community-based projects focused on providing assistance to returning refugees. Promoting enactment and enforceability of domestic refugee and human rights laws, promotion of national human rights institutions, and training of government authorities, are other prevention-oriented activities in which the UN, governments, and NGOs are increasingly engaged.

As part of the development of human rights principles through UN Conventions, a number of international treaty bodies have been established to investigate violations, enforce standards, and assist states in implementing their treaty obligations. These bodies have the authority to examine periodic state party reports regarding implementation of the treaty provisions. With the agreement of states, some treaty bodies have the competence to investigate and decide upon individual and inter-state complaints and undertake field missions in order to monitor implementation measures. During examination of state party reports the committees may prepare formal conclusions and observations on the performance of states in complying with international human rights law. They may also formulate specific recommendations to governments. In recent years, some of these committees such as the Human Rights Committee, the Committee on the Rights of the Child, and the Committee Against Torture, have regularly raised

issues about the treatment of refugees by state parties to the respective Conventions.[5]

The UN human rights machinery has paid increasing attention to the plight of refugees. This raises awareness of refugee protection issues through promoting legal standards for refugees and internally displaced persons in addition to sharing information concerning incidents of violations of refugees' rights. Human rights NGOs and UNHCR have played key roles in educating members of the international and domestic human rights communities on the linkages between safeguarding human rights and refugee protection. These initiatives have firmly entrenched human rights issues in relation to the refugee problem.[6]

National Human Rights Institutions and Refugee Protection: The Indian Experience

On a regional basis a number of human rights treaties have been adopted. These include the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), the *American Convention on Human Rights* (1969), and the *African Charter on Human and Peoples' Rights* (1981). In South Asia, despite efforts in this direction, no regional human rights framework has yet been established. However, several Asian states have enacted or have expressed their commitment to enacting national human rights legislation.[7]

In the absence of a formal legal framework governing the treatment of refugees, several South Asian countries have chosen to manage influxes of refugees through administrative decisions rather than through specific legislative enactments. This has advantages in that it allows for flexibility in the granting of asylum. India, for example, generously accepts large groups of refugees who are fleeing not just for reasons relating to persecution, but also due to generalized violence as is the case of Sri Lankan Tamils. However, this does not hold good for all groups as certain refugees like Afghans, Iranians, Iraqis, Somalis, Sudanese, and Myanmarese are not recognized by the Indian Government. For which reason UNHCR has had to intervene through determining and granting refugee status under its mandate.

This differential treatment of refugees is a fundamental problem. It negates the provision of legal rights and assistance which would normally be granted by an asylum country. Moreover, it is not clear what legal status or rights accrue to a person as a result of registration by the government of India as a refugee, nor the relationship between "refugee" status granted by the government and corresponding national laws governing the entry and stay of foreigners.[8]

Although the host of international human rights instruments which have been ratified by India and other South Asian countries may significantly strengthen the international regime of human rights protection in the region,[9] it remains a curiosity that none of the South Asian countries have acceded to the international refugee instruments.[10] Nor have any of them enacted a domestic legal framework in the form of a refugee or asylum law or determination procedure.[11] In the absence of a domestic legal framework and procedure, national human rights institutions and the courts can play an important role.

The 1993 *Protection of Human Rights Act*[12] established the Indian National Human Rights Commission (NHRC or Commission). Under the *Act* the NHRC has a wide range of powers and functions. First and foremost, it may inquire *suo moto* or on the basis of a petition the violation of human rights of any person.[13] Under its authority the NHRC can intervene in any human rights proceeding before any Court, or visit any jail or other institution under control of the state government to investigate illegal detentions or conditions of legal detentions.[14] The NHRC is authorized to review legal provisions and factors inhibiting the enjoyment of human rights in India and make recommendations to remedy any violation. It is also empowered to summon and examine witnesses, requisition and discover documents including public records, consider affidavit evidence and undertake field investigations.[15]

The NHRC may study treaties and international instruments on human rights and make recommendations on their effective implementation along with promoting research and performing functions necessary for the promotion of human rights. In respect of this particular function the Commission reportedly played an active role in encouraging the Indian government to accede to the *UN Convention against Torture.*

The NHRC comprises a chairperson who has been a Chief Justice of the Supreme Court of India, a member who has been a Judge of the Supreme Court, a member who has been a Chief Justice of a High Court, and two other members with experience in the field of human rights.[16] Under the *Act*, Human Rights Commissions may also be established at the state level. The organizational set-up of the state Commissions are quite similar to that of the National Commission with the Chairperson being a former Chief Justice of the High Court.[17] At the state-level the *Act* provides for the establishment of Human Rights Courts for the purpose of providing speedy trial of offences arising out of violations of human rights. To assist the Court, the state government is also permitted to appoint an experienced Public Prosecutor or advocate as Special Public Prosecutor who would be responsible for conducting cases.[18]

Till date, the NHRC has been considerably active in the field of protection of human rights of refugees. Specific interventions made by the Commission have resulted in wide-ranging consequences relating to the protection of Chakma refugees who have sought refuge in the Northeastern states of India, particularly the States of Arunachal Pradesh and Tripura. It has also effectively intervened and continues to do so in cases of illegal detention of Sri Lankan Tamil refugees in the State of Tamil Nadu.

Details of these interventions are discussed below.

In 1994, an Indian NGO, the Peoples' Union for Civil Liberties (PUCL), spearheading the complaints made by the Chakmas and Hajong refugees, approached the NHRC for redress of their grievances which related to the non-grant of citizenship and attempts at their forcible expulsion from India. Intimidatory tactics employed against the refugees included acts of looting, threats, and physical violence targeting Chakma and Hajong refugees in Arunachal Pradesh. The Commission took steps to verify the authenticity of the grievances by writing to the central and concerned state government, and upon not obtaining a favourable response it sent an inspection team comprising senior officials of the NHRC and the PUCL. The matter was pursued further, and due to lack of cooperation on the part of the State of Arunachal Pradesh the Commission took the initiative and filed a writ petition before the Supreme Court of India.

The Supreme Court granted interim orders for non-expulsion of the refugees till the final disposal of the case. Thereafter, in January 1996, the Supreme Court issued final orders which *inter alia* recognized that there exists a clear and present danger to the lives and personal liberty of the refugees. The Court further upheld that the protection of Article 21 of the *Indian Constitution* which ensures the right to life and liberty, is applicable to all irrespective of whether they are Indian citizens. The Supreme Court thus ordered that the refugees cannot be deprived of their life or personal liberty except in accordance with the procedure established by law. Specific directions were issued to the state government to the effect that

> ... the State shall ensure that the life and personal liberty of each and every Chakma residing within the State shall be protected and any attempt to forcibly evict or drive them out of the State ... shall be repelled, if necessary by requisitioning paramilitary or police force ...

Orders were also passed for ensuring that applications for Indian citizenship made by the Chakma refugees would be duly recorded and forwarded to the central government for consideration. The decision of the Indian Supreme Court is hailed as a landmark judgment in respect of safeguarding fundamental constitutional rights of foreigners, in this case a group of refugees.[19] Although the judgment is rather limited in its discussion of the scope of the "rights" applicable to refugees in India, it is a most helpful pronouncement which has since been referred to repeatedly in respective High and Lower-level courts in India that "refugees," however defined, should be granted certain legal protection in India. More broadly, the decision is a successful example of the National Human Rights Commission following-up a refugee case as intervenor to the Supreme Court. It this respect it creates a favourable precedent.

Another case taken up by the NHRC concerned a number of Jumma refugees in the State of Tripura. In mid-1996 the Commission sent a team to the Jumma refugee camps to investigate allegations concerning the poor camp conditions which, as one NGO pointed out, had the effect of pressuring the refugees to repatriate. After conducting its investigation the team reported on the woefully inadequate accommodation, health and food facilities in the refugee camps. The Commission took up the matter with the state and central governments and is actively involved in enhancing the quality of life in the Jumma refugee camps. As a result of these interventions camp conditions have improved. However, neither UNHCR nor ICRC have been provided a role in the ongoing repatriation exercise to Bangladesh.

The NHRC has also successfully intervened in a number of cases of Sri Lankan Tamil refugees who had been detained in so-called "special camps" in Tamil Nadu on the suspicion of being LTTE militants. A number of these refugees had been issued refugee permits by the state government recognizing their refugee status and thereby authorizing their stay in India. Despite grant of the permits, many refugees were detained for illegal entry and unauthorized stay in India under the *Foreigners Act*. The Commission took up these cases with the state government and obtained the release of many refugees.

The above examples demonstrate that NHRC can play a powerful role in protecting the rights of refugees. In considering the Indian experience it should be noted that the resources of the Commission simply cannot keep pace with the number of complaints it receives, as it is estimated that the NHRC receives over 2,000 communications monthly and has a backlog in excess of 25,000 cases. In such circumstances the delivery of justice will never be satisfactory. Nevertheless, the work of the Indian National Human Rights Commission stands out as a positive example of an accessible and functioning national human rights institution.

The ability and willingness of the Commission to take up the cause of refugees in the future will depend on many factors. These include the quality and presentation of complaints which come to its attention, as well as the crucial part played by advocates and NGOs in pursing such matters before the NHRC. In this regard the work of the national Commission should have a positive impact on the emerging activities of the state-based human rights commissions. As an institution which enjoys an independence of process and procedure, and as a result of the status and expertise of its members, there are high expectations that the NHRC will continue to play an important role in safeguarding and expanding the legal protection of refugees in India. ■

Notes

1. A key element of the refugee definition as found in the 1951 Refugee Convention is fleeing one's country of origin "owing to a well-founded fear of *persecution*." Persecution is not defined in international refugee or human rights law. However, one commentator has offered the follow-

ing description: "[P]ersecution may be defined as the sustained or systematic violation of basic human rights demonstrative of a failure of state protection. A well-founded fear of persecution exists when one reasonably anticipates that the failure to leave the country may result in a form of serious harm which Government cannot or will not prevent ...", James Hathaway, "Fear of Persecution and the Law of Human Rights," *Bulletin of Human Rights* 91/1, UN, New York (1992): 99.

2. There are currently 134 state parties to the 1951 Convention and/or the 1967 *Protocol relating to the Status of Refugees*. Article 1(A) of the 1951 Convention defines a refugee as any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail him or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it ..."

3. In a statement issued by the Indian Ministry of External Affairs it was noted that India's accession to the *Convention against Torture* is part of "India's determination to uphold the greatest values of Indian civilization and our policy to work with other members of the international community to promote and protect human rights."

   In the refugee context, ratification of the *Convention against Torture* is extremely important as Article 3(1) provides that "[n]o State Party shall expel, return ("refouler") or extradite *a person* to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture." Article 3(2) further provides that "[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights" (emphasis added).

   For a description of the mandate and activities of the Committee established under the *Convention against Torture* see Brian Gorlick, "Refugee Protection and the Committee Against Torture," *IJRL* 7, no. 3, July 1995.

4. For a description of the changing nature of UNHCR's mandate see Guy S. Goodwin-Gill, *The Refugee in International Law* (2nd ed.), in particular Chapter 1, (Oxford: Clarendon Press, 1996); also see William Clarence, "Field Strategy for Human Rights Protection," *IJRL* 9, no. 2 (April 1996): 232–33.

5. For example, the third periodic report of India was examined by the UN Human Rights Committee during its sixtieth session held at Geneva. In its Concluding Observations under the heading "Subjects of Concern and Committee's Recommendations," the Committee remarked as follows: "The Committee, noting that international treaties are not self-executing in India, recommends that steps be taken to incorporate fully the provisions of the Covenant into domestic law, so that individuals may invoke them directly before the courts. The Committee also recommends that consideration be given by the authorities to ratifying the Optional Protocol to [International Covenant on Civil and Political Rights], enabling the Committee to receive individual communications relating to India." (Para. 13). Concerning refugees, the Human Rights Committee further stated: "The Committee expresses concern at reports of forcible repatriation of asylum seekers, including those from Myanmar (Chins), the Chittagong Hill Tracts and Chachmas (sic). It recommends that, in the process of repatriation of asylum seekers or refugees, due attention be paid to the provisions of the Covenant and other applicable international norms." (Para. 30). See UN Document CCPR/C/60/IND/3 of 30 July 1997.

6. A useful compilation of the various activities of the UN human rights mechanisms concerning refugees and issues of forced displacement is found in the UN Commission on Human Rights report "Human Rights, Mass Exoduses and Displaced Persons," UN Document E/CN.4/1997/42 of 14 January 1997.

7. At the 2nd Asia-Pacific Regional Workshop held in New Delhi on 10–12 September 1997 the government delegates of Bangladesh and Nepal indicated they are in the process of establishing national human rights institutions through enacting legislation.

8. For a summary of the legal situation facing refugees in India see B. S. Chimni, "The Legal Condition of Refugees in India," *Journal of Refugee Studies* 7, no. 4, OUP, 1994. Also see Sumbul Rizvi Khan, "Response of the Indian Judicial System to the Refugee Problem," *Bulletin on IHL & Refugee Law* 2, no. 1, Indian Centre for Humanitarian Laws and Research, New Delhi, 1997.

9. As concerns the application of international human rights standards in domestic law the former Chief Justice of India, J. S. Verma, noted in his inaugural speech to the seminar on "Refugees in the SAARC Region" held in New Delhi in May 1997 that "[i]n the absence of national laws satisfying the need [to protect refugees], the provisions of the [1951 Refugee] Convention and its Protocol can be relied on when there is no conflict with any provision in the municipal laws. This is a canon of construction, recognized by the courts in enforcing the obligations of the state for the protection of the basic human rights of individuals. It is more so when the country is a signatory to the International Convention which implies its consent and obligation to be bound by the International Convention, even in the absence of expressly enacted municipal laws to that effect ..." For a recent judicial application of this reasoning see the Indian Supreme Court judgment of *Vishaka et al. v. Rajastan et al.*, Writ Petition (Criminal) Nos. 666–70 of 1992, unreported judgment of 13 August 1997.

   It is also noteworthy that certain "rights" provisions of the *Indian Constitution* including Articles 14 (right to equality) and 21 (right to life and liberty) are available to non-citizens including refugees. See *National Human Rights Commission v. State of Arunachal Pradesh et al., op. cit.*, and *Khudiram Chakma v.. Union of India*, (1994) Supp 1 SCC 614.

10. In a speech to the 48th Session of the UNHCR Executive Committee, then Indian Permanent Representative to the UN, Ms. Arundhati Ghose, explained India's reluctance to accede to the 1951 *Refugee Convention* as follows: "The 1951 Convention was adopted in the specific context of conditions in Europe during the period immediately after the second world war. International refugee law is currently in a state of flux and it is evident that many of the provisions of the Convention, particularly those which provide for individualized status determination and social security have little relevance to the circumstances of developing countries today who are mainly confronted with mass and mixed inflows. Moreover, the signing of the Convention is unlikely to improve in any practical manner the actual protection which has always been enjoyed and continues to be enjoyed by refugees in India. We therefore believe that the time has come for a fundamental reformulation of international refugee law to take into account present day realities ... it has be recognized that refugees and mass movements are first and foremost a 'developing coun-

try' problem and that the biggest "donors" are in reality developing countries who put at risk their fragile environment, economy and society to provide refuge to millions. An international system which does not address their concerns adequately cannot be sustained in the long run ..."

11. Although no South Asian country has yet adopted a domestic refugee law or procedure a recent "Model Law on Refugees" was adopted at the 4th Regional Consultation on Refugees and Migratory Movements in South Asia held in Dhaka in November 1997. It is expected that this Model Law will provide a point of departure for continued debate and discussion on the form and content of a national refugee legislation which may be appropriate in the context of South Asia.
12. *The Protection of Human Rights Act*, No. 10 of 1994.
13. Ibid., Section 12.
14. Ibid.
15. Ibid., Sections 13 and 14.
16. Ibid., Section 4.
17. Ibid., Section 21.
18. Ibid., Sections 30 and 31.
19. *National Human Rights Commission v. State of Arunachal Pradesh and another*, (1996) 1 SCC 295. □

Inland Refugee Claims in Canada, Immigration and Refugee Board Statistics, January 1989 – December 1997

Compiled by Len Wong

Year	Claims Finalized	Decisions Rendered	Positive Decisions	*Acceptance Rate (%)*	Negative Decisions	*Rejection Rate (%)*	Withdrew/ Abandoned	*W/A Rate (%)*
1997	**24,943**	**19,138**	**10,031**	***40.2***	**9,107**	***36.5***	**5,805**	***23.3***
1996	**21,803**	**16,578**	**9,541**	***43.8***	**7,037**	***32.3***	**5,225**	***24.0***
1995	**17,189**	**13,710**	**9,614**	***55.9***	**4,096**	***23.8***	**3,479**	***20.2***
1994	**25,069**	**21,666**	**15,224**	***60.7***	**6,442**	***25.7***	**3,403**	***13.6***
1993	**30,553**	**25,549**	**14,101**	***46.2***	**11,448**	***37.5***	**5,004**	***26.4***
1992								
Initial Hearing	31,431	31,189	29,883 *	*95*	1,306	*4.2*	242	*0.8*
Full Hearing	29,175	27,308	17,437	*59.8*	9,871	*33.8*	1,867	*6.4*
Overall	**30,723**	–	**17,437**	***56.8***	**11,177**	***36.4***	**2,109**	***6.9***
1991								
Initial Hearing	30,055	29,608	28,203 *	*93.8*	1,405	*4.7*	447	*1.5*
Full Hearing	28,280	26,941	19,425	*68.7*	7,516	*26.6*	1,339	*4.7*
Overall	**30,132**	–	**19,425**	***64.5***	**8,921**	***29.6***	**1,786**	***5.9***
1990								
Initial Hearing	21,469	21,206	20,240 *	*94.3*	966	*4.5*	263	*1.2*
Full Hearing	13,997	13,623	10,710	*76.5*	2,913	*20.8*	374	*2.7*
Overall	**15,226**	–	**10,710**	***70.3***	**3,879**	***25.5***	**637**	***4.2***
1989								
Initial Hearing	12,690	12,368	11,798 *	*93*	570	*4.5*	322	*2.5*
Full Hearing	5,376	5,306	4,744	*88.3*	562	*10.5*	70	*1.3*
Overall	**6,268**	–	**4,744**	***75.7***	**1,132**	***18.1***	**397**	***6.2***

Source: Adapted from Immigration and Refugee Board Inland Refugee Claims Statistics, 1989 to 1997.

* Granted Full Hearing.

Percentage across the table may not add up to 100 due to rounding error.

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